CHAPTER 6: CRIMINAL DETENTION

This section looks at the criminal detention of stateless persons. Information on the criminal detention of stateless persons has never been systematically collected, and because information on detention generally is rarely – if ever – disaggregated to consider statelessness, it is not easily accessible or discernible. However, ERT’s research suggests that this form of detention primarily raises human rights concerns in two contexts.

First, de jure and de facto stateless persons, particularly if they form a distinct ethnic group, may face discrimination within their country of habitual residence, either as a result of state policies, or because they are vulnerable to corrupt officials, including law enforcement officers, who may abuse their irregular status and extort money from them. One example is the arrest and imprisonment of stateless persons under criminal law because they lack identity and other documents.

Second, outside their countries of habitual residence, breaches of immigration law, such as illegal entry and overstay and the use of false documents, are increasingly criminalised and carry criminal sentences. This is particularly
harsh on stateless individuals whose inability to comply with immigration requirements is a direct outcome of the fact that they have no nationality:

*Under the legislation of a considerable number of countries violations of the immigration law constitute a criminal offence. Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the State border, using false documents, leaving their residence without authorization, irregular stay, overstaying their visa or breaching conditions of stay. The … criminalization of irregular migration is increasingly being used by Governments…*

### 6.1 DISCRIMINATORY CRIMINAL DETENTION IN COUNTRY OF HABITUAL RESIDENCE

Insofar as there is often a correlation between stateless communities and ethnic, religious or cultural difference, discriminatory laws and policies may result in disproportionate percentages of these groups being arrested and convicted. Yet again, the Rohingya of Myanmar are perhaps the quintessential example. Rohingya sentenced either under the Burmese Immigration Act for illegal crossing of the border or under Section 493 of the Penal Code for unauthorised marriages constitute the largest prison population in North Arakan.

#### 6.1.1 Arbitrary Arrest, Extortion and Torture

The arbitrary arrest of Rohingya is common practice in the North Arakan province of Myanmar, and it is essentially a method of extortion. Arrested persons often evade prosecution and secure their release in exchange for large sums of money. In Myanmar, the NaSaKa (the Myanmar border agency), the police and the military regularly arrest Rohingya on various charges.

Detention in NaSaKa premises invariably puts the detainee at risk of torture. If allegations against the detainee are perceived as a threat to security, interrogation sessions involve severe physical as well as psychological torture.

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ranging from beatings, electric shocks, deprivation of sleep, deprivation of food and water and other cruel treatment. Detainees are blindfolded, handcuffed and often put in wooden stocks. In some cases, torture results in death.

When the Rohingya are arrested for minor offences such as breaching marriage rules, the NaSaKa beat the detainees and generally extort bribes from them with a promise of release. Women are particularly at risk of rape in NaSaKa custody. Detainees who are unable to raise the required bribe from their relatives are referred to the judicial system, transferred into pre-trial custody in the police detention centres of Maungdaw or Buthidaung town and produced before the courts for sentencing. Detention in a NaSaKa camp can last between a few days to one month, during which time the detainees have to do forced labour. Detainees who do manage to pay the bribe continue to be vulnerable to future arrest.

Detained, Extorted and Beaten for Marrying – A Rohingya Woman’s Story

We married secretly, only in the presence of our parents and the maulvi [Muslim Cleric]. After marriage we started seeing each other frequently but secretly. This came to the notice of villagers who informed the NaSaKa. Soon after, a NaSaKa patrol arrived at my house at night but we were sleeping in a farm hut. The NaSaKa told our parents that we should go to their camp the next morning, claiming that our marriage permission was ready.

The following day, we all went to the NaSaKa camp at Inn Din. But, instead of delivering the marriage permission, the NaSaKa detained my husband and me in two separate cells and interrogated us: “How long have you lived together? Are you pregnant? Did you have an abortion?” They did not hit me but they beat up my husband.

ERT Interview with a former Rohingya Detainee, 22 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-048).
I denied the allegations about our marriage and cohabitation. They did not believe us and they fined us 200,000 Kyat [approximately 31,000 U.S. dollars according to official exchange rate and 200 U.S. dollars according to unofficial (street) exchange rate]. Our fathers paid the amount and we were released after one night.

There was no further disturbance for some time since the NaSaKa had received a lot of money from our families. Then, again, an informer told the NaSaKa that we were still living together and that I was pregnant. The first accusation was true but I was not pregnant. The NaSaKa again came to our parents’ houses but did not find us. They then arrested my father and my father-in-law and took them to their camp. They beat them up and demanded 1 million Kyat for their release. My father-in-law was beaten so severely that one of his eyes was damaged and he had a serious head injury. My mother-in-law sold all their cattle and a piece of land to raise the money. She bargained and finally the Village Peace and Development Council Chairman and NaSaKa agreed to release them for 500,000 Kyat. As soon as they were released, we all fled to Bangladesh. But, within a month, my father-in-law died of his injuries while undergoing treatment in Cox’s Bazar government hospital.

6.1.2 Imprisonment, Hard Labour and Shackles

Most convicted Rohingya serve their sentence in Buthidaung jail, the only prison located in North Arakan. Buthidaung jail is a large compound with four long blocks housing the detainees: one for female and three for male prisoners. One of the three blocks for male prisoners is a two-storey wooden building. The compound also includes vegetable gardens and paddy fields. Most adult male detainees have to perform hard labour regardless of their sentence. Only prisoners serving short-term criminal sentences or those who are about to complete a longer sentence are sent to do hard labour outside prison walls. Hard labour outside the prison premises usually entails cultivation or plantation work, hill and jungle clearing, road repair or construction, dam building, brick-baking, logging and bamboo-cutting in forested areas. Detainees reported that every day, hundreds of shackled prisoners go to work outside Buthidaung jail and return at night.
According to one Rohingya interviewed by ERT:

During my stay in Buthidaung jail I had to work almost every day outside the jail. The jail police took us in shackles to the worksite. We were divided into three groups guarded by five or six jail police. Each group included 30 to 50 prisoners depending on the work to be done. I had to work with other prisoners in the jail paddy fields or vegetable garden. Every year, as soon as the monsoon ended, we had to build a dam on the stream to preserve water for irrigation, to be used for summer paddy cultivation and vegetable gardening. We also had to look after the jail cattle. Sometimes we had to rebuild roads destroyed by landslides during the monsoon or repair roads around Buthidaung after the monsoon. The routine work we had to do was clearing the hills around the jail and collecting firewood for the cooking needs of the jail. At the worksite the jail police often hit prisoners on their back with a heavy baton when they took a rest. I was beaten many times.475

Prisoners are also at risk of being sent to hard labour camps in rugged areas without returning to the prison or being conscripted as porters for army battalions in conflict zones. The living conditions in hard labour camps are worse than in prisons. Prisoners have to endure backbreaking labour and beatings and often work in chain-gangs. Deaths in labour camps are common due to disease, lack of food and health care, ill-treatment and sometimes work accidents.476 To prevent prisoners from escaping, shackles are still used in Myanmar, particularly in labour camps. This 28-year-old Rohingya man from Taung Bazar in North Buthidaung was sentenced to 3 years imprisonment under the Immigration Act and endured hard labour in shackles. He managed to escape in late 2007:

I followed all orders from the jail officers for the first two years of my sentence but I could no longer bear this during

475 ERT interview with former Rohingya detainee, 22 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-047).

the third year. My mind became unstable. One day, about nine months before the end of my term, the jail police brought a group of ten prisoners, including me, to the hills to collect firewood. I wore shackles as always. At one point our group had dispersed in the forest and the guards were out of my sight. I quietly slipped inside the jungle and walked deeper and deeper. I put leaves around the leg irons so that it would not make any noise. I reached my village in the dark of the night. That is how I ran away.\footnote{The Arakan Project Interview with former Rohingya detainee, 19 September 2008, Cox’s Bazar, Bangladesh. (Ref. 08/30).}

6.2 CRIMINAL DETENTION LINKED WITH STATELESSNESS, THE LACK OF DOCUMENTATION AND CORRUPT PRACTICES

Stateless persons outside their country of habitual residence may also be criminally detained. In some instances, such detention may be brought about by virtue of their statelessness. The Rohingya in Bangladesh have been at the receiving end of policies and practices which have rendered them vulnerable to criminal detention due to lack of documentation, extortion and/or corruption. Research conducted by ERT in Bangladesh suggests that arrests by police occur in a variety of circumstances, which could be classified into three categories:

Firstly, the police apprehend Rohingya following formal complaints lodged by third parties, usually local Bangladeshis or sometimes even other Rohingya. Filing false allegations is common in Bangladesh as a form of revenge or to discard a rival.

The second scenario is that of police arresting Rohingya for real offences they have committed, or because of their lack of personal documents. While there was no discernible pattern of police specifically targeting Rohingya, in some areas, Rohingya pay protection money to the police.

Finally, there are occasions in which the police intentionally arrest Rohingya using them as scapegoats to cover up their own involvement in corruption. A 44-year-old Rohingya was arrested with two others by the police on a bus. According to him:
The Ukhia police needed some scapegoats like us because, the previous day, they had seized Burmese liquor from some smugglers but they had released the smugglers against a good bribe. However, the news became public and the police needed to show that they had arrested the smugglers together with the liquor seizure. Unfortunately we became the victims. The police lodged 2 cases against us: one under the Special Powers Act Section 25(b) (smuggling) and the other under the Foreigners Act Section 14. We did not even see the type of bottles that the police claimed to have found in our possession.478

The main blockage in the Bangladesh legal system which results in grossly overcrowded conditions in prisons is the excessive pre-trial detention period. Arrested Rohingya persons remain between three months and five years in pre-trial detention, the average being three years. Pre-trial detainees, convicted inmates and “released prisoners” often share the same wards.

It is not uncommon that lawyers take advantage of the Rohingyas’ vulnerability as corruption prevails at all levels in the judicial system. The wives of a 44-year-old Rohingya man and his friend who were arrested on fabricated charges of carrying liquor under the Special Powers Act were cheated by a lawyer who demanded 10,000 Taka [approximately 143 U.S. dollars] to apply for bail but did not act:

*During the second year of our detention, my wife and Abdus Salam’s wife hired a lawyer named M. He promised that he would secure our bail for 10,000 Taka. They deposited 6,000 Taka with him but he did nothing to release us on bail. Our second year in jail passed and we all understood that Advocate M. had not even submitted our bail plea to the court and that he had simply eaten up our money. It is shameful that a learned lawyer eats up all the money of two poor Rohingya women with the false promise that he would bail out their husbands!*

478 ERT Interview with a former Rohingya detainee, 14 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-042).
During the third year of my detention our wives again managed to gather some money and contacted another lawyer. He asked 7,000 Taka each to secure our bail. By then, our wives had learned many things about the court system. Finally, we were released on bail, after 3 years and 3 months in detention.  

6.3 THE CRIMINALISATION OF IMMIGRATION OFFENCES AND CONSEQUENT DETENTION

The criminalisation of immigration offences is another cause for detention and punishment for the stateless. The UN Working Group on Arbitrary Detention, in its latest report:

[N]oted with concern ... a development towards tightening restrictions, including deprivation of liberty, applied to asylum-seekers, refugees and immigrants in an irregular situation, even to the extent of making the irregular entry into a State a criminal offence or qualifying the irregular stay in the country as an aggravating circumstance for any criminal offence ... Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.  

Many European countries have criminalised immigration offences which are penalised through fines and/or imprisonment. Examples in this regard include Estonia, Finland, Germany, Ireland, Italy, Lithuania, Malta, Poland, Slovenia, Sweden, and the UK.  

In the UK, for example, Section 24(1) of the Immigration Act of 1971 imposes a fine of up to £5,000 or imprisonment of up to six months for the offences of entering the UK illegally, or overstaying/breaching conditions of leave to

\[479\] Ibid.  
\[480\] See above, note 263, Paras 55 and 58.  
\[481\] For a detailed account of the relevant legislation in each country, see European Migration Network, Ad hoc query on criminal penalties against illegally entering or staying third-country nationals, 21 September 2009, available at: http://emn.ypes.gr/media/16124/criminal%20penalties%20against%20illegally%20entering%20or%20staying%20thi.pdf [accessed on 23 January 2010].
Furthermore, non-citizens including stateless persons who are deemed not to have cooperated with efforts to remove them from the country can be charged and tried under Section 35 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 and if found guilty, they can be imprisoned for two years and/or fined. Given the inherent difficulties in securing the deportation of stateless persons and particularly in the context of the *de facto* stateless, the fact that obstacles to deportation including the indifference of the deportees’ consulate can easily be seen as the non-cooperation of the individual, this section is particularly likely to impact on the stateless in a negative manner. Furthermore, even in genuine instances of non-cooperation, it is often a very real fear of persecution if returned, which is the basis of the non-cooperation.

An example is the unsuccessful prosecution of a *de facto* stateless immigration detainee, Feridon Rostami, under Section 35 of the Act. Mr. Rostami is a 25-year-old Iranian Kurd who claimed asylum in the UK in 2005. He claimed his father was killed and mother and sister mistreated for their political alliances. He was not granted asylum. However, he could not be removed as he had no documentation. Mr. Rostami refused to apply for re-documentation for fear of execution in Iran, and on several occasions attempted to commit suicide while in detention in the UK. He was prosecuted under Section 35 of the Immigration Act, but said that “prison is better than Iran ... I will stay in detention for the rest of my life but I will not return to Iran as I will be executed”. Mr. Rostami was held in detention for 34 months, after which the High Court ruled that his continued detention would be unlawful with no real prospect of him being returned to Iran. The fact that the immigration authorities did not then reconsider Mr. Rostami’s asylum application illustrates the link between the stateless and the failed asylum seeker communities.

Malaysia is one of many countries which have criminalised illegal immigration, rendering it punishable by fine, prison sentence and the abhorrent practice of caning. The main legislation regulating the admission into, and

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482 Ibid.

483 See Section 35 of the UK Asylum and Immigration (Treatment of Claimants etc.) Act 2004.


485 *R (on the application of Feridon Rostami) v Secretary of State for the Home Department [2009] EWHC 2094 (QB).*
departure and removal from Malaysia is the Immigration Act 1959/1963 as amended in 2002.\textsuperscript{486} Under the Immigration Act, any person who enters or remains in Malaysia illegally is liable to prosecution. Sentences include detention, corporal punishment in the form of caning and deportation.\textsuperscript{487}

A non-citizen arrested under the Act can be held for up to 14 days before being produced before a Magistrate. A 2002 Amendment to the Immigration Act imposes stringent penalties for illegal immigration, introducing caning as a punishment for first time offenders. According to Section 6 (3) of the Act, any person who unlawfully enters or resides in Malaysia is guilty of an offence and liable to a fine not exceeding 10,000 Ringgit [approximately 3,117 U.S. dollars], imprisonment not exceeding five years and caning of up to six strokes in addition to being subject to removal proceedings.

Despite the fact that Malaysia is party to the CRC, Malaysian law\textsuperscript{488} permits the caning of children, provided a lighter than normal cane is used. It must be noted that Malaysia has expressed reservations to many Articles of the CRC including Article 37 which prohibits the torture, cruel, inhuman and degrading treatment of children.

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

\begin{quote}
After three months and 20 days, a jail warden came with a list and called my name. 31 people were called altogether. They told us to get ready for the next morning caning session. The following morning they brought us to an office inside the jail. We were called one by one. They said: “You entered Malaysia without documents and the court has sentenced you with three strokes of the cane. We will now carry out that sentence.” I replied that I would take the caning. They took
\end{quote}

\textsuperscript{486} Malaysia Immigration Act 1959/1963, as amended in 2002. Unofficial consolidation available at: http://www.unhchr.org/refworld/country,LEGAL,,MYS,4562d8cf2,3ae6b54c0,0.html [accessed on 10 March 2010].


\textsuperscript{488} See Section 9(1)(g) and Section 92 of the Malaysia Child Act 2001 (Act 611).
me inside a separate room. They strapped me to an A-frame which looks like a ladder. They tied my two hands, my waist and my two legs to the frame. We had to take off all our clothes and we only kept one cloth in front of our private parts. Then, one man kept my head against the frame so that I could not see anything. The other man gave me three strokes with a cane on my buttocks: the first stroke, one minute, another stroke, one minute, and then the third stroke. The waves of the strokes went through my head. Each lash brought some blood. It was very painful. I felt excruciating pain in my chest, in my brain, throughout my whole body. I cried. Some people screamed but many remained silent during the caning. Then one guard untied my hands and legs from the frame. I could not walk after they freed me. They then took me to a place to rest and asked me to lie face down. They cleaned my wounds and put some medicine on it. It did not lessen the pain. After caning all 31 people, they allowed us to get dressed again and we were sent back to our respective prison cells.  

Chapter 6 looked at how criminal detention impacts on the stateless, recalling Hannah Arendt’s words that the stateless are often detained under criminal law because they are an anomaly to the system “without right to residence and without the right to work” whose every act is therefore potentially in violation of some law. The general lack of statistics which shed light on whether those in prison have effective nationality or not makes it extremely difficult to estimate how many stateless persons have been imprisoned due to their lack of documentation, right to work or a related fact, rather than for a serious criminal offence. However, ERT observed three different contexts in which stateless persons are detained under criminal laws.

489 ERT Interview with a former Rohingya detainee, 10 May 2009, Butterworth, Penang State, Malaysia (ERT-SPD-ML-050).
Firstly, we considered the highly discriminatory laws of Myanmar which target the Rohingya community and criminalise actions which most persons take for granted (including the right to marry without obtaining a state permit). Secondly, we commented on the targeting of irregular, stateless communities in immigration contexts and the criminalisation of the lack of documentation as well as corrupt practices of law enforcement officials. This chapter concluded by drawing attention to the growing trend of criminalisation of irregular migration with prison sentences, fines and even caning attached to it.

Key Findings:

1. There are targeted discriminatory laws in Myanmar which specifically victimise the Rohingya, prevent them from leading normal lives and render them vulnerable to arrest, extortion, torture and detention. Corrupt officials utilise such laws to elicit bribes from the Rohingya.

2. ERT research indicates that there is a connection between the lack of personal documents and criminal imprisonment. Stateless persons who do not possess documents are particularly vulnerable to arrest (often by corrupt authorities) and detention for the violation of laws which are not sensitive to the statelessness challenge. More research is required to grasp the true scope of this problem.

3. There is a growing international trend towards the greater criminalisation of irregular migration. This trend has an impact on all irregular migrants. However, the stateless are disproportionately affected due to the reality that many are unable to travel legitimately. The Malaysian practice of caning is of particular concern.