

MALAYSIA/BURMA
LIVING IN LIMBO
Burmese Rohingyas in Malaysia

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I. SUMMARY

*I cannot go back to Burma because there is risk to my life. I have no documents here. I am in a stranded situation.*¹ -undocumented Rohingya man in Kuala Lumpur, Malaysia

Burmese Rohingyas in Malaysia are living in limbo. Most do not have permission to be in Malaysia. However, they cannot return to Burma, which continues to discriminate and perpetrate gross human rights abuses against the Rohingya Muslim minority. Indeed, although Muslims have inhabited northern Arakan state in Burma since the twelfth century, Burma claims that the Rohingyas are illegal immigrants, does not recognize them as its citizens, and refuses to receive them back from Malaysia.

Burmese authorities bear responsibility for the Rohingya's flight. Burma's treatment of the Rohingya is addressed in the background section of the report, and the report offers specific recommendations to the Burmese government. The focus of this report, however, is on what happens to Rohingya when they reach Malaysia. There, they are not treated as refugees fleeing persecution who should be afforded protection, but as aliens subject to detention or deportation in violation of Malaysia's international human rights obligations. Malaysia is highly selective with regard to the refugee populations to which it affords protection, and Burmese Rohingyas are one of the many groups that the Malaysian government refuses to recognize as having legitimate claims to protection. Although the government informally tolerated the Rohingya in the early 1990s, their situation has deteriorated significantly in recent years. Rohingya refugees and asylum-seekers in Malaysia are often detained for months in immigration camps where they suffer malnutrition, unsanitary conditions, and beatings before being pushed over the border into Thailand. The Malaysian government increasingly restricts their access to education and health services, and, to date, the office of the United Nations High Commissioner for Refugees (UNHCR), which has an office in Malaysia, has been unable to secure effective legal protection for the Rohingya.

Human Rights Watch conducted first-hand research in Malaysia in November and December of 1999 to investigate the treatment of Rohingya. We interviewed some Rohingya who had lived in Malaysia for almost twenty years and others who had just returned from the Thai border; some whom UNHCR recognizes as refugees and others whom it does not.² We were not able to visit Malaysia's immigration detention camps—these are closed, even to UNHCR—but we did track down and interview Rohingya who had only recently been deported, and we

travelled to Dumai, the Indonesian port to which Malaysia sends most Indonesian deportees, to interview individuals who had arrived directly from Malaysia's immigration detention camps where they were detained together with Rohingya. In Kuala Lumpur, Malaysia's capital, we also had meetings with UNHCR protection officers, non-governmental organizations (NGOs) working with undocumented persons, and lawyers with immigration experience.

Abuses by Malaysia

Human Rights Watch recognizes that Malaysia has a long history of serving as temporary host to refugees fleeing persecution and conflict. Legal protection for refugees, however, is non-existent: Malaysia's refusal to protect the Rohingya is part of a larger failure to protect refugees no matter their provenance or the circumstances which led to their becoming refugees. According to Malaysia's Foreign Minister, Datuk Seri Syed Hamid Albar, "We do not recognize the status of refugees. . . . [W]e only allow foreigners to stay on a temporary basis after which they have to go back."³ This stance has roots in Malaysia's experience with the Indochinese boat people, who arrived in large numbers in the 1970s and 1980s. When Malaysia, in response, began towing boats of refugees back out to sea, an international agreement was reached according to which refugees were to be interned in Malaysia until they could be either resettled to third countries or else repatriated: they were not allowed to stay in Malaysia. This policy persists, despite significant changes to the nature of refugee flows to Malaysia.

Malaysia's treatment of the Rohingya and other refugees falls far short of internationally accepted standards. The country has yet to become party to the main international treaty for the protection of refugees: the 1951 Convention Relating to the Status of Refugees (hereafter referred to as the Refugee Convention) and its 1967 Protocol. At present, Malaysia has no asylum system, and under the country's general immigration law, refugees-even if recognized as such by UNHCR-are considered illegal immigrants. Statements by Malaysian officials suggest that the government fears that by affording protection to refugees it would create a "pull factor." Such fears, though understandable, do not at all justify the abuses detailed in this report.

Although Malaysia has not signed the Refugee Convention and its 1967 Protocol, it is bound by the principle of *non-refoulement*-a universally accepted prohibition in customary

international law on returning refugees to any country where they are likely to be persecuted or from which they would be likely to be expelled to face persecution. Malaysia does not generally return refugees to Burma, but it continues to expel Rohingya to Thailand. It does this because Burma will not accept them back and because Rohingya generally enter Malaysia by way of the Thai border. However, Thailand also has not ratified the Refugee Convention and its Protocol, and Rohingya expelled to Thailand risk detention and deportation to Burma. A state which returns refugees to a third country in which they do not have access to asylum procedures and from which they may be returned to their country of nationality violates the principle of *non-refoulement*.⁴ Thailand is not a country that is willing to protect the Rohingya, and in deporting the Rohingya to Thailand, Malaysia violates the principle of *non-refoulement*.

Rohingya who have been deported from Malaysia but who manage to avoid detection by Thai immigration authorities usually reenter Malaysia as quickly as they can. Many of the Rohingya Human Rights Watch interviewed had been deported and had reentered several times, including one man who had been through this cycle eight times in eleven years. At each step in the cycle, the Rohingya are bribery fodder for unscrupulous police officers and immigration officials.

Without permission to live legally in Malaysia and without any means to obtain such permission, Rohingya find themselves locked in poverty, with their children not permitted to attend school, and at constant risk of arrest. Malaysian police and immigration officers are woefully ignorant of what it is to be a refugee, and officials at all levels of government tend to ignore UNHCR documents and its urgent requests that particular asylum-seekers and refugees not be detained and repatriated. Low-level police and immigration officials possess broad discretion and power under Malaysian law. What few protections that are mandated, such as judicial review of detention, are often not complied with. Out of the eye of domestic and international monitors, detainees in Malaysia's immigration detention camps are robbed, beaten, inadequately fed, and denied medical care. Sometimes they die as a result. Children are detained with unrelated adults, separated from their families, and deported alone to the Thai border. When these abuses have been brought to light, the Malaysian government has shown more interest in attacking the source of the information than addressing the source of the abuse.

UNHCR's Role

Malaysia is responsible for protecting Rohingya refugees on its soil. But when it fails to do so, UNHCR, with a broad mandate to provide international protection and seek durable solutions for refugees worldwide, has an obligation to fill the gap. Malaysia's reluctance to cooperate with UNHCR makes the organization's work difficult, and it needs additional support from the international community. Nonetheless, UNHCR has done too little to date to provide protection and to seek durable solutions for the Rohingya in Malaysia.

At present, UNHCR screens Rohingya for refugee status, provides those it determines to be refugees with a letter to that effect, and seeks to resettle refugees in third countries. It also appeals to the Malaysian government in individual cases to release refugees from immigration detention. Almost all of the Rohingya Human Rights Watch interviewed in late 1999 had already been screened and rejected by UNHCR during the year. In fact, in the whole of Malaysia, only forty-three Rohingya were granted refugee status in 1999 while 1,473 were rejected, although conditions in Burma remain dismal for Rohingya. The Burmese military government, now called the State Peace and Development Council (SPDC), refuses to recognize them as citizens: as a result they are denied freedom of movement, secondary education, and certain employment opportunities. The Burmese military also subjects the Rohingya to forced labor and arbitrarily confiscates their property. The high rejection rate of Rohingya asylum-seekers in Malaysia, as well as comments made by UNHCR staff to Human Rights Watch, together with the fact that systematic abuses against Rohingya continue in Burma, strongly suggest that Rohingya who have valid refugee claims are being denied refugee status by UNHCR.

UNHCR should also address problems regarding access by refugees and asylum-seekers to its Kuala Lumpur office, and improve its procedures for status determinations. Some of the policies and procedures of the Kuala Lumpur office are commendable: they include distribution of an informational brochure, provision of translators in most cases, and multiple interviews. However, other aspects of the process are not in accord with international standards and should be modified so that refugee status determinations are more fair and accessible to asylum-seekers. The office is located in a neighborhood where there is no public transportation, making it difficult and costly for asylum-seekers to reach it. And when they do, they are not allowed into the UNHCR compound on their first visit. One asylum-seeker who Human Rights Watch referred to the office was questioned extensively about his case by

the office guards, denied entry, and actively discouraged from applying. "The Burmese time is past," the guards told him. When he persisted, the guards gave him a form in English and told him to fill it out on the spot. Unsure of the form's significance and of his own facility in English, the asylum-seeker left.⁵ Applicants who are screened and rejected are not given individualized reasons for their rejection and, thus, have no basis on which to make a meaningful appeal. In addition, appeals are not truly independent: the two protection officers in Kuala Lumpur merely review each other's decisions, and there is no appeal outside the office. UNHCR should reform its decision-making process to be more transparent and credible. The reform effort should include making public statistics on the origin, numbers, legal status, and gender of those applying for refugee status as well as application, rejection, and appeal rates by nationality. Working without any helpful domestic law context, with limited resources, and with an uncooperative host government, UNHCR faces an unenviable task in Malaysia. But it must not let the Rohingya fall through the cracks.

The Rohingya's Citizenship

The Burmese government's denial of citizenship to Rohingya is a primary factor causing them to flee to Malaysia and other countries, and a primary reason why they cannot return to Burma. Burma treats most Rohingya as foreign residents and refuses to take back from Malaysia Rohingya who have fled to seek asylum or escape the harsh conditions to which they are exposed in Burma. International standards prohibit such practices: Burma is clearly violating international standards by not recognizing the Rohingya's valid claims to Burmese citizenship and rendering them potentially stateless. Primary responsibility therefore lies with the Burmese government to reform its current citizenship laws and to ensure that the Rohingya have access to full citizenship rights and are not rendered stateless.

Until it does so, however, the Rohingya are left in a state of legal limbo, without legal residency and its accompanying rights in any country. Their predicament has real human consequences, particularly for children. Neither Malaysia nor UNHCR is taking the implications of the Rohingya's uncertain citizenship adequately into account. Malaysia, at minimum, should ensure that all Rohingya adults obtain temporary legal status and that all Rohingya children born in Malaysia are registered at birth. UNHCR should activate its mandate on statelessness to assist Rohingya. It should also take fully into account the Rohingya's inability to acquire citizenship in their home country when determining refugee status. Struggling to survive in Malaysia, the Rohingya cannot be expected to continue living

in limbo in the hope of a long-term solution in Burma. "I have temporary work here," one Rohingya told us. "My life is temporary as well."⁶

A Note on Terminology

As used in this report, the terms "refugee," "asylum-seeker," and "undocumented person" have distinct meanings. The definition of "refugee" used here is that used in international treaties: a person who is outside his or her country and is unable to return because of a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group. Persons are refugees whether or not they are officially recognized by UNHCR or by a state. The term "asylum-seeker" is used here to denote persons who may be refugees but who have not been recognized as such pending review of their cases by UNHCR or by a state. Finally, the term "undocumented person" is used for all persons present in a state without formal permission to be there. It includes both those with no official form of identification, such as the Rohingya in Malaysia, and those with passports from their home country but without visas allowing them entry into Malaysia. Some refugees and asylum-seekers are undocumented persons; some are not.

II. RECOMMENDATIONS

To the Malaysian Government

Until such time as it is safe for the Rohingya to go back to Burma, they should be afforded full protection and assistance in Malaysia. Given the current conditions in the Rohingya's home state of Arakan, Burma, there should be no summary deportation of undocumented Rohingya either to Burma or to Thailand. Such deportation violates the fundamental principle of *non-refoulement*.

The Protection of Refugees

The government should immediately release from immigration detention all refugees, asylum-seekers, and persons who are registered with the UNHCR office in Kuala Lumpur. In accord with international principles prohibiting the *refoulement* of refugees and asylum-seekers, under no circumstances should any of these persons be returned to their own countries where they would face persecution or to third countries where they could not be

guaranteed adequate protection. Rohingya, therefore, should neither be returned directly to Burma nor expelled to Thailand where they would not be guaranteed protection.

- The Malaysian government should demonstrate its commitment to international human rights standards by becoming a party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Ultimately, Malaysia should develop its own asylum and refugee procedures and pass appropriate implementing legislation. These procedures should be available to all asylum-seekers, regardless of nationality.

- Until it has in place asylum and refugee procedures that fully conform with international human rights and refugee law standards, the Malaysian government should:

- Grant UNHCR immediate and continued access to all asylum-seekers in immigration detention facilities, regardless of their nationality;

- Train police, immigration officials, and magistrates to recognize UNHCR documents and to refrain from arresting, detaining, and deporting refugees and persons registered with the UNHCR office. Immigration officials, police officers, and magistrates should also receive specific training from UNHCR or another qualified organization relating to the rights of refugees and asylum-seekers under international law and the human rights of all persons;

- Create a mechanism for identifying asylum-seekers who may be detained and for notifying UNHCR at once when an asylum-seeker is detained. All foreigners detained under the 1959/1963 Immigration Act should be provided information about refugee status and the rights of refugees under international law, and should be given the opportunity to contact UNHCR.

- Provide opportunities for local integration in Malaysia to Rohingya recognized as refugees by UNHCR. Local integration involves integration into society for long-term or permanent settlement with the possibility of eventually acquiring full citizenship. Temporary residence, through which the Rohingya could pursue a more normal life in Malaysia until an improvement in the situation in Burma could facilitate their return, is a less satisfactory option but one that could achieve some of the basic objectives of full local integration. If the remaining Rohingya refugees received temporary residence, they could seek legal employment, enrol their children in school, and obtain health services, as well as enjoy the legal protections available to other foreign visitors.

Preventing Corruption by Government Officials ·

The Malaysian government, and, in particular, the Anti-Corruption Agency, should take immediate steps to end pervasive corruption in the handling of undocumented persons by police and immigration officials. Senior officials in each agency with responsibility for implementing the immigration laws should make it clear that abuse of undocumented persons is inconsistent with Malaysian and international law and will not be tolerated. All allegations of abuse by government officials should be investigated thoroughly and the responsible officers brought to justice or subjected to appropriate disciplinary measures.

· Where persons in immigration detention are not allowed to retain their belongings, they should be issued a receipt and be allowed to collect their possessions before repatriation.

Immigration Detention ·

Malaysia should become a party to the 1966 International Covenant on Civil and Political Rights and the 1984 Convention Against Torture. Detention conditions for undocumented persons and asylum-seekers should be made to conform to international and domestic standards, including the U.N. Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Detainees are entitled to sufficient food and water, prompt access to medical treatment, adequate washing facilities, and clean and adequate bedding. They must not be subject to cruel, inhuman, or degrading treatment.

· All efforts should be made to minimize the period undocumented persons and asylum-seekers spend in detention where there is uncertainty about an individual's status. In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, all undocumented persons who are apprehended and held in custody must have "an effective opportunity" to have their case reviewed "promptly" by a judicial and other authority. Continued detention should not be permitted except on the basis of clear and specified conditions, and should be subject to periodic review and to a maximum time limit. All persons detained on immigration charges should be brought before a magistrate as required by Section 51(5) (b) of the 1959/1963 Immigration Act. The current practice of protracted, judicially unsupervised detention of undocumented persons is inconsistent with international human rights standards, Article 5 of Malaysia's Federal Constitution, and Section 51(5) (b) of Malaysia's Immigration Act.

- Conditions in immigration detention camps should be regularly inspected by an independent state authority which should make public its findings. Independent, non-governmental organizations should also be allowed to inspect these facilities to ensure compliance with international standards. In particular, UNHCR should have full and free access to detention camps in order to identify, assist, and protect asylum-seekers and refugees in immigration detention. Other international bodies such as the International Committee of the Red Cross should be invited to visit the camps regularly.

- Clear rules of conduct and disciplinary rules for guards in immigration detention camps should be instituted and made public. All guards should be trained in appropriate disciplinary procedures and rules regarding the use of force. Any incidents involving the use of force by guards should be fully investigated and reported. The failure by guards to report incidents involving the use of force should be an infraction subject to disciplinary proceedings.

- The Malaysian Immigration Department should make clear that any form of sexual abuse of detainees is unacceptable. Individuals should have secure mechanisms to report abuse, and sexual abuse of detainees in immigration camps should be vigorously prosecuted.

The Protection of Children ·

The Malaysian government should revoke its reservations to the U.N. Convention on the Rights of the Child and bring its national laws into conformity with the treaty. Specifically, it should revoke reservations to Articles 7, 28(1)(a), and 37, relating to birth registration, universal primary education, and detention of children. In addition, Malaysia should promptly submit its initial report on its efforts to give effect to the rights recognized under the treaty, which was due on March 19, 1997, to the Committee on the Rights of the Child.

- The Education Ministry and the Immigration Department should cooperate with each other to ensure that all children, including children of refugees and asylum-seekers, are enrolled in school at both the primary and secondary levels.

- Children-those under eighteen years of age-should not be detained in immigration detention camps, and the Immigration Department should explore alternatives to detention as required by Article 40(4) of the Convention on the Rights of the Child. Where there is no alternative to detention, placement should be for the shortest possible period of time, and children must be separated from adults who are not their family members. Children should have access to

education while in detention. Families should not be detained if possible, and, if they must be detained as a measure of last resort, should not be separated. If no alternative to separation exists, regular contact must be facilitated, and under no circumstances should children be deported separately from their parents.

Preventing Statelessness ·

The Malaysian government should sign and ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The government should request UNHCR to provide technical and advisory services as well as training on the prevention and reduction of statelessness.

- Malaysia should assist in providing temporary identification papers for Rohingya adults and allow them access to employment and health services.

- The National Department of Registration should make efforts to ensure that all children who are born in Malaysia, regardless of their nationality, are registered upon birth and provided with birth registration documents. Registration should be conducted at a location suitable for refugees, not at local police stations.

- Malaysia should interpret its laws as applicable to Rohingya children. Specifically, Rohingya children whose citizenship is in question and who are born in Malaysia should acquire Malaysian citizenship under Article 14(1)(b) and the Second Schedule, Part II of Malaysia's Federal Constitution. However, the possession of Malaysian citizenship should not restrict the right to return to Burma and to opt for Burmese citizenship should that become available to them.

To the United Nations High Commissioner for Refugees (UNHCR): ·

UNHCR should fill the Head of Office and Junior Protection Officer (JPO) positions for the Kuala Lumpur liaison office.

Improving Access to the Office for Malaysia ·

Applicants who approach UNHCR in Kuala Lumpur should be allowed to enter the office gate; they should not be kept outside on their first visit. Where security is a concern, appropriate, tailored measures such as those detailed in UNHCR's 1995 training module on *Interviewing Applicants for Refugee Status (RLD 4)* should be taken that do not deter or

prevent applicants from approaching the office. The occurrence of demonstrations by asylum-seekers does not justify closing off the compound and restricting access to UNHCR for asylum-seekers.

- Guards at the gate should be prohibited from questioning asylum-seekers about their cases, requesting supporting evidence, or discouraging individuals from applying. Their functions should not include explaining the application procedure, distributing the pre-interview form, or explaining how to fill out the form. This should be done only by UNHCR staff specifically trained to do this work. The role of the guards should be strictly limited to providing security and their interactions with asylum-seekers should be carefully monitored. In addition, guards should receive basic training on how to work with refugees and asylum-seekers.

Informational Brochure

UNHCR should redraft the informational brochure currently provided to applicants so that it is easily understood by persons without expertise in refugee law. It should also be expanded to explain the application procedure, and a flow chart or other pictorial representation of the procedure, including expected waiting time, should be included. The brochure should be translated into the languages of significant population groups seeking protection. The Kuala Lumpur office should insure that every potential applicant who approaches the office receives a copy of the informational brochure. In addition, the brochure should be distributed widely: copies should be sent to local NGOs and other U.N. agencies, and it should be made available to Malaysian immigration officials who should distribute it to asylum-seekers in detention and at ports of entry.

Refugee Status Determination Procedures

In light of current human rights conditions in Arakan and the high denial rates for Rohingya in Malaysia, the UNHCR Kuala Lumpur office should reassess its evaluation of conditions in Burma and produce a set of transparent criteria to assess Rohingya claims to refugee status. This evaluation should be based on independent sources of information regarding human rights conditions in Burma and should take into account the link between uncertain nationality and persecution.

- UNHCR staff should explain the significance of the pre-interview form to all asylum-seekers. Asylum-seekers should be allowed to take the form home and fill it out in their own time. Appropriate space and sufficient time should be provided to those asylum-seekers

wishing to fill out the form at the UNHCR office. Applicants should be allowed to fill out the form in the language in which they feel most comfortable and not be restricted to English or Bahasa Malaysia.

- UNHCR should support a procedure in which independent legal assistance is available to applicants. This could include providing training and financial assistance to NGOs such as Tenaganita (Women's Force) or to the Malaysian Bar Council's legal aid program. Understanding that the ultimate objective should be handing over asylum screening to Malaysia, this would set an important example of a screening program's necessary elements.

- In its rejection letters, UNHCR should clearly state the reasons for its decision. These reasons should be particular to the individual's case and not merely contain standardized language.

- UNHCR should provide for an independent appeal of refugee status determinations—that is, one by a organ different than the one making the initial decision. The current system of processing appeals within the country office does not constitute an independent appeal. This appeal should review not only new information but also whether the law was correctly applied.

Disclosure of Statistics ·

In a way that does not compromise confidentiality, UNHCR should make public clear, current statistics on:

- the number of individuals approaching the office;
- the number of individuals applying for refugee status;
- basic information about who is applying for refugee status, including gender, legal status, and country of origin;
- the amount of time between applications and decisions; and
- the application, rejection, appeal, and success rates by nationality. This information would allow for transparency and accountability and would inform the interested international community. We understand that, in accord with a decision made at a 1995 UNHCR meeting in Kuala Lumpur, UNHCR is already recording this vital information; therefore it is possible for it to be publicly disclosed.

Promoting Refugee Protection in Malaysia ·

UNHCR should seek durable solutions for the Rohingya. It should continue to resettle refugees in third countries while pressing the Malaysian government to fully integrate refugees into Malaysian society.

- UNHCR should offer the Malaysian government training, technical advice, and guidance on respecting the rights of refugees and on developing its own asylum procedures. In particular, it should offer training to police officers, immigration officials, and magistrates regarding working with refugees and respecting refugee rights.

- UNHCR should continue to urge the Malaysian government to sign and ratify the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.

- Until Malaysia takes these steps, UNHCR should continue to press vigorously the Malaysian government:

- to grant UNHCR prompt and regular access to all asylum-seekers in immigration detention;
- to recognize UNHCR status determinations; and
- to refrain from detaining and returning refugees to places where they face persecution.

Reducing Statelessness ·

UNHCR should activate its mandate on statelessness for Rohingya in Malaysia, regardless of their refugee status. In particular, it should continue to urge the Malaysian government to sign and ratify the international instruments on the prevention of statelessness, and should provide technical advice and advisory services to the government on drafting nationality legislation so as to avoid and reduce statelessness. It should provide appropriate training to government officials and disseminate information on avoiding the arbitrary deprivation of citizenship or actions which often result in statelessness. Training should also cover birth registration of all children, regardless of their legal status.

UNHCR in Burma ·

UNHCR should provide the Burmese government with technical advice and training on the prevention and reduction of statelessness, with particular reference to Rohingya, in accordance with its mandate on statelessness under Article 11 of the 1961 Convention on the Prevention of Statelessness, subsequent UNHCR Executive Committee Conclusions, and U.N. General Assembly resolutions. UNHCR should also urge the Burmese government to

sign and ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

To the State Peace and Development Council (SPDC) of Burma ·

The State Peace and Development Council (SPDC) should immediately amend or appeal the 1982 Citizenship Act "to abolish its over-burdensome requirements for citizens"-requirements that, as the U.N. Special Rapporteur to Burma has pointed out, have "discriminatory effects on racial and ethnic minorities." The SPDC should grant the Muslims of Arakan, including children born in Malaysia, full citizenship and accompanying rights.

· The Burmese government should sign and ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The government should request UNHCR to provide technical and advisory services on drafting legislation as well as training on the prevention and reduction of statelessness.

· The SPDC should immediately cease the practice of forced labor in Arakan and across Burma in compliance with the 1930 ILO Convention on forced labor, signed by the Burmese government in 1955. Toward this end, as recommended by the ILO, the SPDC should amend or appeal the sections of the Village and Towns Acts that legally sanction the conscription of labor.

· The SPDC should also cease practices such as the arbitrary confiscation of property without compensation and the denial of freedom of movement within Arakan, which together violate the right of Rohingya to equal protection under the law, as set forth in Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights.

· The Burmese government should fulfil its commitment to respect the rights of children set forth in the Convention on the Rights of the Child, ratified by Burma in 1991. All Rohingya children should be granted full Burmese citizenship and accompanying rights, including those born in Malaysia to Rohingya parents. Children must not be forced to work under any circumstances, and the government should not discriminate against Muslim children in its provision of health and education benefits.

To the International Community ·

Donor governments should continue to encourage Malaysia to protect all refugees on its soil and to permit local integration or temporary residence for the Rohingya population. In the spirit of burden sharing, donors should also offer financial contributions to local integration.

· The international community should also provide third country resettlement possibilities as a durable solution for Rohingya refugees. For those persons who are unable to receive permanent protection in Malaysia, the international community must give due consideration to resettlement in a third country.

· Donor countries should provide adequate financial support for the initiatives recommended to UNHCR. This should include support for training Malaysian police, immigration officials, and magistrates on refugee rights and for training the Malaysian government on preventing statelessness; for creating an independent appeals process; for addressing problems of potential statelessness; and for providing legal representation or assistance for refugee status interviews. In addition, governments should support UNHCR in its efforts to fill the Head of Office and Junior Protection Officer (JPO) positions in the Kuala Lumpur Office.

· The international community must step up efforts to ensure that conditions are created under which Rohingya can return to Burma in safety and with dignity and with human rights guarantees. The international community should coordinate their efforts to press the Burmese government to implement the resolutions of the U.N. Commission for Human Rights, which call on the Burmese government to address the causes of displacement.

1 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

2 All undocumented persons interviewed requested anonymity, and their names have not been used.

3 Joniston Bangkuai, "500,000 Illegals Expected to Leave," The New Straits Times (Malaysia), September 4, 1999, p. 14.

4 Executive Committee Conclusion No. 58 (XL) (1989); Executive Committee Conclusion No. 15 (XXX) (1979), para. (h)(iv), (vi); High Commissioner for Refugees, "Background Note on the Safe Country Concept and Refugee Status," Sub-Committee for the Whole on International Protection, U.N. Doc. EC/SCP/68, July 26, 1991, para. 13; Report of the Sub-

Committee of the Whole on International Protection, U.N. Doc. A/AC.96/781 (9 Oct. 1991), para. 34. See Guy S. Goodwin-Gill, The Refugee in International Law, 2d. Ed. (New York: Oxford University Press, 1998), pp. 333-44; European Council on Refugees and Exiles (ECRE), Safe Third Country: Myths and Realities, (February 1995).

5 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 17, 1999.

6 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 17, 1999.

III. BACKGROUND

History of the Rohingya People

Northern Arakan, consisting of contemporary Maungdaw and Buthidaung townships in western Burma, has been a region of intermittent unrest and refugee flows since the late eighteenth century. During this time, thousands of Rohingya have fled to Bangladesh, which lies directly across the Burmese border from Arakan. In smaller numbers, Rohingya have also moved to other places, including the Middle East, Pakistan, and Malaysia, although this movement has not been as thoroughly explored.⁷ Outflows to Malaysia, like those to Bangladesh, have been prompted by ethnic and religious conflict, which were in turn triggered by broader political struggles. A historical overview of the region not only serves to reveal the long history of refugee flows, but also traces the attachment of the Rohingya to northern Arakan and, thus, their firmly established link to what is modern Burma.

To understand the dynamics of the Rohingya issue, it is important to understand the claims made by both the Burmese government and by the ethnic group now known as "Rohingya," since the term itself has become politically charged.⁸ The current military government denies that Rohingya are an ethnic group and claims that the Muslims in northern Arakan are Bengalis whose arrival is fairly recent.⁹ It takes the view that the migration that took place during the period of British colonial rule was illegal, and it is on this basis that it refuses citizenship to the majority of the Rohingya.

In reality, the Rohingya have had a well-established presence in what is now Burma since at least the twelfth century. Rohingya political leaders claim that Rohingya are an ethnically distinct group, descendants of the first Muslims who began migrating to northern Arakan in the eighth century, though they also say that they are a mix of Bengalis, Persians, Moghuls, Turks, and Pathans who came to the area later.¹⁰ The Rohingya were once counted as a part of the Mrauk-U (Mrohaung) kingdom in Arakan, which stood independent of both the Burman kingdoms in the Irrawaddy delta and central Burma as well as Bengal and the Moguls to the west. The first Muslim traders came to the area in the seventh century, and more Muslim sailors made their way to the Arakan region during the twelfth and thirteenth centuries. A second wave of migration took place in the fifteenth century, and Rohingya give as further evidence of their long settlement in Arakan the fact that the kings of Arakan from 1400 to 1600 took Muslim (as well as Buddhist) names.¹¹ In 1784, the Burman King Bodawpaya conquered and incorporated the Arakan region into his kingdom of Ava in central Burma. As a consequence of the invasion, refugees poured into what is now Bangladesh, which was then controlled by the British.

The British colonized Burma in a series of three wars beginning in 1824. This period witnessed significant migration of laborers to Burma from neighboring South Asia. The British administered Burma as a province of India, thus migration to Burma was considered an internal movement.

In 1942, the Japanese invaded Burma and during the British retreat communal violence erupted. Attacks were made against those groups that had benefited from British colonial rule. Burman nationalists attacked Karen and Indian communities, while in Arakan Buddhist Rakhine and Muslim Rohingya villagers attacked one another causing a displacement of Buddhist villagers to the south and Muslims to the north.¹² Some 22,000 Rohingya are believed to have crossed the border into Bengal.¹³ The region remained under Japanese control until a British offensive drove them out in 1945. Prior to the invasion, the British, seeking to bolster support for their forces, had promised the Muslims of northern Arakan a Muslim National Area, and some of the displaced returned with the British. However, the British government never delivered on its promise to create a Muslim National Area.¹⁴

By 1947 the Rohingya had formed an army and had approached President Jinnah of the newly-created Pakistan to ask him to incorporate northern Arakan into East Pakistan (Bangladesh). This move, more than any other, shaped the present-day Burmese government

attitude toward the Rohingya: they were perceived to have threatened Burma's territorial integrity on the eve of its independence and, consequently, are not to be trusted.¹⁵

From Burma's independence in January 1948, tensions grew between the Burmese government and the Rohingya minority. Immediately following independence, a group of Arakanese Muslims went on the political offensive, pushing for the integration of Maungdaw and Buthidaung into what was then East Pakistan, but this was rejected by the Constituent Assembly in Rangoon.¹⁶ The government contributed to the escalation of tensions by treating the Rohingya as illegal immigrants.

The immigration authorities imposed limitations of movement upon Muslims from the regions of Maungdaw, Buthidaung, and Rathedaung to Akyab [Sittwe]. The Muslims were not resettled in the villages from which they had been driven out in 1942 (with the exception of villages they left in the Maungdaw and Buthidaung regions). Some 13,000 Rohingya still living in refugee camps in India and Pakistan whence they had fled during the war, were unable to return; as for those who did manage to return, they were considered illegal Pakistani immigrants. The properties and land of all these refugees have been confiscated.¹⁷

Because they did not have rights of citizenship, Rohingya were prohibited from military service, and Buddhist Rakhine villagers replaced Rohingya civil servants.¹⁸

The democratic government of Prime Minister U Nu in the 1950s recognized the Rohingya's claim to be an indigenous ethnic group for what most observers consider to have been political motives. Yet, their indigenous status has been denied by subsequent governments ever since the military took control of the country in 1962.¹⁹ Following the 1962 coup, the military government took various measures intended to encourage the Rohingya to leave Burma, withdrawing recognition of their citizenship and restricting their freedom. It became increasingly difficult for Rohingya to join the civil service, and many Rohingya already in the civil service were harassed by frequent transfers away from their families and other measures until they resigned.²⁰ Since the late 1970s Rohingya have not been accepted in the army. In 1974 the government promulgated the Emergency Immigration Act, designed to curtail immigration from India, China, and Bangladesh. All citizens were required to carry identity cards (National Registration Certificates), but the Rohingya were eligible only for Foreign Registration Cards (FRCs), and very few Rohingya were able to obtain them. But even if they

did not possess FRCs, the local authorities did not at this time severely disrupt the Rohingya's lives.21

In 1977, however, the government initiated a program called *Nagamin* (King of Dragons)-a census operation to check identification cards and to take "actions against foreigners who have filtered into the country illegally."22 While the program was nationwide in scope, in Arakan it degenerated into abusive attacks on Rohingya by both the army and local Rakhines. The situation was complicated, as in 1991, by the operations of a Rohingya guerrilla group that became militarily active as the Nagamin operation got underway in the area. By May 1978, over 200,000 Rohingya had fled to Bangladesh. A few went to Malaysia, some of whom continue to reside there.23

Throughout the period of military rule, there was no effort to assimilate the Rohingya, and access to the Burmese education system was very limited, especially after 1973. While the whole of Arakan state, and indeed all ethnic minority areas, suffered from this neglect by the central government, the Rohingya suffered particularly. The situation was exacerbated by a lack of development projects and of planning for reintegration of refugees who returned in 1978 and 1979, many of whom remained landless and without documentation.

When the current military government took power in 1988, very little changed in the authorities' attitude toward the Rohingya. Surprisingly, they were allowed to vote in the May 1990 national elections and were represented by two parties who captured eighty percent of the votes cast in the constituencies. The military government refused to accept the results of the election-a large victory for Aung San Suu Kyi's National League for Democracy, an opponent of military rule-and in July 1990 announced the formation of a constituent assembly to draft a new constitution as a basis for new elections.24 This refusal by the military government to hand over political power provoked demonstrations by monks and students toward the end of 1990, and even political prisoners in Rangoon's central Insein jail went on a hunger strike in protest.25 Critics have suggested that the military, needing a scapegoat, a distraction, and a common enemy that might help to united a disillusioned and angry populace, chose the Rohingya.26

At the start of 1991, Rohingya who had fled to Bangladesh were the first to report a dramatic increase in the number of soldiers being posted to northern Arakan state and a consequent upsurge in human rights abuses against civilians. Before the rains started in May 1991, some

10,000 Rohingya refugees had arrived in Bangladesh. By March 1992, over 270,00 refugees had arrived. The refugees told of summary executions, rape, and other forms of torture which they had witnessed or personally endured at the hands of the military.²⁷ In most cases, the abuses took place in the context of forced labor: the Rohingya were being forced to work as porters, build new army barracks, new roads and bridges, dig fish and prawn ponds, and cut bamboo for the military. This was the period in which the majority of Rohingya who now reside in Malaysia decided to leave Burma.

Since September 1992, there have been efforts to repatriate the Rohingya refugees residing in Bangladesh, and in August 1994 UNHCR adopted a program of mass repatriation in which thousands of Rohingya returned to Burma each week. However, since 1997, events in the refugees camps in Bangladesh and conditions imposed by the Burmese authorities have slowed such returns to a trickle. Even many Rohingya who wish to return to Arakan from Bangladesh have not been able to do so.

There have been no similar repatriations of Rohingya from Malaysia. Indeed, the Burmese government explicitly refuses to recognize Rohingya in Malaysia as its own citizens, and it will not accept them back. Both Rohingya formerly detained in Malaysian immigration camps and UNHCR officials in Kuala Lumpur told Human Rights Watch that Burmese embassy officials occasionally visit the immigration detention camps when reviewing cases for repatriation and separate the Rohingya from other Burmese.²⁸ One man told us that while he was detained in Malaysia's Malacca camp in 1996, Burmese embassy officials came to the camp, separated the Rohingya from other Burmese, and took the latter away, leaving the Rohingya behind.²⁹ Another said that Burmese embassy officials take only those who speak Burmese, and those who speak only the Rohingya language are not accepted. Although we were unable to verify the basis on which Burmese officials identify the Rohingya, UNHCR confirmed that Burmese embassy officials go into the camps and select those whom they will repatriate, but that they do not select the Rohingya.

Current Abuses in Arakan

Conditions for Rohingya inside Burma today remain dismal. As Human Rights Watch has documented, the Burmese government continues to deny citizenship and its accompanying rights to most Rohingya, demand forced labor from Rohingya villagers, and arbitrarily confiscate their property.³⁰ Because these abuses, which were the structural causes of the

1991-92 mass exodus, remain unresolved, new refugee flows persist and the reintegration of those who have returned to Burma is limited.

As we argue in the following chapters, the denial of citizenship rights to the Rohingya and the resulting discrimination provides powerful evidence that they are refugees and are, thus, entitled to protection in Malaysia and elsewhere. Yet, to date, their case has not been given the weight it merits. Moreover, although primary responsibility lies with Burma, the Rohingya's lack of citizenship activates additional obligations on the part of both Malaysia and UNHCR in the face of Burma's intransigence.

Denial of Citizenship and Accompanying Rights

The most critical issue is the Rohingya's legal status in Burma. Most Rohingya who have been permitted to reside in Burma are considered by the Burmese authorities to be "resident foreigners," not citizens. This lack of full citizenship rights means that the Rohingya are subject to other abuses, including restrictions on their freedom of movement, discriminatory limitations on access to education, and arbitrary confiscation of property. Denial of citizenship, and of the rights that go with it, pose serious obstacles to achieving a durable solution to the refugee flows.

Burma's 1982 Citizenship Law was promulgated shortly after Rohingya refugees returned from the 1978 exodus and was designed specifically to deny citizenship to the Rohingya.³¹ The law designates three categories of citizens: (1) full citizens, (2) associate citizens, and (3) naturalized citizens. A person is issued a color-coded Citizenship Scrutiny Card consistent with his or her citizenship status—pink, blue, and green respectively. Full citizens are persons who belong to one of the "national races" (Kachin, Kayah (Karen), Karen, Chin, Burman, Mon, Rakhine, Shan, Kaman, and Zerbadee) or those whose ancestors settled in the country before 1823, the beginning of British occupation of what is now Arakan State. If individuals cannot provide evidence that their ancestors settled in Burma before 1823, they may still be eligible for naturalization. Those persons who qualified for citizenship under the 1948 law, but who would no longer qualify under the 1982 law, are considered associate citizens if they applied for citizenship before the 1982 law went into effect. Following the implementation of the 1982 law, foreigners may become naturalized citizens if they can provide "conclusive evidence" that they or their parents entered and resided in Burma prior to independence in 1948. Persons who have at least one parent who holds one of the three types of Burmese citizenship are also eligible to become naturalized citizens.

Beyond these two qualifications, Section 44 of the 1982 act stipulates that a person seeking to become a naturalized citizen must be at least eighteen years old, able to speak one of the national languages well (the Rohingya language, a dialect related to Chittagonian, is not recognized as a national language), of good character, and of sound mind.³² According to the terms of the law, only full and naturalized citizens are "entitled to enjoy the rights of a citizen under the law, with the exception from time to time of the rights stipulated by the State," and associate and naturalized citizens do not have the right to stand as candidates in general elections.³³ All forms of citizenship, "except a citizen by birth," may be revoked by the state.

Provisions in the 1982 law perpetuate the citizenship crisis by denying citizenship to children born to non-citizens. In order for a child to attain Burmese citizenship, at least one parent must already hold one of the three types of Burmese citizenship.

The stipulations of the Burma Citizenship Law governing the right to one of the three types of Burmese citizenship effectively deny the Rohingya the possibility of acquiring a nationality. Although the Rohingya have history which links them to Burma since the eighth century, Burmese law does not recognize the ethnic minority as one of Burma's national races. Many Rohingya families migrated to and settled in Arakan during the British colonial period, which under the 1982 law, directly excludes them from citizenship. Even for those Rohingya whose families settled in the region before 1823, moreover, the onerous burden of proving it to the satisfaction of the Burmese authorities has made it nearly impossible for all but a handful to secure their Burmese citizenship. Rohingya who cannot provide "conclusive evidence" of their lineage or history of residence find themselves ineligible for any class of citizenship. And because of their formal legal status as resident foreigners, Rohingya are subject to restrictions on their freedom of movement, denied access to higher education, and restricted from holding public office.

Human Rights Watch has persistently called for the Burmese government to amend or repeal the 1982 Citizenship Law in line with recommendations made by the U.N. Special Rapporteur dealing with Burma, and to grant Rohingya full citizenship and accompanying rights.³⁴ The special rapporteur has called on the Burmese government to "abolish its overburdensome requirements for citizens in a manner which has discriminatory effects on racial or ethnic minorities."³⁵ UNHCR has also urged the government to review the law, perhaps within the context of the National Convention deliberations, and has offered to consider providing financial, technical, and legal support to assist the government in distributing

Citizenship Scrutiny Cards.³⁶ The current military government, the State Peace and Development Council (SPDC) has made no progress, however, in addressing the legal obstacles to a sustainable return.

Because they are denied citizenship, Rohingya in Burma are considered resident foreigners, a legal status which subjects them to serious discrimination. The Burmese government restricts Rohingya's travel within Arakan, to other parts of the country, and abroad. The restriction on movement, combined with arbitrary confiscation of property, seriously hinders the Rohingya's ability to seek work and to trade.³⁷ The government reserves secondary education for citizens only, so the Rohingya do not have access to state-funded schools beyond the primary level. The Rohingya's lack of citizenship also bars them from the civil service, so they cannot work as teachers or health workers, nor are they permitted to participate formally in government.

Forced Labor and Arbitrary Confiscation of Property in Burma

Local government authorities continue to require Rohingya to perform forced labor. Human Rights Watch was told that those who refuse or complain are physically threatened, sometimes with death, and that children as young as seven years old have been seen on forced labor teams. Use of child labor directly contravenes the Burmese government's obligations under the Convention on the Rights of the Child.³⁸ The compulsory, unpaid labor includes work in state-run, profit-making industries and in the construction of "model villages" for non-Muslim migrants in Arakan. The Rohingya are often made to pay for the construction of model villages through the confiscation of their land, the provision of labor, and building materials. By contrast, Rakhine villagers in northern Arakan do not have to participate in these projects.³⁹

In 1994, after lobbying from the UNHCR, Arakan state officials informally agreed to limit forced labor demands in northern Arakan to four days a month. This agreement, however, is not being honored in many communities. Rohingya report that Burmese military units have continued to conscript villagers for work without pay for more than of seven days a month on model villages, infrastructure projects, portering, and military camp maintenance. Both the U.N. Special Rapporteur and the International Labor Organization (ILO) reported in 1999 that the government has continued the practice of forced labor in many parts of Burma, especially in ethnic minority states.⁴⁰ Although the Burmese government issued an order in

May 1999 recommending that local authorities stop using forced labor, no significant reduction in its application has been reported.⁴¹

As in many parts of Burma with a high military presence, soldiers frequently require Rohingya villagers to provide them with rice and livestock. With the central government unable to provide fully for its 450,000 strong army, battalions have often turned to extortion and theft, as well as extracting forced labor. Extortion has manifested itself in the confiscation of food and demands for fees or bribes at checkpoints. Soldiers reportedly commit such abuses with impunity. According to Rohingya interviewed by Human Rights Watch, the combination of forced labor, seizure of land, arbitrary confiscation of property, and rice taxes have made Rohingya increasingly economically marginalized in Burma, further contributing to refugee outflows.

Because the conditions that have prompted refugee flows over the past decade have not been addressed, the Rohingya in Malaysia have reason to fear persecution should they return to Arakan. This overview makes clear that Rohingya in Burma are systematically denied the protections of citizenship and, as a result, are denied freedom of movement, education, and civil service positions. They are also subject to forced labor and the arbitrary confiscation of their property. This persistent violation of Rohingya's rights has contributed to outflows from the region, including to Malaysia.⁴²

Life in Malaysia

I am afraid of arrest wherever I go.

-Rohingya man living in Kuala Lumpur⁴³

I have no travel documents and I cannot work. The police are always stopping me and asking where I am going and for my passport. I say that I am from Myanmar and have no documents and sometimes they are sympathetic. Now I have [an unofficial letter that says I am Rohingya] which I show to the police, but they do not always accept it and demand money. . . . Really, the letter is not so helpful, but people want at least one document to show.

-man from Arakan⁴⁴

Undocumented and living in detention, scattered around Malaysia's cities, or hiding in jungle settlements, Rohingya in Malaysia cannot be counted. Estimates range from 5,100 to about 8,000 people.⁴⁵ The majority live in neighborhoods around Kuala Lumpur, but there are also smaller settlements in Penang, Kelantan, and other parts of peninsular Malaysia.

Many Rohingya are single men or men who left their families behind in Burma. However, families have come as well, and in the last ten years some of those who were children have grown up and had their own children.

Almost none of the Rohingya interviewed by Human Rights Watch had current Burmese identity documents, although some had documents from the previous government of Burma. "During the democracy time I had a family card and under the socialists I had a registry card with my picture," one man said.⁴⁶ Another showed us his identity card from 1959, listing his nationality as "Rohingya national."⁴⁷ Neither of these men had more recent documents, without which they cannot get permission from the Malaysian government to live in the country legally.

When the Rohingya first began arriving in large numbers in 1991 and 1992, the Malaysian government was less hostile to them. It even granted some Rohingya six-month permits in 1992 that allowed them to work.⁴⁸ Domestic pressure in the early 1990s, however, not only put an end to the provision of work permits, but also prompted increased efforts to track down and deport illegal immigrants and to punish their employers. The crackdown intensified following the Asian financial crisis in 1997. Malaysia's Immigration Department now runs a twenty-four hour hotline for the public to report undocumented workers, and the Malaysian press frequently reports workplace raids generated by private tips.⁴⁹ Passport checks by police are common on Kuala Lumpur's streets, as are raids on homes and workplaces by teams of police, army, and immigration officials.⁵⁰ Those caught without a passport and a valid visa may be arrested, detained, and deported.

Rohingya are increasingly being denied access to health care, and schools are turning away their children, as set forth in more detail in a later chapter of this report. Housing and steady employment have also become difficult to obtain for undocumented Rohingya.⁵¹ "The bosses are afraid to take undocumented people," explained a welder who works only sporadically.⁵² Now Rohingya generally must rely on what they call "daily work"-poorly-paid, short-term manual labor such as painting, carpentry, and landscaping.

Sadiq M. is a forty-one year-old man from Kyauktaw township in Arakan who reached Kuala Lumpur in February 1990. He found work with an employer who did not ask about his immigration status, and he rented a house with five other men. Later, however, the owner refused to rent to them because they did not have passports. He lost his job and was detained and deported to Thailand three times, each time returning to Kuala Lumpur. "I am lucky to stay in the house because one friend has a [fake] Bangladeshi passport and I stay under his shadow," he told us. "Either I earn money for food or I go hungry."⁵³

Mohammed S., who left his wife and three daughters in Arakan when he fled to Malaysia in 1993, told us:

To earn money, I found some Rohingya workers hired by the Malaysian municipality to clear the road. They paid me to help them. After six months I was accepted by the boss of the subcontractor who cleared the roads. While I was working the police caught me. The first time I paid money-they took RM180 (U.S. \$47)⁵⁴ and gave me back RM20-and I was released. The second time they did not take money but took me to the police station. In the station I explained that I had no passport because I was Rohingya. I explained a lot of the situation to the police officer. The officer said we know nothing, just whether you have a passport or not. Without a passport, you go to the [immigration detention] camp.⁵⁵

7 After the Tatmadaw's heavy handed census operation in 1978, "[t]housands more Muslims have since continued to go into exile in countries as far apart as Pakistan, Egypt, and across the Arab world where they have been dubbed Asia's 'new Palestinians.' All these events virtually repeated themselves in 1991-91." Smith, *Burma: Insurgency and the Politics of Ethnicity*, p. 241.

8 See Human Rights Watch/Asia, "Burma: The Rohingya Muslims: Ending a Cycle of Exodus?," *A Human Rights Watch Report*, Vol. 8, No. 9, September 1996. The ethnic group "Rohang" or "Rohan" is said to have been the name used for the northern Arakan region in the ninth and tenth centuries. Arakan was then inhabited by the Rakhine people, whom scholars believe to be a mixture of an indigenous Hindu people with the Mongols who invaded in the ninth century. The Rakhine people today are Buddhist and speak a dialect of Burmese; they constitute the ethnic majority in Arakan.

9 "In actual fact, although there are 135 national races in Myanmar today, the so-called Rohingya people are not one of them. Historically there has never been a 'Rohingya' race in Myanmar . . . Since the first Anglo-Myanmar war was in 1824, people of Muslim faith from the adjacent country illegally entered Myanmar Naing-Ngan, particularly Rakhine State. Being illegal immigrants they do not hold immigration papers like other nationals of the country." Press release from U Ohn Gyaw, Minister for Foreign Affairs, February 21, 1992.

10 Rohingya Solidarity Organization (RSO), "A Memorandum of the Burma Citizenship Law of 1982," November 1982, unpublished paper; RSO, "The Problems of Rohingya Muslims of Arakan in Burma," 1992, unpublished paper; Rohingya Patriotic Front (RPF), *Rohingya Outcry and Demands*, (Bangladesh: RPF, 1976); Arakan Rohingya National Organization (ARNO), "Peaceful Coexistence," *The Newsletter*, Vol. 1, Issue 2, April 1999, p. 1.

11 Ibid. However, other historical resources show that the kings of Arakan were Rakhine Buddhists who took Muslim names to ease their relationships with the Muslim neighbors. Nevertheless, Persian was the language of the Rakhine court until the late eighteenth century.

12 Joseph Silverstein, *Burmese Politics: The Dilemma of National Unity*, (New Brunswick, New Jersey: Rutgers University Press), 1980, pp. 50-51; Moshe Yegar, *The Muslims of Burma: The Study of a Minority Group*, (Wiesbaden: Otto Harrossowitz), 1972, p. 95.

13 Yegar, p. 95.

14 Ibid., p. 96.

15 See Smith, *Burma: Insurgency and the Politics of Ethnicity*, p. 64.

16 Hugh Tinker, *The Union of Burma: A Study of the First Year of Independence*, (London, New York, and Toronto: Oxford University Press) 1957, p. 357.

17 Ibid.

18 Yegar, p. 98.

19 See Smith, *Burma: Insurgency and the Politics of Ethnicity*. Recognizing them as citizens gave them the ability to vote, and many voted for his party in gratitude at this recognition.

20 This information comes from confidential interviews conducted by Human Rights Watch/Asia in Bangladesh, Burma, and Thailand between 1991 and 1996.

21 Some also obtained FRCs through bribery or forgery.

22 Statement by the Ministry for Home and Religious Affairs, November 16, 1977. See Smith, *Burma: Insurgency and the Politics of Ethnicity*, pp. 37, 241.

23 According to S. Sothi Rachagan, "some 200 to 300 Muslims of Burmese origin crossed the Thai border into Malaysia toward the beginning of 1981." Although Rachagan contends that these "have all since returned to their homelands," Human Rights Watch interviewed Rohingya who arrived in Malaysia during that period and had not left since that time. S. Sothi Rachagan, "Refugees and Illegal Immigrants: The Malaysian Experience with Filipino and Vietnamese Refugees," in John Rogge (ed.), *Refugees: A Third World Dilemma*, (Rowman & Littlefield: New Jersey, 1987), p. 254.

24 SLORC Announcement No. 1/90, July 27, 1990.

25 In response to these demonstrations, two monks and a student were killed by the army in Mandalay, and in November 1990 some 150 monasteries in Mandalay and Rangoon were raided and hundreds of monks were arrested. In Insein jail the hunger strikers were tortured, and later the leaders were moved to prison labor camps far from their homes, making family visits almost impossible. See Win Naing Oo, *Cries from Insein*, (Bangkok: ABSDF, 1996).

26 See Bertil Lintner, "Diversionary Tactics: Anti-Muslim campaign seen as effort to rally Burmans," *Far Eastern Economic Review (Hong Kong)*, August 29, 1991.

27 For details of their allegations, see Asia Watch, "Burma: Rape, Forced Labor and Religious Persecution in Northern Arakan," *A Human Rights Watch Short Report*, Vol. 4, No. 12, May 1992; Amnesty International, "Union of Myanmar (Burma): Human Rights Violations Against Muslims in the Rakhine (Arakan) State," (London: Amnesty International), ASA 16/06/92, May 1992.

28 See "Help Us Deport 8,000 Illegals, Myanmar Deputy Premier Told," *The Sun (Malaysia)*, February 26, 1997. However, many Rohingya report other ethnic minorities and "Buddhists" being deported to the Thai-Malaysia border with them. We interviewed a

Burmese woman from Rangoon who was offered the choice of purchasing a ticket to Burma or being deported to the Thai border. She chose deportation to Thailand. Human Rights Watch interview, Kuala Lumpur, Malaysia, December 1, 1999.

29 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

30 Human Rights Watch/Asia, "Burmese Refugees in Bangladesh: Still No Durable Solution," *A Human Rights Watch Report*, Vol. 12, No. 3, May 2000.

31 For a full discussion, see Human Rights Watch/Asia, "Burma: The Rohingya Muslims: Ending a Cycle of Exodus?"; Human Rights Watch and Refugees International, "Rohingya Refugees in Bangladesh: The Search for a Lasting Solution," *A Human Rights Watch Report*, Vol. 9, No.7, August 1997.

32 Sections 42 to 44 of the 1982 Burma Citizenship Law on the qualifications required for Burmese naturalized citizenship read:
42. Persons who have entered and resided in the State prior to 4th January, 1948, and their children born within the State may, if they have not yet applied under the Union Citizenship Act, 1948, apply for naturalized citizenship to the Central Body, furnishing conclusive evidence.

43. The following persons, born in or outside the State, from the date this Law comes into force, may also apply for naturalized citizenship: (a) persons born of parents one of whom is a citizen and the other a foreigner; (b) persons born of parents, one of whom is an associate citizen and the other a naturalized citizen; © persons born of parents, one of whom is an associate citizen and the other a foreigner; (d) persons born of parents, both of whom are naturalized citizens; (e) persons born of parents, one of whom is a naturalized citizen and the other a foreigner.

44. An applicant for naturalized citizenship shall have the following qualifications: (a) be a person who conforms to the provisions of section 42 or section 43; (b) have completed the age of eighteen years; © be able to speak well one of the national languages; (d) be of good character; (e) be of sound mind.

33 Pyithu Hluttaw Election Law, 1989, Sections 6(a), 10(f).

34 Human Rights Watch/Asia, "Burma: The Rohingya Muslims: Ending a Cycle of Exodus?" *A Human Rights Watch Report*; Human Rights Watch and Refugees International, "Rohingya Refugees in Bangladesh: The Search for a Lasting Solution," *A Human Rights Watch Report*.

35 Yozo Yokota, "Situation of Human Rights in Myanmar," (Geneva: U.N. Commission on Human Rights), U.N. Doc. E/CN.4/1993/3, February 17, 1993. Yokota resigned as special rapporteur in 1993 to be replaced by Justice Rajsoomer Lallah. From the time he accepted the position, Lallah has not been permitted to enter Burma.

36 On the National Convention see Janelle M. Diller, "The National Convention: An Impediment to the Restoration of Democracy," in Peter Carey (ed.), *Burma: The Challenge of Change in a Divided Society*, (New York: St. Martin's Press) 1997, pp. 27-54; The National Convention was SLORC's response "to the 1990 landslide election victory of the National League for Democracy (NLD). The National Convention . . . was conceived by the SLORC as a mechanism to draft a new constitution for the country in accordance with military wishes." Diller, "The National Convention," p. 27.

37 For a more extensive discussion of restrictions on Rohingya's freedom of movement and ability to work and trade, see Human Rights Watch/Asia, "Burmese Refugees in Bangladesh: Still No Durable Solution"; and Federation of Human Rights Leagues (FIDH), *Burma: Repression, Discrimination and Ethnic Cleaning in Arakan*, No. 290/2, (Paris: FIDH, April 2000), p. 19-21, 34-35.

38 The Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/55 on November 20, 1989, and entered into force on September 2, 1990. The Burmese government became a party to the convention in 1991.

39 Construction of model villages was also reported to be on the rise in 1999. Model villages are exclusively for Buddhists, so the government prohibits the Muslim Rohingya from occupying them. For a more extensive discussion, see Human Rights Watch/Asia, "Burmese Refugees in Bangladesh."

40 Rajsoomer Lallah, *Situation of human rights in Myanmar*, October 4, 1999; "ILO concludes 87th Conference: Adopts new instruments against child labour and resolution on Myanmar," ILO Press Release, ILO/99/23, June 17, 1999.

41 ILO, "Forced Labour Persists in Myanmar: ILO Applies Extraordinary Constitutional Measures," ILO/00/9, March 29, 2000.

42 To reach Malaysia, Rohingya now usually travel over land through Thailand, although a few fly from Bangladesh on false Bangladeshi passports. To get from Arakan to Thailand, Rohingya sometimes travel by boat but more often cross over land, assisted by a network of brokers or middlemen. As a Buddhist country, Thailand is less preferable than Malaysia, which is primarily Muslim. Also, many Rohingya we interviewed had been arrested and imprisoned in Thailand, and then deported to the Thai-Burma border. After passing through Thailand, they cross the Malaysian border by land or by ferry. From the border, it is then possible to travel by bus, taxi, or private car to Kuala Lumpur. See, e.g., "Illegals Using Langkawi to Come In," *The Star (Malaysia)*, February 23, 2000; "Dept Steps Up Checks on Illegals," *The Star (Malaysia)*, February 28, 2000.

43 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

44 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

45 According to UNHCR, there are around 5,100 "Burmese refugees" in Malaysia. However, this number appears to be based only on those who registered with the Kuala Lumpur office from 1992 to 1993. UNHCR REFWORLD, "Malaysia," *UNHCR Public Information Section Country Information*, September 1999, <http://www.unhcr.ch/world/asia/malaysia.htm>; UNHCR, "Refugee population by country of asylum and origin, 1997-1998," *Refugees and Others of Concern to UNHCR: 1998 Statistical Overview*, <http://www.unhcr.ch/statist/98oview/intro.htm>. Some Rohingya estimate that there are around 8,000 Rohingya living in Malaysia. See, e.g., Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999; Office of the Diplomatic Representative of Arakan (Rakhaing) League for Democracy (ALD), *A Special Publication in Honor of the Arakan Democratic Forces of Malaysia*, 1998, p. 3. This number may be the more accurate one. In 1997 Malaysian Prime Minister Mahathir Mohamad was reported in the Malaysian press as stating that there were 8,000 illegal immigrants from Burma in Malaysia. According to the

article, "Malaysia is facing a problem deporting [Burmese] to Myanmar as Yangon does not regard them as its citizens." "Help Us Deport 8,000 Illegals Myanmar Deputy Premier Told," *The Sun (Malaysia)*, February 26, 1997.

46 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

47 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999. (4)

48 These permits were not extended and were not available after 1992. We interviewed several men who had been arrested and deported after their permits expired.

49 See "Errant Employers' Passports to be Withdrawn," *The New Straits Times (Malaysia)*, January 31, 2000, p. 9.

50 We witnessed police patrols and passport checks in downtown Kuala Lumpur and in Burmese neighborhoods. See, e.g. "Number of detained illegal workers doubles," *The Star (Malaysia)*, March 31, 2000; "19 Bangladeshi workers held," *The Star (Malaysia)*, March 23, 2000 (describing eight-hour immigration operation); "Crackdown on illegal employment agencies planned," *The Star (Malaysia)*, February 25, 2000.

51 For example, in January 2000, the Malaysian Immigration Department recruited 300 new officers to investigate overstaying students and workers. "Malaysia's Immigration Department Targets Overstayers in Blitz," *Asia Pulse*, January 4, 2000. See also "Asia," *Migration News Vol. 7, No. 2*, February 2000, http://migration.ucdavis.edu/archive/feb_2000-15.html. Human Rights Watch has documented Malaysia's crackdown on foreign workers in Human Rights Watch/Asia, "Bearing the Brunt of the Asia Economic Crisis: The Impact on Labor Rights and Migrant Workers in Asia," *A Human Rights Watch Report*, Vol. 10, No. 02(c), March 1998.

52 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 30, and December 2, 1999. See also Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

53 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

54 Throughout this report an exchange rate of RM3.8 to U.S. \$1 is used.

IV. MALAYSIA'S TREATMENT OF UNDOCUMENTED ROHINGYA

In 1990 I was arrested and because there was no detention camp I was sent to Pudu jail. I was coming from work when the police asked for my passport. I was doing daily work-construction. The police arrested me for a passport case. I didn't see a judge or magistrate, and I didn't have a charge or a sentence. After about four months in jail, immigration took me to the Thai border. Other Rohingya, Burmese, Pakistanis, and a few Indonesians were there as well.

In 1993 I was arrested on my way home from work. I was in Pudu jail for about three months and was then sent to the Thai border.

*In 1995 I was sent to the Kajang immigration camp. It was also a passport case, and I was brought to the court. In court the magistrate asked me if I was arrested two other times, and I said "yes." He asked when I came and if I had travel documents. I said that I had none because I am Rohingya and explained that I couldn't stay in Burma. The magistrate asked me if I was guilty of illegal entry, and I said "yes." He sentenced me to two months in Kajang prison. I did not have a lawyer. After prison I was sent to Kajang immigration camp for eight months. With eighty other Rohingya I was then deported to the Thai border. -undocumented Rohingya man in Kuala Lumpur⁵⁶We can't really assure the protection of refugees here[.] - UNHCR protection officer, Kuala Lumpur⁵⁷Malaysia has one of the world's highest percentages of foreign workers: roughly two million of the country's eight million workers. About half of those are estimated to be undocumented. ⁵⁸ Although many sectors depend on foreign labor, statements by government officials and frequent denunciations in the press reflect a deep distrust of foreigners.⁵⁹ This sentiment has extended to asylum-seekers and refugees since the days of the Indochinese boat people, when tens of thousands of refugees landed on Malaysia's shores. According to Foreign Minister Datuk Seri Syed Hamid Albar, "We do not recognize the status of refugees. . . . [W]e only allow foreigners to stay on a temporary basis after which they have to go back."⁶⁰ While Malaysia has, on an *ad hoc* basis, willingly hosted certain groups of refugees-including Khmer Muslims from Cambodia, Filipinos Muslims, and, most recently, Bosnians-it lacks any institutionalized*

protections for them. Malaysia has no asylum system, and under the country's general immigration law, refugees are not distinguished from other undocumented workers but are considered illegal immigrants. The Malaysian government has not agreed to let the Rohingya stay on even a temporary basis, and the Immigration Department reportedly declared in March 2000 that "the Rohingyas or Myanmars have never been accorded refugee status."⁶¹ Without permission to live legally in Malaysia or any way to get such permission, Rohingya are at constant risk of detention and deportation. Local police and immigration officials generally ignore UNHCR documents and arrest their bearers. Rohingya who are detained spend months in immigration camps where they are subject to poor living conditions and physical abuse in violation of international standards. Then they are deported to the Thai-Malaysia border because the Burmese government will not take Rohingya back. At the border they face detention and deportation to Burma by the Thai authorities.⁶² Consequently, most re-enter Malaysia right away. Many of the Rohingya whom Human Rights Watch interviewed had been deported and had re-entered several times, including one man who had been through the cycle eight times in eleven years.⁶³ At each step in the cycle, the Rohingya are susceptible to bribery by unscrupulous police officers and immigration officials. Malaysia has not treated all refugees this way in the past. But for the Rohingya it is providing no protection.

International Legal Standards

All persons in Malaysia, regardless of their immigration status, share certain basic human rights under international law. Refugees have, in addition, rights based on international refugee law, including the fundamental protection against *non-refoulement*; that is, their right not to be returned to a country where they fear persecution on the grounds of race, religion, nationality, membership in a particular social group, or political opinion.

International human rights law generally places obligations on states in relation to all people, not only citizens.⁶⁴ Although international human rights law recognizes a state's right to control its borders and restrict entry within its territory, the fact that a person has entered a country illegally does not affect his or her basic rights to life, security of person, equality before the law, or other basic civil and political rights.⁶⁵

Malaysia, as a party to the U.N. Charter, is bound by the Universal Declaration of Human Rights, which explicitly prohibits discrimination on grounds of national origin.⁶⁶ It is also a

party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and to the Convention on the Rights of the Child, neither of which distinguish between citizens and non-citizens in the rights they establish.⁶⁷ CEDAW provides explicitly that women and men shall "have equal rights to acquire, change or retain their nationality."⁶⁸

Refugees and Asylum-Seekers

The most important documents establishing the rights of asylum-seekers and refugees are the 1951 Convention Relating to the Status of Refugees (the Refugee Convention), its 1967 Protocol, and the Universal Declaration of Human Rights. Under the 1951 Convention, a refugee is defined as:

any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶⁹

An asylum-seeker is an individual who enters a country with or without the legally required documentation,⁷⁰ who seeks to obtain refugee status, and whose status had not yet been determined. Asylum-seekers should be considered to have the same rights as refugees, until such time as it is fairly determined that they do not have refugee status.⁷¹

Malaysia is not a party to the Refugee Convention or to its 1967 Protocol. However, it is a party to the Convention on the Rights of the Child which requires it 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.⁷²

In addition, Malaysia is an observer state on UNHCR's Executive Committee. While Executive Committee Conclusions do not have the same effect as binding treaty provisions,

as an observer state Malaysia should nonetheless respect them.⁷³ Malaysia is also bound both by the Universal Declaration of Human Rights, which provides refugees the right to seek and enjoy asylum from persecution,⁷⁴ and by the principle of *non-refoulement*, which many, including Human Rights Watch, consider to be customary international law. The Refugee Convention articulates the principle of *non-refoulement* in Article 33(1): "No Contracting State 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 in a particular social group or political opinion."⁷⁵

The principle clearly obligates states not to return refugees to countries that will persecute them. Some states maintain, however, that they are not barred from returning refugees to safe third countries, but it has been strongly argued that:

[n]on-refoulement requires that a state be certain that an asylum-seeker who is sent to a third country will not be deliberately exposed to a threat of serious harm, including threats from a third country, and that the individual is being sent to a third country which is willing and able to provide protection. *Non-refoulement* must therefore include a meaningful opportunity for the asylum-seeker to be heard by someone responsible for identifying those deserving of protection and possessing the authority to provide such protection.⁷⁶

It is generally accepted that protection against *refoulement* is "the fundamental criterion when considering resort to the notion [of safe third country]."⁷⁷ This is true even for individuals who have already been granted asylum in that third country.⁷⁸ Accordingly, when a state returns a refugee to an allegedly safe third country that does not offer asylum or other protection, or itself then returns the refugee to a place of persecution, it violates the principle of *non-refoulement*.

Malaysia's Refusal to Recognize Refugee Status

History of Refugee Policy in Malaysia Malaysia's current policy toward refugees has its roots in its experience with Indochinese refugees in the 1970s and 1980s. After the fall of the South Vietnamese government in 1975, hundreds of thousands of Vietnamese began to leave the country. Most fled by boat to other countries in Southeast Asia, and, for a time, Malaysia was their principal first stop.⁷⁹ These refugees were placed in camps under the auspices of the Malaysian Red Crescent Society in coordination with UNHCR.⁸⁰ By 1979, people were leaving Vietnam at an increasing rate, and the Thai and Malaysian navies were pushing

rickety boats carrying Vietnamese asylum-seekers back into the sea.⁸¹ To address this and other problems, the United Nations convened an international conference in Geneva in July 1979.⁸² At the conference, the participants agreed that the Southeast Asian countries would provide temporary asylum in exchange for resettlement of the Vietnamese refugees in the West. Although the flow of refugees dropped dramatically at first, by the late 1980s the refugee camps were becoming increasingly crowded as asylum-seekers continued to arrive and resettlement to third countries declined. By May 1989, the refugee caseload in Malaysia had again surpassed 20,000, and Thai and Malaysian authorities were again turning away boats of refugees.⁸³ In response, a second Geneva conference on Indochinese refugees was held in June 1989. The conference resulted in a Comprehensive Plan of Action (CPA), adopted by seventy-five countries, that changed the prior system-automatic resettlement in exchange for temporary asylum-by introducing individual screening for refugee status. Persons found not to be refugees would be returned voluntarily or by force. Accordingly, beginning in August 1989, the Vietnamese asylum-seekers already in Malaysian refugee camps were individually screened for refugee status. Although Malaysian military officers actually conducted the screening, UNHCR legal consultants observed and played an active part in the screening interviews. A UNHCR legal consultant provided a written assessment to the Malaysian authorities on every case and was generally present for each interview. UNHCR also provided group counseling on the adjudication process prior to the screening interview and had independent authority to recognize refugees under its mandate.⁸⁴ At the same time, however, Malaysia continued to turn away boats. This led one expert to conclude that "[i]n effect, Malaysia never restored asylum."⁸⁵ On June 25, 1996, Malaysia's last camp for Vietnamese boat people was formally closed.⁸⁶ This coincided with the formal end of the CPA five days later. However, the CPA's legacy-Malaysia's fear of mass refugee influxes and its assumption that refugees should not be resettled in Malaysia but in third countries-lives on. Malaysia's treatment of different groups of refugees, ungoverned by domestic law, has been uncoordinated and variable, ranging from expulsion to full integration. Filipinos, Cambodians, Vietnamese, Indonesians, and Bosnians have all sought refuge in Malaysia at various moments. About 45,000 Filipino Muslims who fled ethnic strife in Mindanao in 1972 and 1974 have been locally integrated in the eastern Malaysian state of Sabah, according to UNHCR estimates.⁸⁷ About 10,000 of the Cambodian Muslims who fled the Pol Pot regime beginning in 1975 have been permanently resettled in Malaysia, with funding from UNHCR to help with integration.⁸⁸ In contrast, Vietnamese refugees were classified as "illegal immigrants," confined to camps, and eventually resettled to third countries or repatriated to

Vietnam.⁸⁹ And on and off from late 1977, Malaysia was also towing Vietnamese refugee boats back out to sea. More recently, in the early 1990s UNHCR brokered an agreement with the Malaysian government under which about 180 Acehese refugees from Indonesia received temporary permits to live in Malaysia. Then, in March 1998, Malaysia forcibly repatriated around 500 Acehese, sparking international protest. The government continues to deny UNHCR access to Acehese asylum-seekers in immigration detention. About 400 Bosnian Muslims have also been accepted for resettlement in Malaysia.

Because whatever protection Malaysia offers to refugees is not institutionalized but must be renegotiated for each group, many, like the Rohingya, are overlooked or ignored. Such an *ad hoc* approach also increases the potential for politicization of asylum based on the relations between Malaysia and the country of origin, and increases the potential for discrimination based on the asylum-seeker's nationality or ethnic background.⁹⁰ As for refugees recognized by UNHCR but not by the Malaysian government, Malaysia provides no protection. Similarly, in terms of durable solutions for refugees, Malaysia generally does not allow for local integration. Therefore, as in the days of the CPA, UNHCR must seek resettlement in a third country for refugees like the Rohingya who cannot be repatriated. And while they await resettlement, these refugees remain vulnerable to detention and deportation.

Refoulement of Rohingya

For the reasons described above, many of the Rohingya in Malaysia should enjoy international protection as refugees. Although Malaysia does not generally repatriate Rohingya to Burma, it continues to deport them to Thailand, including some identified as refugees by UNHCR, despite the fact that Rohingya refugees are also without meaningful protection in Thailand. · Muhammed Sayed is a Rohingya man recognized as a refugee by UNHCR. On October 25, 1999, he was arrested at his home and detained at the Langkap immigration detention center in Perak, reportedly in connection with his participation in a demonstration in front of the Burmese embassy on September 9, 1999.⁹¹ Despite UNHCR's intervention on his behalf, the immigration department refused to release him until June 29, 2000, when he was resettled in Australia.⁹²

· Abdul R. came to Malaysia in 1981, when he was nine years old. When we interviewed him in late 1999, he had just returned from the border to which he was sent following a month and a half in the Malacca detention camp. This was his eighth deportation. When he was arrested the last time, Abdul R. had already been screened and rejected by UNHCR but had appealed.

He showed the police a UNHCR registration document, but they decided that it was not valid as it had expired some months before. He was taken to the Macap Umboo camp in Malacca. Abdul R. was able to show us a copy of a letter that a UNHCR protection officer in Kuala Lumpur had written to the camp commander requesting his release. In this letter, the protection officer stated that, Abdul R. and his family "have been registered with us as Muslims from the Arakan State of Myanmar. They fled their home country due to the problems they faced on account of their ethnic and religious background. Therefore, they do not possess any valid travel documents which would prove that they are Myanmarese citizenship. So far, Malaysia and Myanmar have not been able to agree on a procedure for the verification of the origin of these Muslims from Myanmar and for their [sic] to their country of origin. Until their citizenship and their right to return has been clarified, they will, in practice, not be able to return to Myanmar." The letter also confirmed that Abdul R.'s UNHCR document was authentic and, without mentioning that he had been denied refugee status, stated that Abdul R. was "considered to be a person of concern to UNHCR." The letter concluded by requesting that he be released and granted temporary protection. The camp commander ignored the letter, however, and Abdul R. was deported to Thailand.⁹³

· Eliyas N. registered with UNHCR in 1992 and carries a letter to that effect. Nevertheless, in 1993 and again in 1998 he was detained and deported to Thailand. After he returned to Kuala Lumpur a second time, UNHCR recognized him and his family as refugees. While they await resettlement to a third country, they are at constant risk of arrest.⁹⁴

· According to the UNHCR office in Kuala Lumpur, Afghans, Sri Lankans, and Indonesians from Aceh who were recognized as refugees by UNHCR, including some who had already been accepted for resettlement in third countries, have been sent back to their countries by Malaysian authorities. In early December 1999, at least one Sri Lankan refugee was being held in immigration detention pending deportation from Malaysia.⁹⁵ Malaysia expels Rohingya to Thailand because Burma will not accept them back and because Rohingya generally enter Malaysia through the Thai border. However, Thailand has also not ratified the Refugee Convention and Protocol, and it too has no procedures for asylum and considers deported Rohingya to be illegal immigrants. At best, Rohingya deported to Thailand are able to return to Malaysia without being detected by Thai officials or by paying officials a bribe. At worst, they face detention in Thailand and deportation to Burma. · Hussein E. had been arrested by Thai immigration officials three times, twice after being deported from Malaysia.

Each time he was held in a Thai jail for as long as six months, then sent back to the Burmese border.⁹⁶

· Sadiq M. was arrested as he was crossing through Thailand on his way to Malaysia. After a month and a half in a Thai jail, immigration officials put him and others in boats and sent them across the Thai-Burma border at Mae Sot. Burmese troops fired on them as they crossed, and Sadiq M. hid in the jungle along the shore until he could make his way back through Thailand and, eventually, to Malaysia.⁹⁷

· Sayed M. paid money to Thai officials to avoid arrest, but he witnessed others being arrested.⁹⁸

· Soe Soe had to pay RM100 (U.S. \$26) to Thai officials before she could return to Malaysia.⁹⁹ Returning refugees and asylum-seekers to countries where they could face persecution is a violation of the fundamental principle of *non-refoulement* under international law. Returning refugees and asylum-seekers to a third country, such as Thailand, which is unable or unwilling to provide them with protection and may return them to Burma where they could face persecution, also amounts to a violation of this principle. As the above testimonies indicate, acts of *refoulement* are not isolated incidents in Malaysia.

Powers of Police and Immigration Officials

Malaysia's immigration law makes no provision or exception for asylum-seekers or refugees, and there are no procedures in place for identifying them, informing them about UNHCR, or informing UNHCR about them. Government officials at all levels generally do not respect UNHCR documents or UNHCR's urgent requests that particular asylum-seekers and refugees not be detained and repatriated. Low-level police and immigration officials possess broad discretion and power under the law. What few protections that are mandated, such as judicial review of detention, are often not complied with.

Illegal Entry and "Prohibited Immigrants"

A refugee, like any other non-citizen in Malaysia, may be arrested, detained, and deported for violating the 1959/63 Immigration Act. This act prohibits entering at an unauthorized point of entry, entering without valid documents including a passport, remaining after the cancellation of a permit or expiration of a pass, and possessing or using false documents.¹⁰⁰ The act also specifies a broad range of "prohibited immigrants" who are barred from entering the country.

These include persons unable to show that they can support themselves or that they have employment waiting; anyone suffering from a mental disorder or "suffering from a contagious or infectious disease that makes his presence in Malaysia dangerous to the community"; prostitutes, persons receiving the proceeds of prostitution, or persons bringing in women and girls for prostitution; "vagrants and habitual beggars"; and persons not in possession of valid travel documents. If a prohibited immigrant enters the country or if a person becomes a prohibited immigrant after entering, he or she is subject to detention and deportation.¹⁰¹ The individual bears the burden of proving that he or she entered lawfully and is not a prohibited immigrant.¹⁰² Almost all Rohingya in Malaysia, by virtue of having no valid passport or other identity documents and having entered at an unauthorized point, are in violation of these sections. Although the act makes no mention of refugees, it does give the Minister power to "exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of the Act[.]"¹⁰³ However, "[n]othing short of ministerial intervention prevents persons seeking asylum from being treated as illegal immigrants."¹⁰⁴

Powers of Search and Arrest

Both police and immigration officers have broad powers to search without a warrant, to interrogate "any persons reasonably believed to be a person liable to removal from Malaysia," to require that a person produce documents, and to arrest without a warrant "any person who [they] reasonably believe had committed an offense against this Act."¹⁰⁵ Again, individuals have the burden of proving that they entered and remained legally in Malaysia. Where a person fails to produce evidence of this on demand, "it shall be presumed, until the contrary is proved, that he has . . . entered or re-entered and remained in Malaysia unlawfully."¹⁰⁶ The Rohingya interviewed by Human Rights Watch who had previously been detained by Malaysian authorities had been arrested in one of two ways. The majority were stopped in the street by police, often as they traveled to and from work, while others were detained in "operasi"-raids on homes and workplaces carried out by police, immigration, and customs officials or at roadblocks.

Judicial Review and Sentencing

A person arrested under the Immigration Act "may be detained in any prison, police station or immigration depot for a period not exceeding thirty days pending a decision as to whether an order for his removal should be made."¹⁰⁷ However, the act also requires that anyone who

is not a citizen who "has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, . . . shall, within fourteen days of his arrest or detention, be produced before a Magistrate[.]" The magistrate is then to order detention for the time necessary to investigate the offense, for an immigration officer to "mak[e] inquiries," or for the person to be removed from Malaysia.¹⁰⁸

Persons convicted of violating the Immigration Act face a fine of up to RM10,000 (U.S. \$2,600) and up to five years of imprisonment.¹⁰⁹ In addition to the general penalty, a person convicted of unlawful return after removal may receive a "whipping of not more than six strokes."¹¹⁰ However, if a person has unlawfully entered, reentered, or remained in Malaysia, he or she is subject to deportation regardless of whether "any proceedings are taken against him in respect of the offense."¹¹¹ Under Section 34(1) of the act, once a person is ordered removed, he or she may be detained "for such period as may be necessary for arranging removal." The Rohingya we interviewed who had been brought to court were generally charged with illegal reentry and sentenced to a few months of imprisonment. Some were also caned. After serving part or all of their sentences, they were transferred to immigration detention camps where they were held until they were deported. · S. Nasir was stopped at a police blockade as he was traveling in a taxi to Langkawi Island near the Thai border. He could not produce a passport and was taken to a police station. After nineteen days in the station, he was allocated a state-funded lawyer, charged with illegal entry, and presented before a judge. He told the judge that he could not go back to Burma because he would be killed. "If you send me back by force," he said, "I will kill myself." He was sentenced to three months in prison, after which he was deported to Thailand.¹¹²

· M. Kadir was detained and deported twice before he ever saw a magistrate. After his third arrest, he was taken to court. He was not given a lawyer, but the magistrate questioned him directly about his two prior arrests, his most recent entry into Malaysia, and his travel documents. He admitted to having been arrested twice before. "I said that I had [no travel documents] because I am Rohingya, and I explained that I couldn't stay in Burma. The magistrate asked me if I was guilty of illegal entry, and I said `yes.' He sentenced me to two months in Kajang prison. After prison I was sent to Kajang camp for eight months. With eighty other Rohingya I was then deported to the Thai border."¹¹³

· Soe Soe, a Buddhist woman from Rangoon, was arrested when immigration officers checked passports at the restaurant where she worked. Because the work permit in her

passport listed a different employer, she was arrested and taken to an immigration detention camp. After one month and three days, she was brought to court where she was given a lawyer. The lawyer spoke to her in Malay, however, and she did not understand what he said. She was then returned to the camp. On a second trip to the court she was given a Burmese-speaking lawyer who told her that the fine was RM1000 (U.S. \$260). Because she could not pay the fine, she was sentenced to four months of imprisonment in a women's prison in Port Klang. Although the time she had spent in immigration detention was to count toward this time, she remained in detention until November 19, 1999, when she was deported to Thailand, over six months after she was arrested.¹¹⁴ Unlike the above individuals, many detainees are never brought before a magistrate and are deported without a hearing of any kind. This practice appears to be officially sanctioned. On March 29, 2000, for example, Deputy Home Minister Datuk Chor Chee Heung announced that illegal immigrants who are caught "fresh off the boats" would be deported without being charged in court. Only the "recalcitrant ones who are caught entering the country many times would be charged."¹¹⁵ Most Rohingya we interviewed were never taken to court, charged with an offense, given the opportunity to explain why they could not obtain identity documents, or sentenced. Once they were detained in immigration camps, they did not know how long they would remain there or when they were deported. None were informed of the rights of refugees or given the opportunity to contact UNHCR.

Under the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "[a]ny form of detention . . . shall be ordered by, or be subject to the effective control of, a judicial or other authority."¹¹⁶ The Body of Principles also mandate that "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority," and that a detainee who is "a refugee or otherwise under the protection of an intergovernmental organization" be "promptly informed of his right to communicate by appropriate means . . . with the representative of the competent international organization."¹¹⁷ The current practice in Malaysia of bypassing judicial review, failing to inform asylum-seekers of their rights, and failing to provide them the opportunity to contact UNHCR, violates these standards.

Abuses by Police Police officers who conduct passport checks on the street are woefully ignorant of what constitutes a refugee and of refugees' rights under international law and often take advantage of the Rohingya's vulnerability to extract bribes. While the policy of

ignoring UNHCR refugee status determinations comes from the highest levels of government, abuses against the Rohingya occur at all levels.

Disregarding or Destroying UNHCR Documents

When stopped by police checking for passports, Rohingya show the police UNHCR documents if they have them. Rohingya interviewed by Human Rights Watch said that, despite the documents' affirmation that the bearer is a refugee or is registered with UNHCR, police often ignore and sometimes destroy those documents. For example, Ahmed K. received a certificate from UNHCR in 1992. He stated:

I show the letter to the police, but I still have to pay whatever I have to them. Sometimes if I have a lot they will give me RM5 for transport. Last time (one month ago) I had to pay RM20. The police tore the picture off the letter to see if it was fake so I had to laminate it to keep it on. The policeman said next time not to show him the letter because I would still have to pay.¹¹⁸

Another man explained, "When I showed the policeman my U.N. card, he said, 'I don't need this, I need money.' I gave him RM5."¹¹⁹ Human Rights Watch interviewed one fifty-two year-old man who had been detained and deported to the Thai border twice, despite having a UNHCR registration document. The second time he was arrested, the police took away the document and did not return it. He subsequently returned to Malaysia, contacted UNHCR, and was granted refugee status in 1999. As Malaysia has increasingly cracked down on undocumented persons, UNHCR documents are now even more commonly ignored.¹²⁰

Bribery, Extortion, and Theft during Arrest

Being stopped by the police does not automatically lead to Rohingya being arrested. On the contrary, the information obtained firsthand by Human Rights Watch from Rohingya is that even small amounts of money will almost always secure an undocumented person's release. Usually, we were told, Rohingya who are stopped are obliged to give the police all the money that they have, though some police officers will allow them to retain enough for the bus fare home. Several interviewees told us of cases in which individuals who did not have enough money to satisfy a particular officer were sent by the officer to collect money from family and friends while he waited.¹²¹ Rohingya, as a powerless and vulnerable group, are an easy target for corrupt police. According to one Rohingya man, when asked when he last had to pay a bribe: "The police are waiting when I go to work and they do not ask for any

documents, only bribes-about RM10. It is very shameful how many times I have had no lunch. . . . I can't count how many times this year the police have stopped me and taken money."¹²²Bashar R., who works at odd welding jobs which require him to travel around Kuala Lumpur, told us: "I have never been detained, but I am stopped by the police all the time, almost daily. I have to pay them RM10 to RM50. The last time I was stopped was three days ago. The police used to wait in this little land by a bridge that we all had to cross in order to get to the road to go to work. It was like a toll."¹²³ M. Khan said he had RM1000 taken by police in 1996: "They said, 'Do you want to go to the camp or do you want to give us this money?' So I surrendered the money."¹²⁴ The Malaysian government, officially, is not unaware of the problem of corruption among police and other officials. Indeed, soliciting or accepting a bribe is a crime under both the Penal Code and the Anti-Corruption Act,¹²⁵ and Malaysia's powerful Anti-Corruption Agency is charged with investigating, prosecuting, and preventing all forms of corruption and abuse of power.¹²⁶ In practice, however, the authorities seem unconcerned about police extortion of bribes from Rohingya: we are not aware of any cases in which police or immigration officials have been prosecuted for taking bribes from undocumented persons.

Physical Abuse and Corruption at Local Police Stations

When arrested by police, undocumented persons are generally taken to a local police station before being transferred to an immigration detention camp. How long they are held at the station varies from a few hours, in some cases, to several weeks. While most of those we interviewed complained primarily of abuses at the point of arrest or in the detention camps, some also reported that they or others had been subjected to police corruption and physical abuse while they were being held at police stations.

· Pu Van Mang from Chin State in Burma, is not Rohingya and has a Burmese passport with a Malaysian work permit. However, the permit had expired at the time he was arrested on September 7, 1999, in the Pudu Raya bus station. Two police officers took him to a local police station where he was stripped to his underwear and placed in a cell he described as being around five feet by five feet, with a toilet in one corner. About ten other men, also in their underwear, were in the cell. He was transferred several times to other similar cells. He was not questioned and did not see a magistrate. Three days after he was arrested, he was allowed to call his employer in exchange for all of his money (about RM150 (U.S. \$40)).

After a week, his employer renewed his work permit. The police returned his clothing and released him.¹²⁷

· Police arrested S. Ali in June 1999 as he was walking along the road from work. They took him to a police station, stripped off his clothes, and took his money. They also punched and kicked him, he said. He was never questioned or taken before a magistrate. After three days, the police turned him over to immigration officials who took him to the Malacca camp.¹²⁸· A Rohingya woman described to us how she was assaulted in the police station: I used to go to Kelantan to get property and fish to sell in Kuala Lumpur. In 1995 I was returning to Kuala Lumpur by bus when I was arrested by the local police. In the station I was attacked physically. I was forced to stand still. I was punched and my head hit on the wall. The police said to me, "Why did you come here without permission? Go back." I was not given a chance to explain why I couldn't go back. · Budi was caught on November 6, 1999, as he was landing on the Malaysian shore in a boat with almost fifty other people from Indonesia. He did not know what officials were arresting him because they were not in uniform. The officials took them to what he believed was a police station. "They stripped me naked and took all my money - 80,000 rupiah (about U.S. \$11)."¹²⁹

From local police stations, those persons who are not taken to court and sentenced to prison are handed over to immigration officials and taken directly to immigration detention camps.

Immigration Detention

I spent one and a half months in the Malacca detention camp. When I reached the camp, the guards first took RM250, my watch, my gold ring, and my shoes. None of these were ever returned. The food was not edible: the rice and curry were burned and smelly. Water was very limited so I was always thirsty. My throat became swollen, and when I asked for medication I was kicked and hit with a PVC pipe.

The buildings were two-story longhouses with wooden floors. We slept on the floor without mats. There were many bugs and we couldn't sleep. . . . Within one week of being detained, everyone had skin diseases. We were not able to bathe often and the water, which was in open tanks, was smelly and rusty. We had no soap, not even for washing clothes. We could only wash every four to five days and then only at night. The toilets were dirty and smelly.

Six times a day we had to line up in ten-person lines under the sun. When we were sleeping the police would wake us up and make us clean the area so we could not sleep. We had to eat outside in the heat. There were not many rules. When the whistle blew we had to sit down and if we didn't we were beaten. I was beaten one time-almost everyone there was. When you are beaten you cannot do anything (like speak or look at the guard) or you will be beaten more. Guards beat people with PVC pipe, rubber, and rattan [flexible palm branches]. I was beaten in what was just a random beating, and I still have scars on my back. Punishments were based on the whim of the guard: one person was kept in the sun all day, one person had water put on his head. I saw one person being made to climb up and hold on to the iron mesh fence, but I don't know why he had to do this. I saw many people die I saw one person die because he did not get medical treatment. -Rohingya man detained at the Malacca detention camp, August-September 1999¹³⁰

Detainees in Malaysia's immigration detention camps are robbed, beaten, inadequately fed, and denied medical care, all out of the sight of domestic and international monitors. When these abuses have been brought to light, the Malaysian government has shown more interest in attacking the source of the information than addressing the problem. When the non-governmental organization Tenaganita ("Women's Force") released a memorandum entitled "Abuse, Torture, and Dehumanised Treatment of Migrant Workers at Detention Camps" in mid-1995, camp conditions attracted international attention. Drawing on interviews with over 300 former detainees, the memorandum alleged that unsanitary conditions, inadequate food and water, frequent deaths from beatings and a lack of medical care, sexual abuse, and corruption were rife in Malaysia's immigration detention camps. In response, the Home Ministry's response accused Irene Fernandez, Tenaganita's director, of defamation, and in March 1996, she was arrested on charges of malicious publication of false news.¹³¹ She pled not guilty, and at the time this report went to press, she had been on trial for over four years, forced to bear devastating court costs, and faced three years of imprisonment and substantial fines if convicted.¹³² At the trial, former detainees from Bangladesh testified that, while held at the Tanah Merah and Semenyih camps, they were beaten and seriously injured, subjected to gross sexual abuse, kept in crowded, mosquito-infested rooms with foul toilets, denied water and clean clothes, and forced to stare into the sun.¹³³ In researching this report, Human Rights Watch received information that substantiated many aspects of the conditions reported by Tenaganita and indicates that conditions have not significantly improved since Tenaganita's report was published over four years ago.

The Immigration Department operates at least nine immigration detention camps in peninsular Malaysia and others in Sabah and Sarawak.¹³⁴ These camps are known by the names of the towns in which they are located. The Malaysian government prohibits access to its immigration detention camps. Consequently, Human Rights Watch was not able to gain access to the detention camps themselves. UNHCR staff are allowed to interview certain detainees within particular visiting areas but it is denied general access to the facilities, and whom UNHCR representatives may interview is also restricted. The Minister of Home Affairs has denied UNHCR's request to see Acehnese asylum-seekers, for example, on the grounds that the Malaysian government does not consider people from Aceh to be refugees.¹³⁵

In order to obtain the most accurate picture of life in the camps, as Human Rights Watch could not visit them directly, we sought out people who had been recently released from the camps. Because detainees usually are not separated by nationality and, thus, generally experience the same conditions, we interviewed Indonesians, and both Christians and Buddhist Burmese, as well Rohingya. To do this we traveled to Dumai, the port in Indonesia to which Indonesians are generally deported, and spoke with deportees as they arrived off the ferry from Malaysia. Altogether we interviewed forty-five individuals who, taken together, had been in immigration detention a total of sixty times in Malaysia. Of these, seventeen were detained in 1999, some more than once or in more than one camp, including in camps in or near Tanah Merah, Lenggeng, Malacca, Port Klang, and Johor Baru, and in local police stations. Twenty-eight had been detained from 1997-1999 in the above camps or camps in Kedah, Semenyih, Kajang, Langkap, Kemayan, Juru, or in Pudu prison. We interviewed sixteen people who had been detained in more than one place, and many Rohingya we interviewed had been transferred to the camp in Tanah Merah, Kelantan, prior to deportation. While Indonesians and Bangladeshis constitute the largest groups among detainees, we were told that Filipinos, Pakistanis, nationals of various African countries, Indonesians, Burmese, Indians, Nepalese, Sri Lankans, Thais, and Cambodians were also held in the camps.

International Standards

All persons held in detention, whether nationals, non-nationals, asylum-seekers or refugees, criminally accused or convicted, should be held in conformity with the guidelines for minimum standards of state practice laid down in the U.N.'s Standard Minimum Rules for the Treatment of Prisoners¹³⁶ and in other authoritative international guidelines for minimum

standards of state practice, notably the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,¹³⁷ the Basic Principles for the Treatment of Prisoners,¹³⁸ and the Rules for the Protection of Juveniles Deprived of their Liberty.¹³⁹ These instruments provide a set of standards that are broadly in agreement with each other. For example, they specify conditions under which persons may be detained and include requirements that basic sanitation installations, food, and water be provided; that detainees have access to health services; that no one be subject to cruel, inhuman or degrading treatment or punishment, and that the use of force be limited; that juveniles be held separately from adults; that families not be separated; and that detainees' property be preserved. In particular, the Basic Principles for the Treatment of Prisoners states that, except for those limitations that are demonstrably required by the fact of incarceration, all prisoners should retain and have respected their human rights and fundamental freedoms as set forth in the Universal Declaration of Human Rights. In addition, the prohibition on torture contained in the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is considered to be customary international law and, thus, binds Malaysia despite Malaysia's failure to date to become a party to the convention. The Convention of the Rights of the Child, to which Malaysia is a party, also elaborates standards for the detention of juveniles.¹⁴⁰

Asylum-seekers and refugees should be granted additional protections. UNHCR's *Guidelines on the Detention of Asylum-Seekers* state that "[a]s a general principle asylum-seekers should not be detained."¹⁴¹ Guideline 3 provides that: The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. . . . [T]he detention of asylum-seekers may only be resorted to, if necessary: I. to verify identity . . . ii. to determine the elements on which the claim to refugee status or asylum is based . . . iii. in cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum . . . iv. to protect national security or public order. Where detention of asylum-seekers is considered necessary it should only be imposed where it is reasonable to do so and without discrimination. It should be proportional to the ends to be achieved (i.e. to ensure one of the above purposes) and for a minimal period.¹⁴² Where asylum-seekers are detained, Guideline 4 specifies minimum procedural guarantees, including the right to contact and be contacted by the local UNHCR office and a lawyer. Regarding detention conditions, the *Guidelines on the Detention of Asylum Seekers* refer to

the various U.N. documents and emphasize the need for the segregation of children from adults except when they are part of a family group; the provision of appropriate medical treatment and psychological counseling; and the access to "basic necessities, i.e., beds, shower facilities, basic toiletries, etc."143

Living Conditions

While the camps vary somewhat in size, most are guarded compounds of one or two story wooden longhouses, surrounded by wire. Inside are common rooms, not cells, and the various longhouses are known as blocks. Not all camps detain women but when women are detained, they are separated from men. Small children are detained with the women; however, as discussed below, pre-adolescent boys are detained with adult men. A few detainees reported being separated by nationality, but persons of different nationalities are usually detained together. No recreation or educational facilities are provided, and detainees reported having little to do other than occasional chores.

Almost every person we interviewed complained of overcrowding, insect infestation (especially mosquitoes and bed bugs), and not having enough food. With some variation, food in the camp generally consists of bread and tea for breakfast, and rice and small salty fish for lunch and dinner. Some complained that the food was rotten and wormy.144 A few reported having an occasional egg, vegetable, or piece of chicken. One man from Batam, Indonesia, told us that he saw a man from Madura, Indonesia, die from what he believed was beri beri, a vitamin B deficiency. The man was hospitalized but died after he was returned to the camp. He said that he saw three other detainees, from Bangladesh, Java, and Madura, get sick from beri beri but they were soon deported.145 While some detainees reported not being allowed to see a doctor when sick or not being given medicine, others reported being hospitalized for nutritional deficiencies and then returned to the camps.

In some camps, access to water for drinking, bathing, or laundry is restricted.146 A Burman man described conditions at Lenggeng in 1995:

The most difficult conditions I faced was the toilet and bathroom. There was 250 people in one hall, and the toilets were almost spoiled. Some toilets were blocked by the waste, and we can see the maggots traveling around the floor in the bathroom. Sometimes the water ran out for two or three days, and we had our meals without washing our hands and dishes.147

On July 27, 1999, detainees at the Lenggeng camp mounted a protest demonstration following three days without water. Some of the detainees who demonstrated were also overcome by sudden respiratory problems, and one man reportedly died following the camp's being sprayed with insecticide for mosquitoes that morning.¹⁴⁸

Detainees sleep on wooden floors without mats. Those we interviewed complained that this, combined with the insects, heat, and overcrowding, made sleep very difficult.¹⁴⁹ One woman who was detained in both immigration detention in May and June 1999 and in prison (for an immigration offense) from mid-1999 to November 1999 told us that the conditions in jail were much better than immigration detention in Port Klang:

In Port Klang, there were about fifty-two people in a [small] room which made it very crowded and hard to sleep. The toilets smelled very bad, and the smell in the room was very strong. We could buy bread, tea, and coffee from the guards at double the price. The food was sent by contract people and water came in plastic bags. There was not enough drinking water. Sometimes there was enough for showering and sometimes not. . . . We slept on the floor without mats and were bitten by bugs and mosquitoes. Sometimes the meals were brought in cardboard boxes, and we would open them and sleep on those. I made friends in Port Klang. There were two Filipino women, many Indonesians but no Malays-only foreigners.¹⁵⁰

These conditions breach the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Rules for the Protection of Juveniles, and UNHCR's *Guidelines on the Detention of Asylum Seekers*. These rules provide that adequate sanitary installations, medical care, sleeping accommodations, and food and drinking water of sufficient quality and quantity be provided.¹⁵¹

Detainees do not appear to have any effective way to make requests or complaints regarding the conditions of detention, or any remedy against abuse. Two men and one woman told us that when they complained about the lack of food or its quality, they were punished by being forced to stand in the sun. The woman, who complained to two "inspectors," was also made to do twenty squats, had water thrown in her face, and was hit on her palm with a rattan cane by guards.¹⁵² A former detainee from Bangladesh testified at Irene Fernandez's trial in May 2000 that "the environment was such that we could never complain. . . . I have witnessed

some of my friends who complained before, they were beaten up. And this had led me not to complain."¹⁵³ The Standard Minimum Rules for the Treatment of Prisoners requires that prisoners be given the means to exercise their right to make requests and complaints without censorship to the central prison administration, the judicial authority, or other proper authorities.¹⁵⁴ This guarantee is critical to the protection of prisoners from abuses and substandard conditions.

Physical Abuse and Deaths

Punishment for alleged infractions is often physical and administered on the spot. For small matters, such as dropping food, both men and women reported being forced to stand in the sun or rain for extended periods.¹⁵⁵ For acts such as possessing contraband, arriving late for roll call, making noise or fighting, or men trying to "look at" the women, detainees may be beaten. When tobacco was found in a doorway in S. Yusof's block in the Lenggeng camp in 1999, the guards forced the three people they thought were responsible to take off their clothes and walk around on their elbows until they were raw and skinned. S. Yusof and the rest of those in the block then had to stand in the afternoon sun for three or four hours.¹⁵⁶ A common time for beatings was roll call (or "check-up"), during which detainees line up outside by name or number and are counted, sometimes as often as five times a day.

Another man detained in the Tanah Merah camp in May and June 1999, told us,

I got a fever and the doctor came and I requested medicine. Three of us went together. The doctor did not examine me-he did not check my eyes or chest-but accused the three of us of cheating. He said I was not sick and punished me. He made me put my finger down on the ground and walk around it fifty times. After fifteen times I fell down.¹⁵⁷

Many who were beaten told us that they did not know why. Eliyas N. was stripped to his underwear and hit once on the back with a rattan when he first arrived at the Lenggeng detention camp in 1998. One month later he was given five more strokes of the rattan, and he said the guards did not tell him the reason.¹⁵⁸ Abdul R. told us that "one guard had slingshot (caterpillar) which he used to launch stones at the detainees. I was hit in the head. We would all hide when he pulled it out."¹⁵⁹

Some former detainees told Human Rights Watch that they had seen guards seriously injure or kill detainees. · T. Jamaluddin was detained three times between 1996 and 1998 in

Malacca, Lenggeng, and Tanah Merah for a total of about 10 months. In the Malacca camp in 1996 he was twice beaten by guards. In the Lenggeng camp in 1997 he said he saw guards beat two men, one Bengali and one Indian, so badly that they later died. The guards became angry and beat the men because they were quarreling and shouting, though they were not physically fighting. A doctor came after the guards had assaulted them, but they were not taken to the hospital and both died in the camp, one two or three days later and the other after eight or nine days.160

· S. Ali was in the Malacca camp in July 1999, when a Bangladeshi detainee escaped. When the escape was discovered at roll call, the guards beat the other detainees one by one. When the Bangladeshi man was later caught, S. Ali said he saw the guards forcing other detainees to beat him with small rattan canes and then beating him themselves. The Bangladeshi was taken to the hospital, but S. Ali heard later that he had died.161

· Budi, from Indonesia, told Human Rights Watch that in November 1999 in a Johor camp, an East Timorese man being detained in the block next to him "got crazy"-he was depressed, stayed alone, and screamed. Through the wooden partition separating the blocks, he heard someone begin to beat the man, causing the victim to cry out in pain. He went over to the block when he saw a guard leave the building and found the East Timorese covered with blood. Budi then saw him die.162

· According to T. Jamaluddin and S. Yusof, access to bathrooms at Tanah Merah is restricted to two hours in the morning.163 Detainees are required to collect urine and feces in plastic bags and dispose of the bags when the bathrooms are open. S. Yusof told Human Rights Watch that while he was detained there in May or June 1999, "the guards would come in and check the rooms, and people were punished if the bags were not thrown away. One day the guards found a packet full of urine next to me. Four people including me were made to drink it. A Rohingya who refused to drink was beaten and his skull was broken. The place that he was hit was high on his forehead. Blood came down and the guards were afraid. Guards gave him medicine and the guard that beat him was transferred. The guard that beat him was wearing a uniform and beat him with a stick made of wood as long as an arm. The man was taken to a clinic and then brought back. After three days he was deported to Golok [on the Thai-Malaysia border]."164

· On March 27, 2000, detainees at Pekan Nanas camp in Johor demonstrated after a guard beat a detainee. The immigration department deported the demonstrators several days later.¹⁶⁵

· From January 1 to March 31 1997, ninety-eight people died while detained in immigration camps according to Malaysian Prime Minister Dr. Mahathir Mohamad. The causes of death, he said, included AIDS, beri-beri, heart problems, accidents, cancer, and kidney failure.¹⁶⁶ Articles 63 and 64 of the Standard Minimum Rules of the Treatment of Prisoners limit the use of force, and Article 31 forbids corporal punishment. Under Article 54(1), Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use it no more than is strictly necessary[.] Although Malaysian law allows for caning as punishment for certain crimes, the law specifies for what crimes it may be applied and against what categories of persons.¹⁶⁷ In addition, this punishment must be in accord with international due process standards, not at a guard's whim, and must be proportional to the act committed.

Sexual Abuse

Women detainees are often vulnerable to sexual abuse in detention, particularly where facilities are not subject to outside monitoring and where there is no effective mechanism for reporting abuse, as in Malaysia.¹⁶⁸ Although Malaysia's immigration detention camps employ do female guards, male guards are able to obtain access to female detainees. Girls as young as thirteen reported sexual solicitation and touching by male guards.¹⁶⁹ One of these girls told us, "Once a guard attempted to force me to have sexual relations against my will. A guard drew me to the side and tried to entice me to follow him by making promises. The guard asked me if I had a man and I said `yes,' that my husband was in the camp. The guard then let me go."¹⁷⁰ Many other detainees reported being told of sexual assaults and expressed their conviction that sexual abuse was common, but we were not able to verify these reports. One man, detained in the Malacca camp in August and September 1999, told Human Rights Watch: There was a Rohingya woman who was taken by guards who intended to rape her. She said that her husband was in the camp and the guards came and asked me if I was her husband. I did not know her but I said I was to save her. After that we were allowed to meet periodically (because married couples were allowed to meet). She told me that in the women's block, there were many children and that women delivered babies there. She said

that women kept secret the fact that they had heard sounds of people being tortured and that women were also raped. She said that while women guards looked after the women, those guards would send women detainees to the male guards. This woman, who is about thirty years old, was still detained when I was deported. I have been back to the camp to see her since I returned to Malaysia.¹⁷¹ A witness at Irene Fernandez's trial testified in May 2000 that he saw women at the Kemayan detention camp being caned by police and subjected to other degrading treatment.¹⁷² The same witness also testified that camp guards forced men to perform sexual acts with one another and that Burmese men, on at least one occasion, were singled out for such abuse.¹⁷³

International law, including the Standard Minimum Rules for the Treatment of Prisoners, defines the fundamental rights of prisoners to humane treatment. Sexual abuse and misconduct may constitute either torture or cruel, inhuman, or degrading treatment as defined by international law. Torture is "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing . . . or intimidating him or a third person," by or with the acquiescence of an official.¹⁷⁴ Not all acts of rape constitute torture; however, in a custodial setting, if a guard uses force, the threat of force, or other means of coercion to compel a prisoner to engage in sexual intercourse, the act of rape constitutes torture.¹⁷⁵ If a guard uses force or coercion to engage in sexual touching of prisoners, including aggressively squeezing, groping, or prodding women's genitals or breasts, and the acts cause severe physical and mental suffering, they, too, would amount to torture.

Although Human Rights Watch did not receive direct testimony of rape or sexual assault, former detainees believed such abuses to be common. Sexual abuse of both female and male detainees by guards in Malaysia's immigration camps should be fully investigated. The Malaysian Immigration Department should make clear that such behavior is unacceptable. Individuals should have secure mechanisms to report abuse, and sexual abuse of detainees in immigration camps should be vigorously prosecuted. Malaysia should allow independent monitoring to insure that such abuse does not occur.

Children Malaysia, as a party to the Convention on the Rights of the Child, has agreed to protect certain fundamental rights of children. Under the convention, it must make "the best interests of the child" a primary consideration in all actions concerning children.¹⁷⁶ The convention defines a "child" as anyone under the age of eighteen; this definition is consistent

with the U.N. Rules for the Protection of Juveniles Deprived of their Liberty ("Rules for the Protection of Juveniles").¹⁷⁷ Malaysia maintains reservations to eight articles of the Convention on the Rights of the Child, including provisions that children shall not be subjected to "torture or other cruel, inhuman or degrading punishment"; that children deprived of liberty be treated with humanity and respect for their dignity; that detention of children be used only as a "measure of last resort . . . for the shortest time possible"; that children be detained separately from adults; and that a child is anyone under the age of eighteen.¹⁷⁸ Malaysia's reservation states that those "provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia." It is settled international law that a reservation to a treaty must not be incompatible with the object and purpose of the agreement. To the extent that Malaysia's reservations are incompatible with the duty of care the convention establishes, they should not be considered to be effective. Malaysia has agreed under the Convention on the Rights of the Child to make available a variety of alternatives to institutional care, including "counseling; probation; foster care; education and vocational training programmes."¹⁷⁹ In addition, UNHCR's *Guidelines on the Detention of Asylum Seekers* states categorically that "minors who are asylum-seekers should not be detained."¹⁸⁰ But Malaysia does detain juveniles in its immigration detention camps, often mixing them with adults. Human Rights Watch interviewed three unaccompanied boys who had been detained with unrelated adult men. Adult men also told us that juveniles had been detained with them. · Adi, from Indonesia, was detained in the Johor Baru camp in the fall of 1999, along with his younger brother. When he was detained, Adi, who had completed one year of primary school, told the police he was fifteen, although he believes he was actually twelve. Nevertheless, he and his younger brother were detained with the adult men.¹⁸¹

· Budi told us he was eighteen, although he looked much younger. When he was arrested on November 6, 1999, he was taken to the Johor detention camp and placed in a longhouse with adult men and many boys younger than he was.¹⁸²

· Doni from Indonesia and S. Yusof from Arakan are both adults and were both housed in the Lenggeng detention camp in March and April 1999. Both said that boys from thirteen to fifteen years old were housed with them.¹⁸³ The Convention on the Rights of the Child, the Standard Minimum Rules for the Treatment of Prisoners, the Rules for the Protection of

Juveniles, and *UNHCR's Guidelines on the Detention of Asylum Seekers* require that children be separated from adults unless they are family members.¹⁸⁴

Upon arrest, children in Malaysia are sometimes separated from their parents and deported by themselves. Human Rights Watch documented two cases in which a father and daughter were arrested together, detained separately, and deported to Thailand at different times. In each case, the father was deported first and the daughter was not informed. · Elias N. and his daughter were arrested together in 1993, when she was twelve or thirteen years old. They were sent to the Lenggeng camp where they were not allowed to communicate. After about four months, the father was deported to Golok on the Thai border, where he waited for about two months until his daughter was deported there as well.¹⁸⁵ Five years later, Elias N. was arrested again, this time with his youngest daughter, who was then about thirteen. They were sent to the Malacca camp where they had no contact or communication with each other. The father requested several times that he not be deported so that they might be deported together, but his requests were ultimately refused. The daughter was not notified that he was deported, but when she was sent to Thailand after about ten months, she made her way to the Burmese quarter in Golok and found her father. They then traveled back to Kuala Lumpur together.¹⁸⁶ In addition, UNHCR staff in Kuala Lumpur told us that they were aware of two Burmese boys, each about ten years old, who had been detained and deported to Thailand without their parents.¹⁸⁷

The practice of separating parents from their children contravenes Article 9 of the Convention on the Rights of the Child, which requires states to ensure that children are not separated from their parents against their will except when competent authorities determine it is in their best interests. Where children and parents are separated, states must respect their rights to maintain personal relations and direct contact on a regular basis. The practice also conflicts with the duty of care for children articulated in Principle 31 of the Body of Principles for the Protection of all Persons under Any Form of Detention and with *UNHCR's Guidelines on the Detention of Asylum Seekers*.¹⁸⁸

Corruption and Theft

Former detainees reported pervasive corruption in the camps. Primarily, this consisted of guards stealing money, jewelry, and sometimes clothing as the person entered the camp, often by conducting a strip search.¹⁸⁹ "At the camp they took everything I had, even my clothes

and my watch," said an Indonesian man who was detained in the Malacca camp for three weeks in April 1999. "I had RM350 (U.S. \$92) with me and when I was released they gave me only 250,000 rupiah (about U.S. \$35). The guards also took my jacket, my hat, and many things from my big bag of clothes. When I got the bag back it was opened. Everything was messed up and all the good clothes taken."¹⁹⁰ One man told us that at the Tanah Merah camp in June 1999, "[w]e kept money in our bodies. As long as we paid, the police did not check for money."¹⁹¹ Another man from Indonesia told us he had been issued a receipt for his things but was not allowed to collect them before being deported.¹⁹² This practice contravenes Rule 43 of the Standard Minimum Rules of the Treatment of Prisoners, which requires that all money, valuables and property that prisoners are not allowed to retain while in custody be safeguarded and that a receipt be issued.¹⁹³ Detainees who manage to keep some of their money when they enter the camps may be relieved of it once they are inside. For example, in order to telephone their families, detainees pay guards to use their personal handphones. The rates in the Tanah Merah and Kajang camps in 1999 were reportedly RM10 (U.S. \$2.60) for three minutes.¹⁹⁴ Two people reported having to buy medicine from guards.¹⁹⁵ If undocumented family members visit detainees, they must also pay the guards, and if they send food or money to detainees, a percentage of that is taken as well by guards.¹⁹⁶ In some camps a bribe may also secure faster deportation. We interviewed only one woman who paid a bribe (RM400) to be deported.¹⁹⁷ However, others told us that detainees could pay to be deported more quickly. While they had not been able to pay themselves, they were able to quote rates, which varied by nationality.¹⁹⁸

Protracted Detention and Deportation

Burmese often spend months and sometimes over a year in detention before being sent to the Thai-Malaysia border. In contrast, Indonesians, who are the majority of detainees and who are only a short ferry ride from Indonesia, often are deported within a few weeks.

Rohingya and other Burmese are sent from immigration detention by truck to Golok (Kolok) on the Thai-Malaysia border. The deportees are not processed through Thai immigration but are simply released on the other side.

The Rohingya deportees almost always return quickly to Malaysia, often by hiring an agent. Ahmed K. told us: "I was deported to Golok where I stayed in a mosque. Then my brother sent me money and I paid a middle man to bring me to KL."¹⁹⁹

56 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

57 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999.

58 See "Malaysia: Foreign Workers," *Migration News*, Vol. 6, No. 11, November 1999, http://migration.ucdavis.edu/archive/nov_1999-18.html; "Malaysia: Migrants," *Migration News*, Vol. 6, No. 8, August 1999, http://migration.ucdavis.edu/archive/aug_1999-18.html; Ian Stewart, "Brawling Shanty-Dwellers Fuel Anti-Immigrant Feeling," *South China Morning Post*, February 14, 2000, p. 9.

59 As in many countries, foreigners in Malaysia are often scapegoated. A recent article in a mainstream Malaysian paper urged the government to "stop the inflow of new migrant labour as well as to reduce the number of migrants already in the country" on the grounds that: [t]he presence of illegals creates problems for the host. Illegals are not constrained by rules and regulations and are free to infiltrate into any job so long as the employers are willing to accept them. They also make inroads into jobs not designated for them such as trading, thus putting them in direct competition with the citizens. As illegals, they have no access to the legal system in the country. Thus many conflicts among themselves are resolved internally and this may be the root cause of social strife and much criminal activity among them. Their involvement in criminal activity, their persistent illegal entry and their propensity to violate the law are serious threats to the security and political stability of this country. Besides, the illegals are imposing a heavy financial burden on the government. It has to bear the costs of weeding them out, housing and feeding and deporting them, as well as the costs of stopping further illegal incursions.

Tan See Yunn, "Containing Illegal Workers' Influx," *The New Straits Times (Malaysia)*, January 22, 2000, p. 13. Health Minister Datuk Chua Jui Meng recently described foreigners as "carriers of various diseases." Ramlan Said, Ainon Mohd, Hayati Hayatudin, "Delinquent foreign patients," *The New Straits Times (Malaysia)*, March 15, 2000. See also "Chor: Illegals have no place in Malaysia," *The Star (Malaysia)*, February 25, 2000; and Ian Stewart, "Brawling shanty-dwellers fuel anti-immigrant feeling," *South China Morning Post*, February 14, 2000, p. 9.

60 Joniston Bangkuai, "500,000 Illegals Expected to Leave," *The New Straits Times (Malaysia)*, September 4, 1999, p. 14.

61 Badro Ilisham Bidin, "Hideout for Beggars," *The Malay Mail (Malaysia)*, March 5, 2000.

62 See Shahrums Sayuthi, "Amnesty for 172 Thai Illegals," *The New Straits Times (Malaysia)*, December 4, 1999, p. 5: "Thailand Immigration Bureau commissioner Police Lieutenant General Chidchai Vanasatidya . . . said most of illegal immigrants detained in Thailand before managing to cross the border into Malaysia were those from Bangladesh and Myanmar."

63 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

64 The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which form the foundation of international human rights law, confer the great majority of rights they enumerate to "everyone." UDHR, proclaimed and adopted by U.N. General Assembly resolution 217A(III), December 10, 1948; ICCPR, adopted by U.N. General Assembly resolution 2200 A (XXI) of December 16, 1966, entered into force March 23, 1976; ICESCR, adopted by U.N. General Assembly Resolution 2200 A (XXI) of December 16, 1966, entered into force January 2, 1976. The UDHR, the ICCPR, and the ICESCR all enjoin states to respect and ensure the rights they set out to all persons within their territory without discrimination, except where the rights are expressly qualified.

65 The 1985 *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*, which is not a treaty but a statement setting out standards of practice by states, reinforces the universal application of the great majority of rights. It provides explicitly that "aliens," defined as individuals who are not nationals of the states in which they are present, shall enjoy the rights to life and security of the person; to be equal before the courts; to freedom of expression and assembly; and to freedom from torture or cruel, inhuman and degrading treatment or punishment. *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live*, adopted by General Assembly resolution 40/144 of December 13, 1985, Arts. 5 and 6. These and other rights are repeated in a "general comment" relating to the position of undocumented persons under the ICCPR adopted by the Human Rights Committee. U.N. Human Rights Committee, General Comment 15: The Position of Aliens under the Covenant (27th session 1986), U.N. Doc. HRI/GEN/1/Rev/1 (1994), p. 18.

66 UDHR, Art. 2. The Universal Declaration of Human Rights, adopted by the United National General Assembly in 1948, is not a treaty to which states can become parties. Rather, it is a statement by the international community of the minimum standards of state practice and is also regarded as an articulation of states' human rights obligations as parties to the Charter of the United Nations. The ICCPR and the ICESCR also prohibit discrimination on the basis of national origin. ICCPR, Art. 2(1); ICESCR, Art. 2(2). Malaysia is not a party to the ICCPR or the ICESCR, which are treaties. However, many of the rights contained in these treaties and set out in the UDHR are considered to have become part of customary international law, by which Malaysia is bound as a member of the community of states.

67 Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of December 18, 1979, entered into force September 3, 1981, and acceded to by Malaysia July 5, 1995. Malaysia became a party to the Convention on the Rights of the Child on February 17, 1995, and maintains reservations to articles 1, 2, 7, 13, 14, 15, 28(1)(a), 37, declaring that those provisions "shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia."

68 CEDAW, Art. 9(1). Malaysia initially entered a reservation to Article 9 but lifted its reservation to 9(1) on February 6, 1998. It retains a reservation to Article 9(2) which provides that women be granted "equal rights with men with respect to the nationality of their children."

69 1951 Convention Relating to the Status of Refugees, Art. 1(A)(2). Note that it is possible for a person to become a refugee at some time after leaving his or her own country, for example if political events at home suddenly make return unsafe.

70 Under the 1951 Convention Relating to the Status of Refugees, Article 31 (1), refugees should not be penalized for "their illegal entry or presence." According to Professor Goodwin-Gill, "In view of the normative quality of *non-refoulement* in international law, the precise legal status of refugees under the immigration or aliens law of the State of refuge is irrelevant, although a State seeking to avoid responsibility will often classify them as prohibited or illegal immigrants." Goodwin-Gill, "*The Refugee in International Law*," p. 152.

71 UNHCR Executive Committee Conclusion No. 6 (1977), para. 53.4, reaffirms "the fundamental importance of the principle of non-refoulement . . . irrespective of whether or not individuals have been formally recognized as refugees."

72 Convention on the Rights of the Child, Art. 22. Malaysia revoked its reservation to this provision on March 23, 1999.

73 The Executive Committee (ExCom) is UNHCR's governing body. Since 1975, the Committee has passed a series of Conclusions at its annual meetings. The Conclusions are intended to guide states in their treatment of refugees and asylum-seekers and in their interpretation of existing international refugee law. While Conclusions are not legally binding, they do constitute a body of soft international refugee law, and ExCom member states are obliged to abide by them. Although Malaysia is neither a state party to the 1951 Convention Relating to the Status of Refugees, nor an ExCom member state, it is an observer state and participates in ExCom meetings; as such it should respect the international standards stipulated in the Conclusions.

74 UDHR, Art. 14(1).

75 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment lends further support to the principle of *non-refoulement* as it prohibits parties from returning persons to states where they would be danger of being subjected to torture. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by United Nations General Assembly resolution 39/46 on December 10, 1984, entered into force June 26, 1987, Art. 3(1).

76 Arthur C. Helton, "The Malaysian Policy to Redirect Vietnamese Boat People: *Non-Refoulement* as a Human Rights Remedy," *N.Y.U. Journal of International Law & Politics*, Vol. 24, Spring 1992, pp. 1206 (arguing that Malaysia's policy of redirecting Indochinese boat people to Indonesia violated international law, including the principle of *non-refoulement*). In addition, Helton, a refugee legal scholar, contends that the Comprehensive Plan of Action (CPA), adopted at the 1989 International Conference on Indo-Chinese Refugee at which Malaysia participated, "constitutes strong evidence that, at least in South-east Asia, non-refoulement comprehends a considerable number of procedural guarantees and an absolute right to temporary refuge." *Ibid.*, p. 1211.

77 Report of the Sub-Committee of the Whole on International Protection, U.N. Doc. A/AC.96/781 (9 Oct. 1991), para. 34. See Goodwin-Gill, *The Refugee in International Law*, pp. 333-44; European Council on Refugees and Exiles (ECRE), *Safe Third Country: Myths and Realities*.

78 Executive Committee Conclusion No. 58 (XL) (1989) on Irregular Movements accepts that refugees and asylum-seekers may be returned to a country of first asylum if they can enter and remain there, are protected against being returned to places of persecution (*refoulement*) and treated in accordance with basic human rights standards, will not be subject to persecution or threats to safety and liberty, and have access to a durable solution. See also Executive Committee Conclusion No. 15 (XXX) (1979), para. (h)(iv), (vi); High Commissioner for Refugees, "Background Note on the Safe Country Concept and Refugee Status," Sub-Committee for the Whole on International Protection, U.N. Doc. EC/SCP/68, July 26, 1991, para. 13.

79 See Henry Kamm, "Illegal Refugee Exodus Increasing, but Hanoi Denies Encouraging It," *The New York Times*, May 3, 1979, <http://www.nytimes.org/learning/general/specials/saigon/boatpeople.html>.

80 Rachagan, "Refugees and Illegal Immigrants," p. 260.

81 See Court Robinson, *The Comprehensive Plan of Action: Sharing the Burden or Passing the Buck?*, March 1996, p. 3; W. Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response*, (New York: Zed Books, Ltd, 1998) pp. 42, 50-51, 189.

82 See United Nations, *General Assembly, Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and Subsequent Developments, Report of the Secretary-General*, U.N. Doc. A/34/627 (1979); United Nations, *1978 United Nations Year Book*, (Lake Success, NY: Dept. of Public Information, 1978) pp. 281-82, 633; and United Nations, *1979 United Nations Year Book*, (Lake Success, NY: Dept. of Public Information, 1979) pp. 12, 271-301, 918-10.

83 Robinson, *Terms of Refuge*, p. 190; Robinson, *The Comprehensive Plan of Action*, pp. 4, 6.

84 Lawyers Committee for Human Rights, *Uncertain Haven: Refugee Protection in the 40th Anniversary of the 1951 U.N. Refugee Convention*, (New York: Lawyers Committee for Human Rights, 1991), p. 28-30.

85 Robinson, *The Comprehensive Plan of Action*, p. 6.

86 Robinson, *Terms of Refugee*, p. 221; Vietnamese Asylum-seekers: Refugee Screening Procedures Under the Comprehensive Plan of Action, note 8 (GAO/NSIAD-97-12, Oct. 21, 1996).

87 UNHCR, *UNHCR Country Profiles - Malaysia*, September 1999; Robinson, *Terms of Refugee*, p. 283; Rachagan, "Refugees and Illegal Immigrants," p. 254-260.

88 Robinson, *Terms of Refugee*, p. 283; see also Rachagan, "Refugees and Illegal Immigrants," p. 254.

89 Although Vietnamese refugees were initially admitted into Malaysia without their admission being conditional on resettlement elsewhere, by November 1977 as their numbers surpassed 8,000, more stringent conditions were imposed. Rachagan, "Refugees and Illegal Immigrants," p. 261.

90 Under international refugee law, the granting of asylum should be an entirely non-political, neutral act. Executive Committee Conclusion No. 48 (XXXVIII) (1987), para. 206 ("the grant of asylum or refuge is a peaceful and humanitarian act that is not to be regarded as unfriendly by another State"); Executive Committee Conclusion No. 22 (XXXII) (1981) ("[A]sylum seekers . . . should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.").

91 Mohammed Sayed was a spokesperson for the group and told the press that "the gathering symbolised [sic] the Rohingya refugees' continuing quest for democracy and human rights in Myanmar." He also delivered a memorandum to an embassy official calling for the release of political prisoners and an end to religious and political persecution in Burma. "Rohingya Refugees Appeal for Democracy," *New Straits Times (Malaysia)*, September 10, 1999.

92 E-mail from UNHCR Protection Officer in Kuala Lumpur, Malaysia, July 19, 2000; Human Rights Watch telephone interviews with UNHCR Protection Officer in Kuala Lumpur, Malaysia, February 22, 2000, and March 14, 2000; Ajinder Kaur, "Detained Burmese activist an `illegal immigrant,'" *Malaysiakini (Malaysia)*, February 16, 2000, <http://www.malaysiakini.com>.

93 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

94 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

95 Human Rights Watch interviews with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12 and December 3, 1999.

96 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 4, 1999.

97 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

98 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999.

99 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 1, 1999. In contrast, Ahmed K. told us that Malaysian officials handed him over to Thai immigration authorities who told him, "in your country there is a problem . . . if we send you back you will be in problems." The Thai authorities gave him one week to leave, and he returned immediately to Malaysia. Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

100 1953/1969 Immigration Act (Act 155), Sections 5, 6, 15, 56.

101 1953/1969 Immigration Act (Act 155), Section 8.

102 1953/1969 Immigration Act (Act 155), Sections 6(4), 8(4).

103 1953/1969 Immigration Act (Act 155), Section 55.

104 Rachagan, "Refugees and Illegal Immigrants," p. 254.

105 1953/1969 Immigration Act (Act 155), Sections 39A, 50(1), 51(1), 51(3)(a).

106 1953/1969 Immigration Act (Act 155), Section 56(4).

107 1953/1969 Immigration Act (Act 155), Section 35.

108 1953/1969 Immigration Act (Act 155), Section 51(5)(b). This requirement is in accord with Malaysia's Federal Constitution which requires that any person "arrested or detained under the law relating to immigration . . . within fourteen days" be "produced before a magistrate and shall not be further detained in custody without the magistrate's authority." *Federal Constitution*, Art. 5.

109 1953/1969 Immigration Act (Act 155), Section 57.

110 1953/1969 Immigration Act (Act 155), Section 36. Not everyone convicted of illegal reentry is caned; however, "the Deputy Home Minister in March 2000 announced that the government will ask prosecutors to request courts to order illegal foreigners caught for the second or third time to be caned, in addition to sentencing them to jail. Deported foreigners will be fingerprinted to determine whether they are repeat offenders." "Malaysia," *Migration News*, Vol. 7, No. 4, April, 2000, http://migration.ucdavis.edu/archive/apr_2000-17.html.

111 1953/1969 Immigration Act (Act 155), Section 56(2).

112 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

113 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

114 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 1, 1999.

115 Lee Yuk Peng, "Faster Way to Deport Illegals," *The Star (Malaysia)*, March 30, 2000.

116 Body of Principles for the Protection of All Persons under Any Form of Detention, adopted by U.N. General Assembly resolution 43/173 of December 9, 1998, Principle 4. While the Body of Principles is not a binding treaty, it articulates standards based on international law and best practices.

117 *Ibid.*, Principles 4, 11(1), 13, 16(2), 17, 18.

118 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

119 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

120 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999.

121 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 17, 19, 1999.

122 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

123 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 30, and December 2, 1999.

124 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

125 Penal Code (Act 574), Sections 161 ("Public servant taking a gratification, other than legal remuneration, in respect of an official act") and 21 ("public servant"), November 15, 1998; Anti-Corruption Act. Under the Penal Code, a public servant's soliciting or accepting a bribe is punishable by up to three years imprisonment and a fine. Under the Anti-Corruption Act, the minimum sentence for corruption is a mandatory fourteen-day imprisonment and a RM10,000 fine or five times the value of bribe, whichever is higher.

126 Anti-Corruption Agency, The Official Homepage of the Anti-Corruption Agency, Malaysia, visited April 11, 2000, <http://www.bpr.gov.my/English/acamain.html>. Police officers have reportedly been fired for corruption. See "221 sacked from police force," The Star (Malaysia), April 11, 2000 (citing the 1998 Police Commission report as listing corruption as one of several reasons for which the officers were fired).

127 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 28, 1999.

128 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999.

129 Human Rights Watch interview, Dumai, Indonesia, November 24, 1999. An exchange rate of 7,000 rupiah to U.S. \$1 is used throughout this report.

130 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

131 Fernandez was charged under Section 8A of the 1984 Printing Presses and Publications Act (Act 301) which requires the defendant to prove the absence of malicious intent.

132 For more information about the case, see Sidney Jones, *Making Money Off Migrants: The Indonesian Exodus to Malaysia*, (Malaysia: Asia 2000, Ltd., Center for Asia Pacific Social Transformation Studies, 2000), pp. 107-126.

133 Agence France-Presse, "Bangladeshi Says Police Beat him in Malaysian Detention Camp," January 19, 2000; "Unsanitary Living Conditions at Detention Camp, Says Witness," *New Straits Times (Malaysia)*, January 29, 2000. p. 6; Ajinder Kaur, "Inmates Forced to Do Grueling Exercises, Court Told," *Malaysiakini (Malaysia)*, May 9, 2000, http://www.malaysiakini.com/archives_news/2000/may/may9/news5.htm; Ajinder Kaur, "Sick Inmate Died After Being Kicked by Police," *Malaysiakini (Malaysia)*, May 12, 2000, http://www.malaysiakini.com/archives_news/2000/may/may12/news1.htm; Anil Netto, "Malaysia: Detention Camp Horror Recalled in Shocking Testimony," Inter Press Service, May 16, 2000; Ajinder Kaur, "Detainees Forced to Masturbate, Says Witness," *Malaysiakini (Malaysia)*, May 10, 2000, http://www.malaysiakini.com/archives_news/2000/may/may10/news1.htm; Ajinder Kaur, "Detainees Forced to Perform Sex Show," *Malaysiakini (Malaysia)*, May 11, 2000, http://www.malaysiakini.com/archives_news/2000/may/may11/news1.htm; "Police Beat Detainees Reluctant to Perform Sex Act," *Malaysiakini (Malaysia)*, May 12, 2000, http://www.malaysiakini.com/archives_news/2000/may/may12/news3.htm.

134 We were not able to obtain official figures of camp populations. However, reports in the Malaysian press allow for some general estimates. For example, as of March 29, 2000, there were reportedly 2,000 persons detained in Pekan Nanas, Johor; as of July 28, 1999, there were 1,205 or 1,025 persons detained in Lenggeng, Negeri Sembilan; Norman Ong and Mazwin Nik Anis, "Indons Riot at Pekan Nanas Camp," *The Star (Malaysia)*, March 29, 2000; "Health Problems and One Death Spark Unrest at Detention Camp," *The New Straits Times (Malaysia)*, July 28, 1999, p. 4; Kamarulzaman and R. Sittamparam, "192 Illegals Escape Camp During Demo," *The New Straits Times (Malaysia)*, July 27, 1999, p. 16.

135 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999. Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

136 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

137 Adopted by General Assembly resolution 43/173 of December 9, 1988.

138 Adopted by General Assembly resolution 45/111 of December 14, 1990.

139 Adopted by General Assembly resolution 45/113 of December 14, 1990.

140 Article 37 of the Convention on the Rights of the Child addresses detention and the application of penal law to children. However, Malaysia has entered a reservation to Article 37 stating that the article's provisions "shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia."

141 UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, Guideline 2, (Geneva: UNHCR, 1996). These guidelines, which UNHCR has published and which it considers to be minimum standards of state practice, apply to all forms of detention or detention-like situations. They would, therefore, apply to Malaysia's immigration detention camps. Guideline 1.

142 Guideline 3 is based on UNHCR Executive Committee Conclusion 44, "Detention of Refugees and Asylum-seekers," adopted by consensus, 1986. However, Human Rights Watch is concerned that the grounds for detention provided in Guideline 3 are too vague and undefined, and believes that states should set more precise and limited rules for detention.

143 Guideline 10.

144 See, e.g. Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

145 Human Rights Watch interview, Dumai, Indonesia, November 24, 1999.

146 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999; Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999; Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

147 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 28, 1999.

148 "Health Problems and One Death Spark Unrest at Detention Camp," *The New Straits Times (Malaysia)*, July 28, 1999, p. 4; Kamarulzaman and R. Sittamparam, "192 Illegals Escape Camp During Demo," *The New Straits Times (Malaysia)*, July 27, 1999, p. 16.

149 See, e.g. Human Rights Watch interview, Dumai, Indonesia, November 24, 1999; Human Rights Watch interview, Kuala Lumpur, Malaysia, November 28, 1999 (stating, "We slept on the timber floor without pillow and blanket. On the floor there was so many bed bugs sucking our blood. There was also a lot of mosquitoes at night").

150 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 1, 1999.

151 Standard Minimum Rules for the Treatment of Prisoners, Arts. 9, 10, 19 (sleeping accommodation), Arts. 11-16 (sanitary installations and water), Art. 20 (food and water), Arts. 22-26 (medical services); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 24 (medical care); UNHCR, *Guidelines on the Detention of Asylum Seekers*, Guideline 10 (conditions of detention).

152 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999. She was told that the people she spoke with were "inspectors" but was not told what authority they were with. See also Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999 (stating that he saw others beaten for asking for more food).

153 Testimony reported in: Ajinder Kaur, "Detainees `Used Mud as Toothpaste,'" *Malaysiakini* (Malaysia), May 17, 2000, http://www.malaysiakini.com/archives_news/2000/may/may17/news5.htm.

154 Standard Minimum Rules for the Treatment of Prisoners, para. 36(3).

155 See, e.g., Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999; Human Rights Watch interviews of three people, Dumai, Indonesia, November 24, 1999.

156 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

157 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

158 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

- 159 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.
- 160 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.
- 161 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999. (9)
- 162 Human Rights Watch interview, Dumai, Indonesia, November 24, 1999.
- 163 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 13, 20, 1999.
- 164 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.
- 165 Norman Ong and Mazwin Nik Anis, "Indons Riot at Pekan Nanas Camp," *The Star (Malaysia)*, March 29, 2000; Lee Yuk Peng, "Faster Way to Deport Illegals," *The Star (Malaysia)*, March 30, 2000. These accounts did not report any investigation of the guard responsible.
- 166 "Dr M: 98 Illegals Died at Immigration Depots," *The Star (Malaysia)*, April 24, 1997, p. 8.
- 167 Prison Act 1995 (Act 537).
- 168 For examples in other countries, see Human Rights Watch/Women's Rights, "Nowhere to Hide: Retaliation Against Women in Michigan State Prisons," *A Human Rights Watch Report*, Vol. 10, No. 2, September 1998; Human Rights Watch, *Behind Bars in Brazil* (New York: Human Rights Watch, 1998); Human Rights Watch/Women's Rights, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (New York: Human Rights Watch, 1996).
- 169 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 30, 1999.
- 170 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.
- 171 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.
- 172 "'I Saw Female Detainees Screaming When They Were Caned,' Says Witness," *New Straits Times (Malaysia)*, May 16, 2000, p. 11.

173 Ajinder Kaur, "Detainees Forced to Masturbate, Says Witness," *Malaysiakini (Malaysia)*, May 10, 2000, http://www.malaysiakini.com/archives_news/2000/may/may10/news1.htm; Ajinder Kaur, "Detainees Forced to Perform Sex Show," *Malaysiakini (Malaysia)*, May 11, 2000, http://www.malaysiakini.com/archives_news/2000/may/may11/news1.htm; "Bangladeshi Former Detainee Alleges Sexual Abuse in Malaysian Camp," Agence France-Presse, May 13, 2000; "Detainees Beaten for Refusing to Perform Oral Sex," *New Straits Times*, May 13, 2000, p. 2; Anil Netto, "Malaysia: Detention Camp Horror Recalled in Shocking Testimony," Inter Press Service, May 16, 2000.

174 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment, Article 1.

175 Rape committed by prison authorities against inmates has been recognized as a form of torture. In 1992, the U.N. Special Rapporteur on Torture noted, "Since it was clear that rape or other forms of sexual assault against women in detention were particularly ignominious violations of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." U.N. Doc. E/CN.4/1992/SR.21, para. 35. Report by the Special Rapporteur, P. Koojimans, appointed pursuant to Commission on Human Rights resolution 1985/33, U.N. Doc. E/CN.4/1986/15 (February 19, 1986), p. 29. More recently, the U.N. Special Rapporteur on Torture recommended "that female security personnel be present during interrogation of women detainees, as interrogation and detention of detainees by exclusively male personnel constitute conditions that may be conducive to rape and sexual abuse of women prisoners or the threat or fear thereof." U.N. Doc. E/CN.4/1995/34 para. 24.

176 Convention on the Rights of the Child, Art. 3.

177 U.N. Rules for the Protection of Juveniles Deprived of their Liberty, adopted by U.N. General Assembly resolution 45/113 of December 14, 1990. These rules apply to "all types and forms of detention facilities in which juveniles are deprived of their liberty." Art. 15.

178 Convention on the Rights of the Child, Arts. 1, 37.

179 Convention on the Rights of the Child, Arts. 40(4), 37(b). Malaysia withdrew its reservation to Article 40 on March 23, 1999.

180 Guideline 5.

181 Human Rights Watch interview, Dumai, Indonesia, November 24, 1999.

182 Human Rights Watch interview, Dumai, Indonesia, November 24, 1999.

183 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999; Human Rights Watch interview, Dumai, Indonesia, November 24, 1999.

184 Convention on the Rights of the Child, Article 37. Malaysia has expressed a reservation to this article. See Standard Minimum Rules for the Treatment of Prisoners, Art. 8(d); and Rules for the Protection of Juveniles, Art. 29; UNHCR, *Guidelines on the Detention of Asylum Seekers*, Guideline 10. Although Malaysia has entered a reservation to the relevant provision of the Convention on the Rights of the Child, it is still bound by the overall duty of care the convention sets out. That the convention and the rules require that children be detained separately from unrelated adults suggests that this practice is part of that standard of care.

185 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 30, 1999.

186 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 30, 1999.

187 According to UNHCR, NGOs discovered the boys and negotiated with Malaysian government for reuniting them with their parents who were also undocumented. Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, December 3, 1999.

188 Under Principle 31, "the appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision." See also UNHCR, *Guidelines on the Detention of Asylum Seekers*, Guideline 6.

189 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 15, 20, 1999. Human Rights Watch interviews of nine people, Dumai, Indonesia, November 24, 1999.

190 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 24, 1999.

191 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

192 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 24, 1999.

193 Rule 43 specifies that: (1) "All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition." (2) "On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend such money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. . . ." (3) "Any money or effects received for a prisoner from outside shall be treated in the same way."

194 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 20, December 1, 1999.

195 Human Rights Watch interview, Kuala Lumpur, Malaysia November 15, 1999; Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999.

196 We were told that the rate in the past for undocumented persons to visit detainees was RM20 to RM30. Human Rights Watch interviews with undocumented Indonesians, Kuala Lumpur, Malaysia, November 16, 17, 1999. A Burman woman detained in Kajang camp in 1999 told us that her husband sent her RM300 but that she received only RM250. Human Rights Watch interview, Kuala Lumpur, Malaysia, December 1, 1999.

197 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999.

198 Human Rights Watch interviews, Kuala Lumpur, Malaysia, November 15 and 20. The rates we were quoted were fairly consistent. Persons detained at camps in Tanah Merah, Malacca, and Kajang in 1997 and 1999 all reported that sums from RM2,800 to RM3,000 would secure a faster deportation.

199 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999.

V. THE ROLE OF UNHCR

Malaysia is responsible for protecting Rohingya refugees on its soil. But when it fails to do so, UNHCR, which the U.N. General Assembly has entrusted with "providing international protection . . . to refugees" and "seeking permanent solutions" for refugees, has a greater responsibility to provide protection.²⁰⁰ Malaysia's reluctance to cooperate with UNHCR makes the organization's work difficult, and it needs more support than it currently receives from the international community. Nonetheless, UNHCR should be providing protection and seeking durable solutions for the Rohingya in Malaysia. UNHCR, however, takes the position that the Rohingya are "less vulnerable than other alien/refugee populations in Malaysia," that they are "informally tolerated by the Malaysian authorities," and that they "are not, in general, exposed to deportation and are able to live and work unofficially in the country."²⁰¹ Our findings, detailed above, indicate that this is not the case, and to the extent that UNHCR considers the Rohingya in Malaysia a lower priority on this basis, it should reconsider its evaluation of conditions in Malaysia. In addition, UNHCR should realistically assess the conditions the Rohingya would face were they to return to Arakan, taking into account their uncertain citizenship status. It should also address problems with access to the Kuala Lumpur office and improve the procedures for refugee status determinations. With limited resources and an uncooperative host government, UNHCR faces an unenviable task in Malaysia. But it should not let the Rohingya fall through the cracks.

This section first addresses the basis for UNHCR's operations in Malaysia and how the office functions there, including UNHCR's past policies for Rohingya in Malaysia and how the current status determination process works. Second, problems with access and refugee status determination procedures are discussed. Finally, this section looks at UNHCR's assessment of conditions in Arakan and its high rates of denial of refugee status for Rohingya. Evidence suggests that, among other things, UNHCR is not giving sufficient weight to the implications of statelessness. A detailed analysis of the implications of statelessness for both long-term and interim remedies is set forth separately in section VI.

Current Operations

The basis for UNHCR's operations in Malaysia comes from its work with Vietnamese refugees who flooded into Malaysia in the 1970s and 1980s and from the 1989

Comprehensive Plan of Action (CPA), the international agreement providing for the screening of these refugees for refugee status and their resettlement to third countries or repatriation.²⁰² Since the CPA's end, UNHCR has had no formal written agreement with the Malaysian government, either for its presence in the country or for the conduct of its activities there. Nevertheless, it maintains a liaison office in Kuala Lumpur, and Malaysia has continued formally to accredit UNHCR representatives in the country. With a staff much smaller than in the CPA years, the Kuala Lumpur office serves all of Malaysia—there are no UNHCR offices in the eastern Malaysian states of Sabah and Sarawak. The staff was further reduced in 1999, following the violence surrounding East Timor's independence, when the Head of Office and other personnel were sent to East Timor, leaving only two junior protection officers and a few local staff.²⁰³ By July 2000, there was only one protection officer in the office, and the Head of Office position had yet to be filled.²⁰⁴

The lack of a formal agreement in no way affects UNHCR's universal mandate to protect refugees.²⁰⁵ But because it has no formal agreement with the Malaysian government, UNHCR's interventions with the government on behalf of refugees are *ad hoc*. When, for example, Malaysia detains refugees for deportation, UNHCR makes an appeal directly to government officials. But UNHCR can intervene only if it first learns that a refugee is being detained. As Malaysia has no provision for identifying refugees or informing UNHCR that a refugee has been detained or deported, UNHCR must depend on other sources for this information, including the detainees themselves, their friends and relatives, and NGOs.

Policies for Rohingya in Malaysia

The Three Policies: 1992-1999

Since 1992 UNHCR has had three different policies for Rohingya in Malaysia. First, in 1992, UNHCR issued Rohingya letters stating that they had approached the Kuala Lumpur office "applying for recognition of refugee status" and that they were "considered to be refugees under the High Commissioner's Mandate." Families who applied were issued one letter listing each member's name. For several months, Rohingya received financial and material assistance through the Malaysian Red Crescent Society, including rice, milk, butter, blankets, and cash. Many Rohingya told Human Rights Watch that they believed this letter signified that they were recognized as refugees.²⁰⁶

After about six months, UNHCR in 1992 took back these letters and began issuing a new document, which UNHCR called a "certificate" or "attestation letter." The certificate was a

single sheet of paper stating that the individual had "registered as a Muslim from Myanmar" with the UNHCR liaison office in Kuala Lumpur. Included on the certificate were family members' names, dates of birth, and photographs. A UNHCR protection officer in Kuala Lumpur told Human Rights Watch that this information was included because the Rohingya usually had no other identity papers, suggesting that this letter was to serve as a sort of interim identification document. The certificate listed an expiration date and had to be periodically renewed. The office issued the certificate both to those who had received the first letter and to others who applied before December 31, 1993. As of that date, 5,100 Rohingya were registered with UNHCR in Kuala Lumpur, and the office stopped issuing certificates to Rohingya approaching the office.²⁰⁷ However, it did continue to renew the certificates of those who already had them. A Rohingya man who arrived shortly after the cut off told us, "When I reached Kuala Lumpur, I went to UNHCR and asked for help. They said that in 1993, the Rohingya chapter was closed and there was no more registration."²⁰⁸ No refugee status determinations were conducted at this stage.²⁰⁹ This certificate was helpful to those who had it. Parents used it to enroll their children in government primary schools. And with the crackdown on foreigners' use of medical services and the imposition of double fees for foreigners in 1996, Rohingya sometimes showed the document to get public medical care. (See section VI below.) It could also be presented to local police checking for passports, although in many cases, as discussed above, the police ignored or destroyed the certificate or requested a bribe anyway. The policy of renewing certificates continued until December 1998 when UNHCR stopped renewing the certificates and adopted a third policy, beginning to screen Rohingya individually for refugee status. UNHCR changed its policy for several reasons. As the crackdown on foreigners increased in the late 1990s, UNHCR's Kuala Lumpur office had become concerned that Malaysian police and immigration officials were no longer respecting the certificates but instead were proceeding to detain the bearers regardless. Worse, officials were confusing the document with letters indicating actual refugee status, which undermined the authority of those letters in the minds of police and immigration officials. The office also believed that some Rohingya were using the document to beg for money. Moreover, the Rohingya themselves requested individual determinations, according to UNHCR, because the certificates left their personal status unclear and kept them from being eligible for the durable solutions available to refugees. Finally, UNHCR points to the repatriation of Rohingya from Bangladesh as inspiration for the change.²¹⁰

M. Kadir, who has a wife and four children in Malaysia, has experienced each of the three policies:

In 1992 I went to UNHCR and was recognized as a refugee. I received humanitarian assistance with my family: food (rice, bread, milk) for about five months plus RM900 for one month After five months they said they could not give any more assistance and were going to cancel the letter and issue another. This letter only said that we were registered. Until 1999 this letter was renewed . . . but it was stopped in January [1999]. Then I filled out a new application form. I had an interview and I was rejected. I appealed and was rejected again. . . . I would like to go back [to Burma], live my life, live peacefully. My children are growing up. But I cannot go back and I cannot stay here because I am not a refugee.²¹¹

The Refugee Status Determination Process in Kuala Lumpur

Applying for refugee status requires a minimum of two visits to the UNHCR compound, but typically involves more. First, asylum-seekers must approach the UNHCR gate, where, on their first visit, the guards do not allow them to enter, instead giving them a pre-interview form to fill out. This form, which must be filled out on a bench at the gate, is available in English and Bahasa Malaysia and is to be completed in one of those languages. When we asked a protection officer how Rohingya who could not speak either language could fill out the form, we were told that most Rohingya could manage one of those languages and that the office had had no complaints. Many of the Rohingya we interviewed, however, spoke little or no English or Malay. The guards are also supposed to give applicants a brochure in English that defines who is a refugee and what UNHCR can and cannot do, and a UNHCR protection officer told us that local staff often go to the gate to monitor this process.²¹²

Sometime after the first visit, the asylum-seeker is mailed a letter giving a time and date for an interview with a protection officer. Two protection officers in Kuala Lumpur conduct all of the interviews, and in 1999, the office received 1,597 applications for Rohingya alone.²¹³ At the interview, an interpreter is provided if necessary. Afterwards, UNHCR notifies the asylum-seeker of its decision by mail. Rejection letters are standardized—they do not contain individualized reasons for denial of status. Rejected applicants may appeal. UNHCR's Kuala Lumpur staff told Human Rights Watch that, because many Rohingya lack education and language skills, they send out appeal submission letters along with the rejection notifications, rather than waiting for individuals to approach the office again. On

appeal, one of the two protection officers reviews the other's decision, often conducting a further interview, but no appeal beyond the Kuala Lumpur office is available.²¹⁴

Those whom UNHCR recognizes as refugees receive a letter to this effect and are eligible for a daily subsistence allowance, with extra allowances for small children. According to a protection officer in Kuala Lumpur, applicants do not receive assistance during the application process as decisions are usually made quickly; however, the office would consider giving assistance if a decision could not be reached within one to two weeks. Many of the Rohingya we interviewed, however, said that they had waited several months between being interviewed and obtaining their decisions, with the entire process, from filling out the pre-interview form to the final appeal, lasting six months or longer.

Once recognized, refugees are slated for resettlement to a third country, as Malaysia has no provision for local integration of Rohingya.²¹⁵ Indeed, UNHCR's Kuala Lumpur office told us that it seeks to resettle refugees as quickly as possible because refugees face a constant threat that the Malaysian government will detain them and return them to countries where they would be at risk of persecution. "Local integration in Malaysia is nearly impossible because Malaysia has not signed the Refugee Convention and does not have any refugee law," UNHCR told us. We were told too by UNHCR in Kuala Lumpur that while it encourages voluntary repatriation for some refugees, it is "not really encouraging voluntary repatriation for the Rohingya."²¹⁶ In contrast, the Bureau for Asia and the Pacific with UNHCR's headquarters in Geneva told Human Rights Watch that Rohingya in Malaysia are resettled "on the basis of the same criteria as other refugees in Malaysia, *inter alia*, protection-related reasons (including arbitrary or prolonged detention), family reunification, women at risk, vulnerable groups etc.," although it believed 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."²¹⁷

Problems with Access and Procedure

Some of the procedures in place for refugee status determinations in Kuala Lumpur are commendable. For example, the UNHCR office distributes a brochure defining refugee status, albeit only in English. In addition, almost all Rohingya we spoke to confirmed that they had had an interpreter at their interview, had been able to appeal the decision, and had been interviewed at least two or three times. However, other aspects of the process are not in accord with international standards and UNHCR's own procedures as set out in its *Handbook*

on *Procedures and Criteria for Determining Refugee Status ("Handbook")*, training modules on *Interviewing Applicants for Refugee Status* and *Determination of Refugee Status*, and internal memoranda for staff on status determinations for particular nationality groups.²¹⁸ Where UNHCR's procedures differ from these documents, they should be modified so that the refugee status determination process is more fair and more accessible to asylum-seekers.

Access to the Kuala Lumpur Office

For Rohingya, simply getting to the UNHCR office in Kuala Lumpur is problematic. UNHCR has one office for the whole of Malaysia, and it is located on a hill near the national palace in a neighborhood of colonial-era homes, far from Cheras Baru and Ampang, neighborhoods in Kuala Lumpur with sizable Rohingya communities. Asylum-seekers who reside in other parts of the country must travel to the capital for each appointment.

There is no public transportation to the neighborhood where UNHCR's office is located. Asylum-seekers must therefore either walk or travel by taxi. Most, in fact, consider it necessary to go by taxi in order to avoid exposure to local police. One asylum-seeker explained how he traveled to the compound from his home in Cheras Baru: "I went by taxi because there are no buses that run there. I had to pay over RM20 [U.S.\$5] for the taxi-I also paid the taxi to wait because there is no taxi stand nearby, and I don't want to be walking because I'm afraid of police."²¹⁹ We interviewed one man who had been stopped by the police while walking to the UNHCR office: he said that he paid them money and then fled, never reaching the UNHCR office.²²⁰ The cost of a round-trip taxi and lost work is sometimes prohibitive, as one man explained: "UNHCR gave me many appointments. Sometimes when the date came I didn't have the money to get there."²²¹ These risks are multiplied by the number of visits UNHCR requires. Sadiq M., who was eventually denied refugee status in 1999, told us that since 1992 he had been to UNHCR "many times, more than ten times to get a document and each trip cost RM15. [Sometimes] I was not even allowed into the compound."²²²

While low recognition rates are clearly a primary cause of the Rohingya's frustration and disillusionment with UNHCR, the costs and risks associated with applying for refugee status are also an obstacle to the vigorous pursuit of their cases. For example, one Rohingya man told Human Rights Watch: "When I went for my second interview, I was called inside and told that they were having an emergency meeting. I was given another date. I didn't go

because it was too expensive and knew most people were getting rejected. . . . I went with three other people but they were all rejected."²²³ Another told us, "I never have been to UNHCR because I know people who were caught there, and everyone gets rejected."²²⁴ Once asylum-seekers reach the office gate, the guards may discourage them from applying or give them incorrect information about the application process. Human Rights Watch interviewed John, a Christian from Rangoon, shortly after he had approached UNHCR on November 25, 1999: First I called the main number and a woman told me to come. . . . When I got there I went to the gate and spoke to two Nepalese guards. I said that I wanted to meet an officer. They told me that no one had an appointment for the morning. I said that I spoke to a woman that morning and she told me to come. They asked me why I came there. I said that I wanted to meet with an officer to discuss it. They asked me why I wanted to meet with an officer. I said I wanted to apply for a U.N. passport, and I wanted to know how to apply. I told them that I am Burmese. The guard said that the Burmese had problems in 1992 but now the [papers] for Burmese are closed and Burmese people cannot apply: "Why can't you go back to Burma? You can go back. We have no need to discuss this—the Burmese time is past." I said that I wanted to meet with someone inside to get information. The guard said, "If you want any information, ask me. Have you got documents? Show me." I said that I wanted to apply for a passport because I did not want to go back to my country. The guard said, "Everyone says that. Why can't you go to Myanmar?" I said that I have problems. The guard asked if I was working, if I had a job. I said yes. The guard said that because I had a job I was not a refugee. He then asked for my NLD [National League for Democracy] documents: "Please show them to me as proof." I showed him my Burmese passport, and he took it to his office. He brought back a form and said that I should fill in the blanks then—that I had 2 hours to do it. He asked if I could write in English. When I looked at the form, I saw that there were lots of questions and many looked difficult. I said that I did not have time then because I had to go to work. The guard took the form back from me. I asked if I could take the form home and bring it back. The guard said, "No, you have to fill it out right now." I did not want to fill out the form then because my English is not good enough so I left.²²⁵

The guard did not give John an informational brochure, and when we spoke with him several days later, he still had no understanding of what refugee status was or how the application process worked. According to UNHCR headquarters, the correct procedure is for a guard to

ask only the applicant's name and the purpose of his or her visit. He should then communicate this information to a UNHCR staff member who should assist the applicant.²²⁶

The gates and guards date back to the time of the CPA, when many more refugees were approaching the office.²²⁷ But a protection officer told us that the UNHCR office had more recently received threats from disgruntled asylum-seekers, and Acehnese asylum-seekers fleeing deportation to Indonesia occupied the grounds in 1998: hence the office's policy of preventing asylum-seekers from coming inside on their first visit. The officer also mentioned a protest by Rohingya on August 25, 1999, outside the UNHCR compound.²²⁸ But the Rohingya's exercise of their free speech right to demonstrate is no justification for keeping all asylum-seekers outside the gate. While threats may justify UNHCR's taking reasonable security measures, these measures should be appropriately tailored so as not to inhibit legitimate asylum-seeker's access to the office. Security precautions recommended in UNHCR's 1995 training module on *Interviewing Applicants for Refugee Status* do not include barring all first-time visitors.²²⁹

Informational Brochure

Under current UNHCR procedure in Malaysia, all applicants are to be given a brochure of five information sheets entitled "Information for Asylum-Seekers." These sheets state the refugee criteria, including the definitions of "well-founded fear" and "persecution," but in technical language. The brochure also explains what UNHCR can and cannot do. It does not explain the application procedure for refugee status and is available only in English. The UNHCR *Handbook* states that "[t]he applicant should receive the necessary guidance as to the procedure to be followed."²³⁰ Accordingly, in Human Rights Watch's view, the current brochure should be redrafted so that it can be easily understood by persons without expertise in refugee law and so that it describes clearly the application procedure. Visually, the brochure is also somewhat difficult to follow, and this too should be addressed. Further, the amended brochure should be translated into the languages of all major groups approaching the office, and UNHCR's Kuala Lumpur staff should ensure that it is available to all asylum-seekers, not simply those who a staff member believes might be recognized. In addition, copies of the brochure should be made available to NGOs such as Tenaganita that have contact with asylum-seekers and should be given to the Malaysia's Immigration Department, which should be urged to distribute it to asylum-seekers in detention and at ports of entry.

Legal Assistance

Legal or advocacy assistance to prepare for the refugee status interview is not available to applicants. In Malaysia there are no non-governmental organizations that assist persons seeking refugee status from UNHCR, and UNHCR does not promote funding for or encourage such assistance. Indeed, Human Rights Watch was not able to locate a single attorney who claimed to specialize in Malaysian immigration law for detained undocumented workers, let alone in refugee law. Nor does the Malaysian Bar Council list immigration as within the scope of available legal advice and assistance, although "detention" is covered.²³¹ UNHCR does not permit advisers or representatives to be present at the interview. However, in its general advice to governments, UNHCR recognizes the importance of independent legal advice and assistance for asylum-seekers. UNHCR should consider providing training or financial support to the Malaysian Bar Council or to other non-governmental organizations in order that the capacity to provide such legal assistance be developed.²³²

Appeals

When applicants are denied refugee status, they receive notification by mail. This letter is standardized-it does not give particular reasons for the applicant's rejection. The letters that Rohingya showed to Human Rights Watch stated, "You could not show that you suffered or would suffer treatment of such a gravity that it would amount to persecution. You have not been able to substantiate your fears of being persecuted in your home country upon return today."²³³ This is inadequate and does not conform to the standard which UNHCR itself recommends. International due process protections and UNHCR's own training module on the *Determination of Refugee Status* require rejection letters to state the reasons for the decision with sufficient specificity that they can be understood by the person rejected.²³⁴ Hence, the obligation to state reasons is not satisfactorily fulfilled by using standard formulae. Every person is entitled to know the specific case against her or him. Just as governments are required to provide reasons for denying status, so should UNHCR be required to provide those reasons. According to the refugee legal scholar Guy Goodwin-Gill: Reasons for decisions are an essential pre-requisite for fundamental justice, allowing the applicant for refugee status to know why his or her claim has been refused and to make a meaningful appeal or application for review. The reasons alone will be practically meaningless, however, unless accompanied by a statement of the relevant facts. The reasons requirement provides justification for the decision, showing that the decision-maker has

identified the material facts in the applicant's claim; identified relevant country of origin evidence and assessed its weight; assessed the credibility of the applicant; identified and interpreted the relevant rule or rules of law; applied the law to the facts in a reasoned way . . . ; and determined whether the claimant is a refugee.235

UNHCR maintains, nonetheless, that it lacks the resources to provide individualized reasons for rejection, but staff are permitted to explain orally those reasons to applicants who request them.236

In Malaysia, rejected applicants do not have access to their files, including the evidence relied upon and notes from their interviews. According to a UNHCR protection officer in Kuala Lumpur, in order to determine whether the applicant has a well-founded fear of persecution, the officers consider country of origin information such as newspaper articles, communications from UNHCR headquarters, and data from other applications.237 Without knowing what this evidence says or being able to review the protection officer's interpretation of their testimony, applicants have no way to challenge its accuracy. Consequently, applicants are not able to meaningfully appeal the decision. From August 1999 to April or May 2000, there were two UNHCR protection officers in the Kuala Lumpur office to handle all status determinations for asylum-seekers in Malaysia from anywhere in the world. Each was responsible for reviewing the other's decision during an appeal process, and no appeal outside the office was available. This arrangement, we believe, does not provide the independence and objectivity necessary for a fair appeal. As of July 2000, there was only one protection officer present and appeals were sent to the UNHCR office in Jakarta, Indonesia. Under this arrangement, applicants were not reinterviewed on appeal. UNHCR did not provide Human Rights Watch with information about how many rejections are overturned on appeal, although office staff told us that some cases are.238

The lack of transparency and accountability in the refugee status determination process inevitably serves to discourage Rohingya from applying and fosters resentment and anger in the Rohingya community against UNHCR. We were told that the Kuala Lumpur Head of Office held a meeting with Rohingya in mid-1999 to discuss the high rejection rate, but many of the people we interviewed did not understand the refugee criteria or why they had been rejected. Further, those who had been given the original letters in 1992 did not understand why the status that they thought these had conferred had subsequently been revoked. Bashar R. left Arakan after Burmese soldiers took his family's chickens and rice, made his family

collect prawns from the river for them, and forced him to work as a porter. He told us, "I applied for refugee status and had two interviews but was rejected on November 11, 1998, about two months after the interviews. My second interview was an appeal, which I lost. My father-in-law has refugee status but my wife does not. I think UNHCR picks randomly so we have to be random refugees."²³⁹ Ahmed K. told us that, although he had received a certificate in 1992 he was not going to apply for refugee status because he was certain he would be rejected.²⁴⁰ D. Hafez actually applied for refugee status: "I went for an interview and never heard back. Many people were rejected so I assume that I was rejected too."²⁴¹

Venting their frustration regarding these problems, over 200 Rohingya mounted a protest outside the UNHCR compound on August 25, 1999, demanding that UNHCR send them to third countries and renew their expired certificates.²⁴²

UNHCR's Inconsistent Policies on Conditions in Arakan

A refugee status determination hinges on an evaluation of the conditions in the applicant's home country. UNHCR, however, appears to be taking inconsistent positions on conditions in the Rohingya's place of origin-Arakan state in Burma-and on their status and treatment in Malaysia. UNHCR has stated that it abandoned an initial attempt to conduct refugee status determinations for Rohingya in 1993 because of "the large numbers that approached the Office, and the situation prevailing in northern Rakhine State [Arakan], Myanmar, at the time."²⁴³ One might assume from this statement that the large numbers of Rohingya asylum-seekers made it difficult to conduct individual status determinations and so *prima facie* refugee status was awarded on a group basis because of prevailing conditions in Arakan State that were forcing people to flee their homes.²⁴⁴ But this was not what happened. When refugee status determinations were abandoned, no group-based refugee protection was provided, thus leaving the Rohingya in a complete protection vacuum in 1993.

Although individual screening for refugee status was re-instituted at the end of 1998, the contradictions were not resolved. Human Rights Watch saw copies of three letters that UNHCR officials had sent in 1999 to the Malaysian immigration department, the commander of an immigration detention camp, and a school principal on behalf of individual Rohingya. Each letter stated that the individuals concerned had "fled their home country due to the problems they faced on account of their ethnic and religious background."²⁴⁵ This assessment of conditions in Arakan, which we believe to be accurate, indicates that the three individuals all have a valid need for protection in Malaysia. In fact, UNHCR denied refugee

status to all three. Moreover, the letters stated that the three were registered with the office, despite the fact that UNHCR had refused to renew their certificates. In one letter UNHCR described the individual as an asylum-seeker instead of stating that he had already been rejected for refugee status.

As this shows, UNHCR's position on repatriation is not coherent. In contrast with what was said in the three letters cited above, UNHCR officials have reportedly told some Rohingya that conditions in Arakan are conducive to their return. Jahura, for example, told Human Rights Watch that she fled to Malaysia in 1989 after soldiers entered her home and tried physically to attack her and her family. She was only screened for refugee status in 1999, however: "Our first application for refugee status was rejected. When we asked why, we were told that the situation is all right in Arakan." She later made two appeals which were denied.²⁴⁶ Nevertheless, a UNHCR official in Kuala Lumpur assured Human Rights Watch that UNHCR does not encourage repatriation for Rohingya refugees in Malaysia.²⁴⁷

UNHCR in Kuala Lumpur has also noted the implications of the denial of citizenship to Rohingya in Burma and has informed Malaysian government officials in writing, that the Rohingya:

do not possess any valid travel documents which would prove that they are Myanmarese citizen[s]. So far Malaysia and Myanmar have not been able to agree on a procedure for the verification of the citizenship of these Muslims from Myanmar and for their return to their country of origin. *Until their citizenship and their right to return has been clarified they will not be able to return to Myanmar.*²⁴⁸

In contrast, UNHCR in Bangladesh is actively encouraging the 22,000 or so Rohingya in camps there to return to Arakan on the ground that conditions are safe for return.²⁴⁹ On and off since 1994, UNHCR has actively facilitated a large-scale repatriation of some 230,000 Rohingya from Bangladesh. The inconsistencies in the stances of the two UNHCR offices on repatriation highlight the contradictory nature of the organization's policy.

Denial of Refugee Status

UNHCR's inconsistent policies in relation to prevailing conditions in Arakan appear to be affecting their refugee status determinations. UNHCR has granted refugee status to very few Rohingya who have applied. In 1999, the UNHCR office in Malaysia received 1,597

applications for refugee status from Rohingya asylum-seekers. Of these, forty-three were granted refugee status, 1,473 were denied, and the remainder were pending as of May 2000.²⁵⁰ Human Rights Watch interviewed some of these asylum-seekers who recounted credible acts of persecution in Burma and reasons to fear return, but were nevertheless rejected for refugee status in 1999.

Some had been subjected to forced labor and violence by the military: · In April 1989, soldiers collected Sadiq M. and other men and forced them to carry ammunition. "There was an old man who was over seventy years old. He was with me and others when we were forced to be porters and the soldiers made those that could not work go along anyway. I saw three soldiers put gas on the old man and light him on fire. I tried to push the soldiers away." After a scuffle in which one of the soldiers was hurt, Sadiq M. managed to escape and went into hiding. A week later, soldiers went to his village searching for him and arrested his elder brother. The soldiers beat the brother and told him to "get your brother dead or alive or else you will be killed." But Sadiq M. fled from the area and made his way over land through Thailand to Malaysia. He applied to UNHCR for refugee status in 1998 but was rejected: "They said that I was an economic refugee. I had one interview on October 20, 1998, and was rejected on March 17, 1999."²⁵¹

· According to K. Maung, "My father in Burma had four [units] of land which the Burmese military took away. The military was taking porters for forced labor and one day my father was taken. He was quite old and had a disease. The soldiers beat him and then he was taken to the hospital where he later died. The doctor in the hospital asked my father what happened, and my father said that the military beat him. The doctor told a high-ranking military officer what my father had said. As we were taking his body from the hospital, the military tried to block us from removing the body. The military went after us and followed us." After this, K. Maung was afraid to stay in Burma.²⁵² M. Khan and Nazumeah B. recounted human rights violations connected with restrictions on their freedom of movement-limitations imposed because they are not recognized as Burmese citizens. · In 1991, without permission from the Burmese government, M. Khan's younger brother went to Malaysia by way of Thailand. When Burmese military intelligence found out, they came to M. Khan and told him either to make his brother come back or to pay 30,000 kyats. Otherwise they would arrest him. He could not pay the money, and the officials beat him severely. He fled to Malaysia. His family

later told him that, in retaliation for his flight, the military detained another of his brothers. To obtain the brother's release the family was forced to pay 150,000 kyats.²⁵³

· Nazumeah B. told us: "I left in 1991 because I could not work in Burma because I had no documents. The military dictatorship would not give me documents which meant that I could not leave my village. My movements were restricted. . . . Soldiers forced me to build a road, a military structure, and to porter against the insurgent movement. I did not receive payment. That year (1990) I was involved with the democracy movement and organized meetings against the government to encourage people not to give their votes to the government party. This made the military angry and they followed me. When we were meeting in the village, the military surrounded the meeting. I ran away but some people were arrested." ²⁵⁴Others were persecuted for their political opinions: · A. Shukor left Arakan in August 1989. He told us: "My cousin was a leading person in the opposition. I went to his place in Kyauktaw. I supported him and went to a meeting. Then I went to Rangoon and kept organizing people. The military arrested me, and I paid money to be released." He then fled, entering Malaysia in 1990. In 1995 A. Shukor was able to contact his family by telephone. The military learned of the call, and "[a]s a result, my elder brother was arrested. Then he was taken to the hospital where he died. . . . I cannot go back to Burma because there is risk to my life."²⁵⁵

· M. Kadir was accused in 1979 of having a connection with an insurgent group and of committing acts of sabotage against the government. He told us that the charges were false, but that he was arrested and detained for four months in Kyauktaw, Arakan, during which he was interrogated and tortured. He was released without being tried but had to report twice a day to the local police station. In 1982 he was arrested again on the same charges. Police officers took him to a temporary police station and told him that he would be interrogated again. That night, with a few other prisoners, he escaped. The police chased them and shot and killed two persons. M. Kadir made his way to Akyab [Sittwe] where a friend hid him in a boat and took him to the coast. There he hired a boat to take him out to a Thai fishing boat, which then carried him to Thailand. He stayed illegally in Thailand for about five years before entering Malaysia in January 1988.⁰

· Kasim J. was only fourteen years old when he joined the student party in his village. The party, led by older students, had only ten members but conducted public lectures and was politically active for the opposition. After the army crushed the mass demonstrations of 1988, he and the other students were called into a government office, made to sign a paper saying

that they were student party members, and were forbidden from joining another group. When three students were subsequently killed, Kasim J. fled to the mountains along the Bangladeshi border. When he later returned to his home town, he continued his activities with the student party and participated in demonstrations in 1994. The military arrested fifteen of his fellow students and accused them of being in the opposition party. Only ten of those arrested ever returned. In 1995 Kasim J. joined the opposition party and then fled the country.¹Based on our interviews with UNHCR and on the above cases, Human Rights Watch is concerned that UNHCR is failing to give adequate consideration to Rohingya's accounts of abuse suffered in Burma and their fears of persecution and, consequently, is rejecting Rohingya who do have valid refugee claims. One key consideration is the implications of the Rohingya's inability to obtain citizenship. This makes them especially vulnerable to related human rights abuses by the military. And as "non-citizens," their ability to travel is heavily restricted by the Burmese authorities, exposing them to exploitation by corrupt officials and threatens their economic survival.² Less directly, lack of citizenship makes them more vulnerable to forced labor and its associated human rights abuses. All of these, as explained in the next section, are possible grounds for refugee status. Yet UNHCR protection officers screening Rohingya in Kuala Lumpur seem not to be making this connection. One of the two officers told Human Rights Watch: "Many Rohingya don't qualify as refugees because their problem is that they are not accepted as nationals by Myanmar. Statelessness problems are not the same as refugee claims. With the former, the government doesn't want the person back; with the latter, the government wants the person back to persecute him."³ This reasoning is flawed. As discussed in the next section, the Rohingya's inability to obtain citizenship in Burma is an integral part of the abuses they suffer and should be a key consideration in asylum determinations.

200 Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly, December 14, 1950. Our analysis of UNHCR's role is based on meetings and subsequent contact by telephone with UNHCR in Kuala Lumpur and on communications with UNHCR headquarters by telephone, electronic mail, and letter.

201 Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

202 UNHCR's operations were established during the CPA through an exchange of letters between the High Commissioner and Malaysia's Minister of Foreign Affairs.

203 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999; Human Rights Watch telephone interview with UNHCR Protection Officer in Kuala Lumpur, Malaysia, March 14, 2000.

204 Human Rights Watch interview with UNHCR Bureau for Asia and the Pacific, Geneva, Switzerland, July 5, 2000.

205 Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly, December 14, 1950.

206 See, e.g., Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

207 *Refugees and Others of Concern to UNHCR - 1998 Statistical Overview*.

208 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

209 An initial attempt to conduct refugee status determinations was abandoned, according to UNHCR, in light of "the large numbers that approached the Office, and the situation prevailing in northern Rakhine State, Myanmar, at the time." Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

210 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, December 3, 1999. According to the Bureau for Asia and the Pacific, "this change in policy was also inspired by the fact that over 200,000 Rohingya refugees had repatriated voluntarily to Myanmar from Bangladesh, under UNHCR auspices, since 1993." Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

211 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

212 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, December 3, 1999; Human Rights Watch telephone interview with UNHCR Protection Officer in Kuala Lumpur, Malaysia, March 14, 2000.

213 Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

214 Ibid. Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 13, 1999.

215 UNHCR, *UNHCR Country Profiles - Malaysia*, September 1999, <http://www.unhcr.ch/world/asia/malaysia.htm>; Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999.

216 Human Rights Watch telephone interview with UNHCR Protection Officer in Kuala Lumpur, Malaysia, March 14, 2000.

217 Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

218 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc HCR/IP/4/Eng/REV.1 (Geneva: UNHCR, reedited 1992); UNHCR, *Interviewing Applicants for Refugee Status (RLD 4)*, (Geneva: UNHCR, 1995); UNHCR, *Determination of Refugee Status (RLD2)*, (Geneva: UNHCR, 1989). The *Handbook on Procedures and Criteria for Determining Refugee Status* was written to guide governments in conducting their own asylum procedures. See Executive Committee Conclusion No. 8 (1977), para. 53.6 (listing basic requirements for procedures for the determination of refugee status from which the *Handbook on Procedures and Criteria for Determining Refugee Status* was prepared).

219 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 17, 1999. When Human Rights Watch visited the UNHCR office, a staff member drove us back to the nearest taxi stand, explaining that it would be nearly impossible to catch a taxi outside the office.

220 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

221 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

222 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999. (19)

223 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

224 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999. Another man told Human Rights Watch: "In 1999 I applied for refugee status and was rejected. I had

no money to go to UNHCR to appeal. Now I have no job. . . . I want documents from UNHCR and money to appeal. When I applied, I paid RM50 for someone to write my application. I had to bring it by taxi and go more than once." Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

225 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 17, 1999.

226 Human Rights Watch interview with UNHCR Bureau for Asia and the Pacific, Geneva, Switzerland, July 5, 2000.

227 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, December 3, 1999. In a 1996 interview in *The New Straits Times* with then UNHCR representative Erika Feller, it was reported that the barbed wire gates were erected and guards stationed after "[f]rustrated persons who claimed to be refugees had, a few times, destroyed equipment." Carolyn Hong, "Mission Accomplished," *The New Straits Times (Malaysia)*, p. 4.

228 See "200 Myanmar Illegals Seek Asylum at UNHCR," *The Star (Malaysia)*, August 26, 1998.

229 UNHCR, *Determination of Refugee Status (RLD2)*.

230 Art. 192 (ii).

231 "The Bar Council Legal Aid Scheme," at the Bar Council Malaysia website, visited March 8, 2000, http://www.jaring.my/bar-mal/fr_aid.htm.

232 For more information about UNHCR's position on legal assistance and its activities in other countries, see Michael Alexander, "Refugee Status Determination Conducted by UNHCR," *International Journal of Refugee Law*, Vol. 11, No. 2, 1999, pp. 267-272.

233 UNHCR rejection letters dated January 14, 1999, and January 13, 1999.

234 The training module *Determination of Refugee Status (RLD2)*, (Geneva: UNHCR, 1989), states in Chapter 2 that: "If the applicant is not recognised, the reasons on which the negative decision is based should be made available to him." See Alexander, "Refugee Status Determination Conducted by UNHCR," pp. 277-279.

235 Goodwin-Gill, *The Refugee in International Law*, p. 331.

236 Human Rights Watch interview with UNHCR Bureau for Asia and the Pacific, Geneva, Switzerland, July 5, 2000.

237 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, December 3, 1999.

238 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999; Human Rights Watch telephone interview with UNHCR Protection Officer in Kuala Lumpur, Malaysia, March 14, 2000.

239 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 30, and December 2, 1999.

240 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

241 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

242 See "200 Myanmar Illegals Seek Asylum at UNHCR," *The Star (Malaysia)*, August 26, 1998.

243 Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

244 See, e.g., UNHCR, *Refugee Children: Guidelines on Protection and Care*, (Geneva: UNHCR, 1994): "If a refugee movement is too large to make individual status determinations possible, the State might grant refugee status to all members of the group."

245 We read copies of these letters in interviews with the letters' bearers. Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 30, and December 2, 1999 (20); Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999 (40); Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

246 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 15, 1999.

247 Human Rights Watch telephone interview with UNHCR Protection Officer in Kuala Lumpur, Malaysia, March 14, 2000.

248 Letter dated December 2, 1999, copied verbatim at Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999 (emphasis added); Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

249 Human Rights Watch/Asia, "Burmese Refugees in Bangladesh"; see FIDH, *Burma: Repression, Discrimination and Ethnic Cleansing in Arakan*, pp. 46-48.

250 Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000. In the first quarter of 2000, UNHCR's Malaysia office recognized twenty-seven persons total as refugees. Human Rights Watch was not able to obtain information as to how many, if any, of these were Rohingya. UNHCR, "Table 8. Applications and Refugee Status Determination by Country of Asylum," *Refugees and Others of Concern to UNHCR: Statistical Overview - First Quarter 2000*.

251 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 1999.

252 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

253 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999. The exchange rate may range from about 6 kyats to the U.S. dollar, officially, to around 120 kyats to the U.S. dollar on the black market.

254 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999. (6)

255 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

0 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999. As Thailand does not give Rohingya refugee status or other protection but detains and deports them to Burma, A. Kadir's stay of five years in Thailand should not affect his claim to refugee status in Malaysia.

1 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

2 See Human Rights Watch/Asia, "Burmese Refugees in Bangladesh: Still No Durable Solution," pp. 11-12.

3 Human Rights Watch interview with UNHCR Protection Officer, UNHCR liaison office, Kuala Lumpur, Malaysia, November 12, 1999.

VI. THE ROHINGYA'S CITIZENSHIP: THE ROOT OF THE PROBLEM

Citizenship, or nationality, is a fundamental human right that facilitates the ability to exercise other human rights.⁴ The Rohingya's lack of citizenship lies at the heart of why they fled to Malaysia and why they cannot return to Burma. Human Rights Watch believes that all Rohingya born in Burma and their children have a right to Burmese citizenship. By denying them citizenship, Burma is violating international law. It is also forcing its neighbors to bear the burden of its actions. The international community should continue to put pressure on Burma to provide full citizenship and accompanying rights to its Rohingya population. Until Burma does so, the Rohingya who flee human rights abuses and ill-treatment in Burma should be provided with asylum and international refugee protection. In particular, Rohingya should not be detained or deprived freedom of movement in countries of asylum. They should receive temporary identification papers and their children should be registered at birth. This section first discusses the basis for the conclusion that Burma is violating international law. Second, it addresses how the denial of citizenship affects the Rohingya's rights once they have left Burma.

Burma's Responsibility

According to Article 15 of the Universal Declaration of Human Rights, "[e]veryone has the right to a nationality," and "[n]o one shall be arbitrarily deprived of his nationality." While issues of nationality are primarily within each state's jurisdiction, a state's laws must be in accord with general principles of international law.⁵ Nationality, according to the International Court of Justice, is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments."⁶ The court first articulated criteria

for defining an individual's nationality in the pivotal *Nottebohm Case*, which gives "preference to the real and effective nationality, that which accord[s] with the facts, that based on stronger factual ties between the person concerned and one of these States whose nationality is involved." A "genuine and effective link," as the "real and effective nationality" has been termed, is determined by considering factors laid out in *Nottebohm*, including the "habitual residence of the individual concerned but also the centre of interests, his family ties, his participation in family life, attachment shown by him for a given country and inculcated in his children, etc."⁷ States are required by international standards described below to avoid acts that would render stateless anyone who has a genuine and effective link to that state.

The right to nationality without arbitrary deprivation is now recognized as a basic human right under international law, which, through legal instruments and the practice of many states, imposes the general duty on states not to create statelessness.⁸ The primary international legal instruments addressing the issue of statelessness are the 1954 Convention Relating to the Status of Stateless Persons⁹ and the 1961 Convention on the Reduction of Statelessness.¹⁰ These conventions provide for the acquisition or retention of nationality by those who would otherwise be stateless and who have an effective link with the state through factors of birth, descent, or residency. The 1954 convention defines a "stateless person" as someone "who is not considered a national by any State under the operation of its law."¹¹ Under Article 1 of the 1961 convention, a state "shall grant its nationality to a person born in its territory who would otherwise be stateless." Article 8 prohibits the deprivation of nationality if it results in statelessness, and Article 9 prohibits the discriminatory deprivation of nationality. Burma violates both of these articles. While Burma is not a party to these conventions, the general principles embodied in the conventions are drawn from the basic provisions found in nationality legislation and practice of the majority of states. The conventions, therefore, reflect an international consensus on the minimum legal standards of nationality. In addition, provisions in other conventions support the principles underlying the instruments on statelessness.¹²

Nearly all Rohingya or their parents were born in Burma, have resided there, and have family there, all factors that establish a genuine and effective link to Burma. Burma, however, continues to treat the Rohingya as foreign residents and refuses to accept them back from Malaysia. It does this on the basis of the Rohingya's ethnic origin. Discriminatory denial of citizenship renders the Rohingya potentially stateless, as no other country recognizes them as

its nationals. This violates Articles 8 and 9 of the 1961 Convention on the Reduction of Statelessness. Burma, thus, bears clear responsibility for the Rohingya's plight.

Statelessness and Refugee Status Determinations

Burma has created an intractable situation for Rohingya in Malaysia and elsewhere, and the international community's response must not be seen as endorsing Burma's abusive policies. Granting the Rohingya refugee status or any other form of institutionalized protection in the countries to which they have fled may appear to be acquiescing in Burma's illegal acts. Yet the Rohingya cannot be left in a state of legal limbo, and their rights should not be held hostage to the Burmese government's intransigence. Returning them to Burma, where they are currently denied citizenship and so made especially vulnerable to human rights abuses, should not be a permissible option. Malaysia's failure to protect the Rohingya has heightened the need for UNHCR to act with particular care. UNHCR's high rejection rates, together with the testimonies Human Rights Watch gathered from Rohingya and the statements from UNHCR officials, all suggest that UNHCR is not taking sufficient account in making its refugee status determinations of the pervasive abuses Rohingya continue to face in Burma and the impact that the denial of citizenship rights has in increasing their vulnerability to such abuses. Denied citizenship on the basis of their ethnicity, nearly all Rohingya in Burma have severely restricted rights to education, employment, and movement in Burma. Many are also subject to quasi-institutionalized forced labor practices.

Under its statute, UNHCR is charged with "providing international protection" and with "seeking permanent solutions for the problem of refugees."¹³ A refugee, as defined by the 1951 Refugee Convention, is:

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

While the Refugee Convention does not define "persecution," UNHCR in its *Handbook* interprets it to include the threat to life or freedom on one of the five grounds listed in the definition of a refugee—"race, religion, nationality, membership of a particular

social group or political opinion"-as well as other serious human rights violations.¹⁴ Regarding persecution on the basis of nationality, the *Handbook* specifies that the term "nationality" in the refugee definition should be interpreted more broadly than "citizenship":

It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race.' Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.¹⁵

The Rohingya constitute such a distinct ethnic, linguistic, and racial group, and the discrimination they experience in Burma is based on their status as members of that group. Therefore they fit squarely under the *Handbook's* definition of nationality.

The *Handbook* goes on to assert that discrimination may amount to persecution "if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn a livelihood, his right to practise his religion, or his access to normally available educational facilities."¹⁶ All of these restrictions apply to the Rohingya in Burma, who because of their lack of full citizenship rights experience severe and "substantially prejudicial" social, economic, and legal exclusion.

Even a person who at first appears to be an economic migrant may still be a refugee, according to the *Handbook*:

The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same ways as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may, according to the circumstances become refugees on leaving the country.¹⁷

The Rohingya are subjected to arbitrary confiscation of their property and other economic restrictions precisely because of their membership of a specific ethnic and religious group.

The Rohingya's inability to acquire citizenship status is thus integral to the discrimination and human rights abuses they suffer in Burma. Where an entire group is arbitrarily denied or deprived of citizenship on the basis of nationality or ethnicity, there is a strong argument to be made that this constitutes discrimination rising to the level of persecution. In addition, because important legally enforceable rights are associated with citizenship, arbitrary denial or deprivation of citizenship deprives individuals of legal remedies for a variety of restrictions. At minimum, therefore, Human Rights Watch argues that discriminatory denial of citizenship should weigh heavily in favor of a finding of persecution. The refugee legal scholar Guy Goodwin-Gill has addressed this issue in the context of Soviet Jews, who were subjected to repressive measures when they expressed a wish to leave the USSR and who, when they were finally allowed to leave, were forced to renounce their citizenship. Goodwin-Gill reasoned that, in such cases, "the denationalization itself provided compelling testimony of denial of protection," and weighed in favor of eligibility for asylum.¹⁸ This reasoning applies even more strongly in the Rohingya's case, where citizenship is denied across the board and not simply to those attempting to leave the country.

When the deprivation of citizenship is accompanied by other acts of discrimination and human rights violations are perpetuated on the basis of the victims' nationality, the argument that a group member has a "well-founded fear of being persecuted" as defined by the UNHCR *Handbook* is even stronger. Lack of citizenship exposes the Rohingya to serious human rights violations including restrictions on their freedom of movement, exclusion from some educational and employment opportunities, and arbitrary confiscation of property. And without citizenship and its accompanying rights, the Rohingya are excluded from Burma's protection. These factors, taken together with the exposure to forced labor and the constraints on political rights faced by all Burmese, provide a compelling case that many Rohingya have "a well-founded fear of being persecuted for reasons of . . . nationality," are outside of their home country, and are "unable . . . to avail [themselves] of the protection of that country."¹⁹

Protections for the Stateless Independent of Refugee Status

Regardless of whether Rohingya meet the criteria for refugee status, they continue to face the perils of statelessness. UNHCR has a clear role to play in this situation. Article 11 of the 1961 Convention on the Reduction of Statelessness provides for "a body to which a person

claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority." This function has been entrusted to UNHCR and affirmed by General Assembly resolutions 3274 (XXIV) of December 10, 1974, and 31/36 of November 30, 1976. More recently, the Executive Committee of UNHCR issued a Conclusion in 1995 which significantly broadened UNHCR's role concerning statelessness. Executive Committee Conclusion 78 on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons "acknowledges the responsibilities already entrusted to the High Commissioner for stateless refugees and with respect to the reduction of statelessness, and encourages UNHCR to continue its activities on behalf of stateless persons, as part of its statutory function of providing international protection and of seeking preventive action."²⁰ The Executive Committee further requested in its Conclusion that UNHCR "provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States."²¹ This Conclusion broadened UNHCR's role in relation to statelessness. These requirements were confirmed in General Assembly Resolution 50/152 of December 21, 1995. The U.N. High Commissioner for Refugees, Sadako Ogata, reiterated this mandate in a statement before the 51st session of the Commission for Human Rights in 1995:

Stateless persons are another category in need of international protection, for whom UNHCR has a special responsibility. My Office has been designated as an intermediary between States and stateless persons under the 1961 Convention on the Reduction of Statelessness. Most recently, UNHCR has been requested by its Executive Committee to place the matter of statelessness on its agenda this year. We will explore promotional and preventive activities to which UNHCR can contribute in collaboration with concerned States. There is an obvious link between the loss or denial of national protection and the loss or denial of nationality. On the one hand, the prevention and reduction of statelessness is an important aspect of securing minority rights. Although neither Malaysia nor Burma are parties to the 1954 and 1961 conventions on statelessness, UNHCR's mandate is based on the General Assembly resolution and conclusion of UNHCR's Executive Committee, on which Malaysia has observer status. UNHCR has thus been mandated to undertake a variety of different activities in the field of prevention and reduction of statelessness. These include: · providing technical and advisory services to interested states in the drafting and implementation of nationality legislation, so as to avoid and reduce statelessness;

- promoting accession to and implementation of the two international instruments designed to promote the avoidance and reduction of statelessness, and to ensure a minimum legal status for all stateless persons;
- cooperating with relevant agencies and partners toward this end;
- training staff and government officials as part of the promotion of the prevention and reduction of statelessness; and
- disseminating information and cooperating with states in avoiding arbitrary deprivation of citizenship or other actions which often result in statelessness. UNHCR, under its mandate to prevent and reduce statelessness, should address the problem of the Rohingya's lack of citizenship and their potential for statelessness, regardless of whether it has formally recognized the Rohingya in Malaysia as refugees. Primary responsibility for addressing the problem of statelessness lies with the Burmese government. The UNHCR Burma office, as a part of its repatriation and reintegration activities, should to seek to prevent and reduce statelessness in Burma, including by continuing to offer technical assistance and guidance to the Burmese government on its national laws and on measures to avoid and reduce statelessness.

UNHCR's Malaysia office must also activate its mandate for statelessness as regards to the Rohingya in Malaysia. The office currently provides some emergency medical care to rejected Rohingya asylum-seekers and intervenes with the Malaysian government on humanitarian grounds. It has registered Rohingya who arrived through 1993-this registration could be reinstated and some form of identification documents (such as the certificates) issued. UNHCR should also offer technical advice, assistance, and training to the Malaysian government on its nationality legislation. Providing birth certificates or similar documentation to all children is critical, and training could be provided on this. If necessary, UNHCR could conduct its own system of birth registration, as described in UNHCR's own guidelines.²² Finally, UNHCR should encourage the Malaysian government to accede without reservations to the international conventions on statelessness.

Much of what UNHCR can do, however, depends on Malaysia's cooperation and its recognition of the international norms on preventing statelessness. Malaysia's observer status on the UNHCR Executive Committee imposes at least a moral obligation on it to abide by the

Executive Committee Conclusion on statelessness. At minimum, therefore, Malaysia should assist with temporary identification papers for Rohingya adults and allow access to employment and health services.

Protections for Stateless Children

Regarding Rohingya children, Malaysia has additional obligations under Article 8 of the Convention on the Rights of the Child, which requires Malaysia to "respect the right of the child to preserve his or her identity, including nationality[.]"²³ This is of special concern for Rohingya children born on Malaysian soil. Over the last twenty years that Rohingya have been coming to Malaysia, at least one, and in some cases two, generations have been born in Malaysia. But under Malaysian law, children do not have a right to Malaysian citizenship merely by having been born in the country. Rather, Malaysia's Constitution provides that a person born within the country becomes a citizen only if one parent is a citizen or permanently resides in Malaysia at the time of his or her birth or if he or she "is not born a citizen of any country[.]"²⁴ The former is inapplicable because the Rohingya lack papers. The latter would appear to apply, but Malaysia does not currently treat Rohingya children as citizens by birth. As a result, the children have no legal status in Malaysia.²⁵

Rohingya children born in Malaysia are at even greater risk of statelessness than their parents. Burma does not grant citizenship to children whose parents are not recognized as citizens, even if the children are born in Burma. Thus the likelihood of Burma recognizing the citizenship of children born outside the country to former inhabitants whose citizenship is also disputed is remote in the extreme. It is appropriate, then, that Malaysia's constitutional provision granting citizenship to persons who are born in the country and who are not born citizens of any other country should apply to these children. However, the conferring of Malaysian citizenship should not restrict the child's right to return to Burma should that become possible.

At minimum, Malaysia should work to ensure that all children born within its borders, whether documented or not, are registered at birth. Yet while UNHCR continues to discuss the registration of refugee children born in the country with the Malaysian government, its efforts have so far not been productive.²⁶ According to UNHCR's guidelines:

Birth registration is essential to enable date and place of birth to be conclusively established, thereby activating certain rights, including those rights which are dependent on nationality

and personal status. Those basic human rights can be violated in refugee situations unless particular attention is given to ensure the proper documentation of children.²⁷ Equally important is that parents receive validated birth certificates.²⁸ Malaysia should therefore should develop viable procedures for birth registration and the issuance of birth certificates that take into account the needs of refugees. Requiring undocumented persons to register with the police, the current competent authority for registration would not be an effective solution as long as refugees continue to be subject to arrest and harassment by Malaysian police.

Consequences

One consequence of the Rohingya's disputed citizenship status and both Malaysia's and UNHCR's failure to afford them adequate protection is the Rohingya's inability to access vital education and health care in Malaysia. In the past, a UNHCR certificate and a Malaysian birth certificate were enough documentation to get access to these services. But UNHCR has stopped renewing the certificates and has offered most Rohingya no alternative. Malaysia, meanwhile, has begun excluding Rohingya children from schools and from health care, and not all Rohingya children born in Malaysia have been able to obtain birth certificates. Providing these documents now would reduce some of the hardship to which the Rohingya are subject due to their uncertain legal status. Temporary protection in Malaysia until the issue of their nationality is resolved or protection as refugees would also resolve these problems.

Access to Education

*My four children used the UNHCR registry letter to go to school but when the letter was stopped, they had to stop school. -undocumented Rohingya man²⁹*None of the Rohingya Human Rights Watch interviewed in late 1999 had children enrolled in school; these included parents of twenty-five school-aged children. Three had children who had previously attended school in Malaysia until they were told by school authorities earlier in 1999 that their children could no longer be admitted. Those who had never been in school did not have Malaysian birth certificates. One parent told Human Rights Watch that after his child, now seven years old, was denied admittance because the child did not have a birth certificate, he and his wife decided not to have any more children.³⁰ Up until 1999, Rohingya children with both Malaysian birth certificates and with their family's UNHCR letter were able to enroll in school. But when the Rohingya's certificates expired without being renewed, even those with birth certificates were no longer able to continue.

When Eslam Khatun tried to re-enroll her seven year-old daughter in 1999, the school asked her to bring a renewed UNHCR certificate because the one she presented had expired on February 10, 1999. She explained that the certificate had not been not renewed. The school then sent her to the general government education office where she was asked for the original UNHCR certificate issued for her entire family in 1992. However, the Malaysian police had confiscated that original when they arrested, detained, and deported her father in 1998. Because Eslam Khatun could not produce the letter, she was sent home.³¹

Bashar R. wept as he described his efforts to keep his child in school:

My son is 7 years old. He was born in Malaysia and has a Malaysian birth certificate . . . He completed two years of primary school in a government school but now . . . the school refuses to accept him. He wants to go to middle school next month. I went to the school and talked to the headmaster. He said that my son has no documents and they are worried. He said they cannot allow him to attend under the new system and under the new rules he must have an immigration visa. I went to the general office today and they are asking for a visa from immigration. . . . My children face the same problem I faced in a different country.³²

Although both Eslam Khatun and Bashar R. had already been denied refugee status, each approached UNHCR for help. For Eslam Khatun, UNHCR wrote a letter to the principal of her child's school, stating that she and her family were registered with the UNHCR office and that they "fled their home country due to the problems they faced on account of their ethnic and religious background." The letter requested that the principal "render whatever assistance you could to enable [Eslam Khatun's] child to receive the very basic right to education."³³ It did not mention that Eslam Khatun and her family had already been screened and rejected for refugee status and that her certificate (stating that she was registered) had not been renewed.

UNHCR also wrote a letter for Bashar R.. This letter, addressed to the government's immigration department, gives more information than Eslam Khatun's letter:

Mr. Bashar R. and his family have been registered with us as Muslims from the Arakan State/Myanmar. *They fled their home country due to the problem they faced on account of their ethnic and religious background. Therefore they do not possess any valid travel documents which would prove that they are Myanmarese citizenship. So far Malaysia and Myanmar have not been able to agree on a procedure for the verification of the citizenship of*

these Muslims from Myanmar and for their return to their country of origin. Until their citizenship and their right to return has clarified they will not be able to return to Myanmar (our emphasis). . . . Mr. Bashar R. and his wife have been in Malaysia since 1989. Two children were born and bred in Malaysia. Mr. [Bashar R.'s] family has applied for refugee status. In this regard, we hope the Immigration Department would on humanitarian grounds, consider the issuance of an immigration student pass to Mr. [Bashar R.'s son] in order that he can be admitted into a government school in Cheras Baru.³⁴

As in Eslam Khatun's case, this letter does not mention that Bashar R. and his family had been screened and rejected for refugee status.

When Human Rights Watch interviewed Eslam Khatun and Bashar R., they had just received the letters and had not yet delivered them. UNHCR told each that if the letters did not have the desired effect, there was nothing else UNHCR could do.

Access to Health Care

My wife gave birth in a hospital in 1997, but we had to pay double. Last time we went to the government subsidized clinic, I was told not to come again because we were not citizens. They said to go to a private clinic. They said, "Don't come here again." -undocumented Rohingya man³⁵

In the last year, Rohingya have increasingly been denied access to public health care. Although there is no law that patients must produce identity documents, some government clinics have recently started turning away undocumented people. Human Rights Watch interviewed five individuals who were turned away from government clinics in the last year because they lacked identity documents, including one man whose wife gave birth at home as a result.³⁶ Two others told us that they do not go to the hospital or take their children when they are sick because are undocumented.³⁷ One man said that he had forged a passport so that his child could get treatment for a cut on his leg,³⁸ and a woman reported that she had been given medicine at a government clinic when she showed a copy of her 1992 letter but was told not to come back again without the original, which she does not have because UNHCR took it back when it issued the certificates.³⁹ All agreed, however, that they could not afford to pay a private clinic: foreigners are charged at the highest rate health care-"first-class category fees"-which, reportedly, are about twice those charged to citizens.⁴⁰

4 Former U.S. Supreme Court Chief Justice Earl Warren has described citizenship as a "basic right for it is nothing less than the right to have rights." *Trop v. Dulles*, 356 U.S. 86 (1958).

5 Under Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."

6 *Nottebohm Case*, I.C.J. Reports, 1955, p. 23.

7 *Ibid.* In the *Nottebohm Case*, brought by Liechtenstein against Guatemala, the court developed this analysis to determine an individual's nationality.

8 See, e.g. Carol A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status," *International Journal of Refugee Law*, Vol. 10, No. ½, January/April 1998, p. 169.

9 Adopted on September 28, 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526A(XVII) of April 26, 1954; entered into force June 6, 1960.

10 Adopted on August 30, 1961 by a Conference of Plenipotentiaries convened pursuant to General Assembly resolution 896(IX) of December 4, 1954; entered into force December 13, 1975.

11 1954 Convention Relating to the Status of Stateless Persons, Art. 1(1).

12 The Convention on the Elimination of All Forms of Racial Discrimination seeks "to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law" in the enjoyment of the right to a nationality. International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(iv), adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force January 4, 1969. Article 1(3) provides that the convention does not affect a state's nationality laws so long as those laws do not discriminate against a particular nationality. Neither Burma nor Malaysia are parties to this treaty. The Convention on the Rights of the Child, to which Burma is a

party, specifies that children shall be registered at birth and have the right to acquire a nationality. Convention on the Rights of the Child, Article 7. Article 24 of the International Covenant on Civil and Political Rights also states that every child shall be registered upon birth and have the right to acquire a nationality.

13 Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly, December 14, 1950.

14 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paras. 51-53.

15 *Ibid.*, para. 74.

16 *Ibid.*, paras. 51-53. According to Guy Goodwin-Gill: "In its broader sense, however, [persecution] remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship and freedom of movement." Goodwin-Gill, *The Refugee in International Law*, p. 68.

17 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 63.

18 "Statelessness and refugee status are by no means identical phenomena. . . . [F]or years Soviet Jews leaving the country permanently were required to renounced their citizenship. Refugee status in such cases might appear determinable in the light of the situation prevailing in the country of origin as the country of former habitual residence. *However, in addition to internal repressive measures applied to those seeking to leave that country, the denationalization itself provided compelling testimony of denial of protection.* Whether it severs the effective link for all purposes of international law, including the responsibility of States, is less clear, but the expulsion of an unwanted minority could not justifiably be predicated upon the municipal act of deprivation of citizenship." Goodwin-Gill, *The Refugee in International Law*, p. 42 (emphasis added; internal footnotes and quotation omitted).

19 See the definition of a refugee in the 1951 Refugee Convention, Art. 1.

20 Executive Committee Conclusion No. 78 (XLVI) (1995), "The Prevention and Reduction of Statelessness and the Protection of Stateless Persons," para. a.

21 *Ibid.*, para. c.

22 UNHCR, *Refugee Children: Guidelines on Protection and Care*, (Geneva: UNHCR, 1994), pp. 103-104.

23 Malaysia has entered a reservation to Article 7 of the convention which states that children shall be registered at birth and have the right to acquire a nationality. It has, however, agreed to be bound by Article 8.

24 *Federal Constitution*, Art. 14(1)(b) and Second Schedule, Part II.

25 Some Rohingya parents have been able to obtain birth certificates for their children, but this document does not legalize their status in Malaysia.

26 Letter from UNHCR Bureau for Asia and the Pacific to Human Rights Watch, dated May 16, 2000.

27 UNHCR, *Refugee Children: Guidelines on Protection and Care*, pp. 103-104.

28 *Ibid.*

29 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 13, 1999.

30 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

31 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

32 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 30, and December 2, 1999. (20)

33 Letter dated October 4, 1999, copied verbatim at Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

34 Letter dated December 2, 1999, copied verbatim at Human Rights Watch interview, Kuala Lumpur, Malaysia, November 20, 30, and December 2, 1999 (emphasis added).

35 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

36 Human Rights Watch interviews with five people, Kuala Lumpur, Malaysia, November 15, 20, 30, and December 2, 1999.

37 Human Rights Watch interviews, Kuala Lumpur, Malaysia, December 2, 4, 1999.

38 Human Rights Watch interview, Kuala Lumpur, Malaysia, December 2, 1999.

39 Human Rights Watch interview, Kuala Lumpur, Malaysia, November 30, 1999.

40 Ramlan Said, "At the Dewan Rakyat: Delinquent Foreign Patients," The New Straits Times (Malaysia), March 15, 2000.

VII. APPENDICES

Appendix A:

Appendix B:

Executive Committee Conclusion No. 78 (XLVI) - 1995 - Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons

The Executive Committee,

Recognizing the right of everyone to a nationality and the right not to be arbitrarily deprived of one's nationality,

Concerned that statelessness, including the inability to establish one's nationality, may result in displacement,

Stressing that the prevention and reduction of statelessness and the protection of stateless persons are important in the prevention of potential refugee situations,

(a) Acknowledges the responsibilities already entrusted to the High Commissioner for stateless refugees and with respect to the reduction of statelessness, and encourages UNHCR to continue its activities on behalf of stateless persons, as part of its statutory function of providing international protection and of seeking preventive action, as well as its responsibility entrusted by the General Assembly to undertake the functions foreseen under Article 11 of the 1961 Convention on the Reduction of Statelessness;

(b) Calls upon States to adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality, and by eliminating provisions which permit the renunciation of a nationality without the prior possession or acquisition of another nationality;

(c) Requests UNHCR actively to promote accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, in view of the limited number of States parties to these instruments, as well as to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States;

(d) Further requests UNHCR actively to promote the prevention and reduction of statelessness through the dissemination of information, and the training of staff and government officials; and to enhance cooperation with other interested organizations;

(e) Invites UNHCR to provide it biennially, beginning at the forty-seventh session of the Executive Committee, with information on activities undertaken on behalf of stateless persons, particularly with regard to the implementation of international instruments and international principles relating to statelessness, and including the magnitude of the problem of statelessness.

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