**Malaysian Stakeholder Response to Call for Inputs from the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment**

*Responses to selected questions*:

**Question 1**

**Please provide examples of ways in which water pollution, water scarcity and floods are having adverse impacts on human rights. Adversely affected rights could include, among others, the rights to life, health, water and sanitation, food, culture, livelihoods, non-discrimination, a safe, clean, healthy and sustainable environment, and indigenous peoples’ rights.**

Water pollution in Malaysia has had a significant impact on human rights in recent years.[[1]](#footnote-2) The most recently available estimates from Malaysia’s Environment Ministry from 2018 classified 8% of surveyed rivers as ‘polluted’, and 36% as ‘slightly polluted’.[[2]](#footnote-3) The Environment Ministry’s analysis suggested that chief contributors to river pollution may be inadequately treated sewage, and runoff from land clearing activities, as well as agricultural and industrial waste.[[3]](#footnote-4) Since 2018, several major river pollution incidents have been documented, implicating human rights such as those to life, health, water, and a healthy environment. For example:

* Chemical dumping on 7 March 2019 into the Kim Kim River resulted in harmful fumes which led to 5,848 individuals seeking medical treatment, and the closure of 111 schools for two weeks in the southern state of Johor;[[4]](#footnote-5)
* Between 19-24 July 2019, pollution discharged into the Liam and Selangor Rivers forced authorities to interrupt running water supply to almost five million users in Kuala Lumpur and the neighbouring state of Selangor;[[5]](#footnote-6)
* Between 19-23 October 2020, solvent pollution discharged into the Selangor River forced an interruption of water supply to 1,196,457 premises in and around Kuala Lumpur;[[6]](#footnote-7)

Additionally, the Human Rights Commission of Malaysia has called attention to the issue of indigenous peoples’ rights to water resources. Indigenous communities have faced difficulties accessing water following resettlement in response to infrastructure projects,[[7]](#footnote-8) and have reported the pollution of water sources and the destruction of catchment areas by private businesses.[[8]](#footnote-9)

**Question 2**

**How has climate change exacerbated water-related problems?**

Malaysia’s latest UN Framework Convention on Climate Change National Communication projects that by 2030, the country’s flood prone basins will expand in area by nearly 54%.[[9]](#footnote-10) The National Communication also projects an increasing frequency of dry spells, potential seawater contamination of groundwater resources, and new challenges to dam management.[[10]](#footnote-11)

**Question 3**

**To protect a wide range of human rights, what are the specific obligations of States and responsibilities of businesses in terms of addressing water pollution, water scarcity and floods? Please provide specific examples of constitutional provisions, legislation, institutions, regulations, standards, policies and programmes that apply a rights-based approach to preventing, reducing, or eliminating water pollution, water scarcity and floods. Please include, inter alia, any instruments that refer directly to the right to a healthy environment and/or the rights to clean water and adequate sanitation.**

As noted in the Special Rapporteur’s 2020 good practices report, the right to life and personal liberty under Article 5(1) of Malaysia’s Federal Constitution implicitly encompasses the right to a healthy environment.[[11]](#footnote-12) The leading authority for this proposition remains Gopal Sri Ram JCA’s comments in the *Tan Tek Seng* case. Article 5(1) was said to incorporate ‘all those facets that are an integral part of life itself and those matters which go to form the quality of life… [including] the right to live in a reasonably healthy and pollution free environment’.[[12]](#footnote-13)

While these comments were *obiter* and thus not technically binding on future courts, they have been more recently cited with approval at the apex Federal Court level.[[13]](#footnote-14) That Article 5(1) includes a right to a healthy environment is further supported by the position taken by the Federal Court in the *Semenyih Jaya* case. There, a unanimous Federal Court was prepared to state that ‘there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity’,[[14]](#footnote-15) militating against a narrow interpretation of Article 5(1).

**Question 4**

**If your State is one of the 156 UN Member States that recognizes the right to a safe, clean, healthy and sustainable environment, has this right contributed to preventing, reducing, or eliminating water pollution, water scarcity and floods? If so, how? If not, why not?**

The implicit constitutional recognition of the right to a healthy environment does not appear to have materially contributed to preventing or reducing water pollution, water scarcity or floods in Malaysia. The lack of direct judicial pronouncements since *Tan Tek Seng* on the right to a healthy environment under Article 5(1) of Malaysia’s Federal Constitution has meant that the precise scope of the right remains unclear. For instance, it cannot be said with certainty that a Malaysian court would hold that the Article 5(1) right requires public authorities to take proactive steps to prevent pollution by private actors. It is similarly uncertain what legal relevance the right may have to compelling public authorities to anticipate and mitigate water scarcity or floods.

Moreover, vindicating the Article 5(1) right to a healthy environment through judicial review in the public interest would require an applicant to satisfy a court of their *locus standi* or standing to sue. Malaysian law took a restrictive view of *locus standi* at the time when the right to a healthy environment was recognised in *Tan Tek Seng*, dulling its enforceability.[[15]](#footnote-16) The legal position on *locus standi* has since liberalised,[[16]](#footnote-17) but a test case would need to be brought to establish solid precedent for public interest litigation based on the Article 5(1) right.

**Question 6**

**Please identify specific challenges that your government, business, or organization has faced in attempting to employ a rights-based approach to address water pollution, water scarcity and floods and the impacts of these problems on human rights.**

A specific challenge facing efforts to employ a rights-based approach to address water pollution, water scarcity and floods is Malaysia’s status as a non-State party to both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[[17]](#footnote-18) The ICESCR and ICCPR are touchstone sources of international human rights law relating to water issues. Malaysian ratification nevertheless remains unlikely. Attempts by Malaysia’s previous ruling coalition to effect related treaty ratifications were the subject of considerable domestic contestation, and were eventually shelved.[[18]](#footnote-19)

**Question 7**

**Please specify ways in which additional protection is provided (or should be provided) for populations who may be particularly vulnerable to water pollution, water scarcity and floods (e.g. women, children, persons living in poverty, members of Indigenous peoples and traditional communities, older persons, persons with disabilities, ethnic, racial or other minorities and displaced persons). How can these populations be empowered to protect and improve water quality and availability?**

The obligation to fulfil the right to water under Article 11(1) of the ICESCR requires States parties to take positive steps to promote the enjoyment of the right, especially for the benefit of vulnerable or disadvantaged societal populations.[[19]](#footnote-20) With respect to non-ICESCR States parties like Malaysia, there is a need to stress that they may be bound by similar obligations aimed at safeguarding particular populations under other human rights treaties. In the case of Malaysia, reference may be made to Articles 3 and 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women,[[20]](#footnote-21) and Article 24(c) of the Convention on the Rights of the Child.[[21]](#footnote-22)

**Question 9**

**There is substantial evidence that the actions of high-income States (from high levels of material consumption to high levels of greenhouse gas emissions) are linked to adverse effects on water availability and water quality in low and middle-income States. What are ways in which high-income States should assist low-income States in responding to and preventing water pollution, water scarcity and floods?**

High-income States should consider the enactment of legislation requiring parent companies headquartered within their jurisdiction to conduct human rights due diligence covering the conduct of overseas subsidiaries and other entities within supply chains. Parent companies in high-income States could thereby be required to implement group wide policies and precautions to prevent overseas subsidiaries in low-income States polluting water sources.

High-income States should also redouble their efforts in providing climate change adaptation assistance to low-income States, and in this connection give the growing body of literature on extraterritorial obligations under international human rights law their renewed consideration.[[22]](#footnote-23)

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1. Floods and water scarcity are also serious issues affecting Malaysia. See UNHRC, ‘Report of the Special Rapporteur on the human rights to safe drinking water and sanitation’ (2019) UN Doc A/HRC/42/47/Add.2, 8; Prime Minister’s Department, ‘Eleventh Malaysia Plan’ (2015) <https://www.pmo.gov.my/dokumenattached/RMK/RMKe-11Book.pdf> 6.2, 6.7, 6.8. [↑](#footnote-ref-2)
2. Ministry of Energy, Science, Technology, Environment and Climate Change, ‘Environmental Quality Report 2018’ (2019) <https://enviro2.doe.gov.my/ekmc/wp-content/uploads/2019/09/FULL-FINAL-EQR-30092019.pdf> 38 (sample of 638 rivers). [↑](#footnote-ref-3)
3. ibid. [↑](#footnote-ref-4)
4. ‘Pasir Gudang pollution caused by leftover toxic waste from Sungai Kim Kim, minister says’ (*Straits Times*, 24 June 2019) <https://www.straitstimes.com/asia/se-asia/pasir-gudang-pollution-caused-by-leftover-toxic-waste-from-sungai-kim-kim-minister-says> accessed 9 November 2020. [↑](#footnote-ref-5)
5. ‘Four water treatment plants in Selangor shut down after diesel pollution detected’ (*Malay Mail*, 22 July 2019) <https://www.malaymail.com/news/malaysia/2019/07/22/four-water-treatment-plants-in-selangor-shuts-down-after-diesel-pollution-d/1773574> accessed 9 November 2020; ‘SPAN will probe and take action against culprits over odour pollution, says Xavier’ (*The Star*, 21 July 2019) <https://www.thestar.com.my/news/nation/2019/07/21/water-pollution-span-will-probe-and-take-action-says-xavier/> accessed 9 November 2020. [↑](#footnote-ref-6)
6. ‘Eight arrested over Monday’s Sungai Selangor odour pollution, says Selangor CID chief’ (*Malay Mail*, 21 October 2020) <https://www.malaymail.com/news/malaysia/2020/10/21/eight-arrested-over-mondays-sungai-selangor-odour-pollution-says-selangor-c/1914908> accessed 9 November 2020. [↑](#footnote-ref-7)
7. Human Rights Commission of Malaysia, ‘Annual Report 2018’ (2018) <https://drive.google.com/file/d/1fvvmlSqXJ2ysTdhRrYnSws6Bwz6FQiaG/view> 96. See also UNHRC (n 1) 7-8. [↑](#footnote-ref-8)
8. ibid, 89, 95. [↑](#footnote-ref-9)
9. Ministry of Energy, Science, Technology, Environment and Climate Change, ‘Malaysia’s Third National Communication and Second Biennial Update Report submitted to the United Nations Framework Convention on Climate Change’ (2018) <https://www.mestecc.gov.my/web/wp-content/uploads/2019/04/10.Malaysia-3rd-National-Communication-and-2nd-Biennial-Update-Report-to-UNFCCC-NC-3-BUR-21.pdf> 91. [↑](#footnote-ref-10)
10. ibid, 91, 94, 96, 98. [↑](#footnote-ref-11)
11. UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2020) UN Doc A/HRC/43/53, 25. [↑](#footnote-ref-12)
12. *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261, 288. [↑](#footnote-ref-13)
13. *Bato Bagi & 6 Lain v Kerajaan Negeri Sarawak* [2011] MLJU 699, para 75 (Richard Malanjum CJSS). [↑](#footnote-ref-14)
14. *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another* [2017] 3 MLJ 561, para 69. [↑](#footnote-ref-15)
15. See *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12. [↑](#footnote-ref-16)
16. *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi* [2014] 2 CLJ 525, para 57-58; *Anwar Ibrahim v Government of Malaysia* [2020] 3 CLJ 593, para 100-101. [↑](#footnote-ref-17)
17. See UNHRC (n 1) 3. [↑](#footnote-ref-18)
18. ‘Malaysia: Little Progress on Rights Reforms’ (*Human Rights Watch*, 7 May 2019) <https://www.hrw.org/news/2019/05/07/malaysia-little-progress-rights-reforms> accessed 9 November 2020. [↑](#footnote-ref-19)
19. CESCR ‘General Comment 15’ (20 January 2003) E/C.12/2002/11, 10-11. [↑](#footnote-ref-20)
20. See Anne Hellum, ‘Engendering the Right to Water and Sanitation: Integrating the Experiences of Women and Girls’ in Malcolm Langford and Anna FS Russell (eds), *The Human Right to Water: Theory, Practice and Prospects* (CUP 2017) 310-311. [↑](#footnote-ref-21)
21. See John Tobin, ‘Art. 24: The Right to Health’ in John Tobin (eds) *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 946-948. [↑](#footnote-ref-22)
22. See eg Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 HRQ 1084. [↑](#footnote-ref-23)