



Submission to the Universal Periodic Review of MALAYSIA

September 2008

This submission will focus in particular on the emergency laws and other laws that permit detention without trial in violation of international human rights standards; on the situation of human rights defenders; on the situation of migrants and asylum seekers in Malaysia; and on the lack of independence and effectiveness of the Human Rights Commission of Malaysia (SUHAKAM) in protecting and promoting human rights in Malaysia.

1. Ratification of international human rights instruments and cooperation with UN Special Procedures

1.1 Malaysia has not ratified most of the major international human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, as well as the UN Convention against Torture.

1.2 In addition to a very limited number of ratifications, no standing invitation has been extended to Special Procedures. Eight Special Procedures have requested to visit Malaysia since 2002, following repeated allegations of human right violations. Only one of them, the Special Rapporteur on the right to education, has obtained satisfaction, in 2007.

2. The Internal Security Act and other laws which permit detention without trial

2.1 The government of Malaysia **maintains laws that are contrary to international human rights standards** (such as the Internal Security Act (ISA), the Emergency Ordinance, the Dangerous Drugs Act) and often makes abusive use of them to **detain suspects without trial**.

2.2 As a chilling deterrent against opposition social activism, Malaysia's ISA permits indefinite detention without charge or trial and has long been used against peaceful political and rights activists. In 1960, three years after independence, the Malaysian Government enacted the ISA, a temporary measure to deal with extraordinary circumstances, but the ISA was made permanent in law¹. The ISA was initially justified by the authorities as necessary in order to counter what remained of the communist threat within the country. However, it almost immediately came to be used to suppress critics and political opponents. After September 11, 2001, the main justification for use of the ISA became terrorism².

¹ It was enacted under Article 149 of the Federal Constitution and can be repealed only by another act of Parliament. Article 149 provides that any law designed to stop or prevent "organised violence against person or property" or "promotion of feelings of ill-will and hostility between different races or other classes of the population likely to cause violence" is valid, notwithstanding that it is inconsistent with basic liberties (such as freedom of movement, assembly and speech) provided for by articles elsewhere in the Constitution.

² Then Deputy Prime Minister Abdullah Badawi announced soon after September 11 that the attacks demonstrated the value of the ISA as "an initial preventive measure before threats get beyond control": Human

2.3 More recently, the ISA's net has widened further and has been used to combat criminal activities such as piracy, human smuggling, currency counterfeiting, and forgery of passports and identity cards³. Over time, the legislative arsenal authorising arbitrary detention has been supplemented by the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Preventive Measures) Act 1985, both of which allow for imprisonment without arrest warrant.

2.4 The ISA has been repeatedly deployed to stifle opposition political movements. More specifically, political leaders who challenge the ruling coalition's sway within particular ethnic constituencies have most often been targets of ISA detentions. Individuals detained under the ISA have been regularly denied access to lawyers and their families. Some have been told their families would be harmed if they did not cooperate. They report having been held in solitary confinement, in dirty cells with no windows and poor ventilation, where they have no bedding and lights are left on 24 hours a day. Detainees further report having been, especially in the preliminary stages of investigation, physically assaulted, forced to strip naked, forced to imitate sexual acts, denied food, drink or sleep and subjected to intense psychological interrogation techniques in order to coerce a confession. The latest example was the case of Sanjeev Kumar, who was paralysed as a result of torture in detention in 2008.⁴

2.5 According to the Malaysian activist group Abolish ISA Movement, sixty-six detainees are currently detained under the ISA. Out of this number, five are currently approaching their eighth year in detention, while another eleven are approaching their sixth year.

2.6 Malaysia's courts have been extremely conservative in protecting individual liberties against extensive executive powers. In adjudicating the legality of detention based on the Minister's satisfaction that a national security threat exists, the courts have customarily applied a subjective test of ministerial satisfaction. In other words, courts are precluded from scrutinising the Minister's decision to detain according to any objective criteria of reasonableness.

2.7 ISA detention does not respect the basic international guarantees relating to the right to a fair trial, as confirmed by the UN Working Group on Arbitrary Detention in May 2004. ISA allows for an indefinite detention without trial of persons for security concerns - those security concerns being defined very vaguely. The Working Group considered that « administrative detention on such grounds, even being in conformity with a domestic law means to deny the opportunity of a fair trial by an independent and impartial judiciary authority.

2.8 Although there is a three-member Advisory Board under the ISA to review detention cases, the Advisory Board's mode of establishment and operation compromise any claim to independence. While the Chair of the Board is required to have attained the level of judges, or be so qualified, no criteria guide the appointment of the two other members of the Board. All three appointments are made by the King on the advice of the Prime Minister. A detainee may only institute such review once a two-year detention has been authorized, leaving him without recourse during the first sixty days of detention. More importantly, the Board is only empowered to make recommendatory findings and they are non-binding on the government. Taken together, these factors fundamentally impair the Board's independence and cannot be regarded as independent judicial review as required by international standards.

Rights Watch, *Opportunism in the Face of Tragedy*, at <http://www.hrw.org/campaigns/september11/opportunismwatch.htm#Malaysia>.

³ SUARAM, *Malaysia: Human Rights Report 2006 – Civil and Political Rights*, SUARAM Komunikasi 2007, p. 12

⁴ See Annex 1: Testimony of Sanjeev Kumar A/L Krishanan (830126-08-5269) regarding his arrest under the Internal Security Act (ISA).

2.9 FIDH and SUARAM consider that the ISA should be repealed in its entirety and all persons in Malaysia should be tried in conformity with international fair trial standards. Indefinite detention without trial can never be in conformity with international human rights standards.

2.10 The lesser-known Emergency Ordinance (EO) continues to be used mainly on alleged underworld kingpins and suspected criminals. According to former detainees who were recently released from the Simpang Renggam detention centre, there currently are over 1,000 people detained under the EO, including minors⁵.

2.11 Over the years, a significant number of EO detainees have successfully won their freedom through *habeas corpus* applications. However, many detainees were re-arrested immediately after the court had released them. Some were released but put under the Restricted Residence Act which confined the movement of the detainees within certain localities and were compelled to report to police station regularly.

2.12 Similar to the ISA and EO, the Dangerous Drugs Act also gives powers to the Internal Security Minister to hand a two-year detention order to any suspect who “has been or is associated with any activity relating to or involving in dangerous drugs” (Section 6(1)). According to a parliamentary reply by the Internal Security Ministry, as of 19 March 2007, there were 1,531 persons detained under the DDA in the Simpang Renggam detention centre.⁶

3. The situation of human rights defenders⁷

3.1 In Malaysia, human rights defenders operate within the context of national security laws and government pressure, which seriously impede their work and constantly threaten their physical and psychological integrity. Chief among the barriers facing human rights defenders is the curtailment of freedom of speech in Malaysia. Under domestic law, Ministry for Internal Security has indeed the discretion to grant and revoke newspaper’s publishing licenses without judicial review⁸. Compounding such legal restrictions is the fact that all major mass media (print, television and radio) are controlled by interests linked to the ruling Barisan Nasional Government and are staunchly pro-Government in perspective.

3.2 On top of this, a noxious cocktail of laws further restrict the ability of activists to congregate, organise or protest freely. Despite the provision in Article 10 of the Constitution that Malaysians enjoy freedoms of assembly and association, laws such as the Trade Union Act 1959, the Societies Act 1966 and the Universities and University Colleges Act 1971 impose a straightjacket on the exercise of freedom of association and further undermine freedom of expression.

3.3 The Police Act 1967 renders it compulsory to obtain a license for any public assembly, meeting or procession of more than three persons and confers wide discretion on the police to regulate such gatherings⁹. Licenses are granted only if the gathering is not likely to be “prejudicial to the interest of the security of Malaysia or any part thereof, or to excite a disturbance of the peace”. The application for a license can be refused and, if issued, can be imposed with conditions or cancelled by the police at any time. Without such a license, or upon breach of stipulated conditions, the police can stop the assembly on the basis that it is illegal and order its dispersal. Moreover, police hold equally wide

⁵ SUARAM, *Malaysia: Human Rights Report 2007* – Civil and Political Rights, SUARAM Komunikasi 2008, p. 22.

⁶ Fu Ah Kiow, 29 March 2007, First Meeting of the Fourth Session of Eleventh Parliament, Hansard, DR.29.3.09 (p. 19) <http://www.parlimen.gov.my/hindex/pdf/DR-29032007.pdf>

⁷ See 2007 Annual report of the Observatory for the protection of human rights defenders, a joint programme of OMCT and FIDH.

⁸ See the *Printing Presses and Publications Act 1984*. The permit may be revoked at any time if the publication contains anything that is “prejudicial to public order or national security”.

⁹ Sections 27, 27A, 27B, 27C.

powers to stop and disperse activities in private places if the activity is “directed to, or is intended to be heard or participated in by persons outside the premises”, “attract[s] the presence of 20 persons or more outside the premises” or is “prejudicial to the interest of the security of Malaysia or ... excite[s] a disturbance of the peace”. A ban on political gatherings has been imposed by the coalition Government since July 2001, on the pretext of “national security”, after opposition parties expanded their influence following Mr. Anwar Ibrahim’s detention¹⁰.

3.4 The most recent example of repression against human rights defenders concern the situation of five leaders of the Hindu Rights Action Force (HINDRAF), an NGO defending the rights of the Indian minority in Malaysia¹¹. Those persons are being arbitrarily detained since December 13, 2007, under Section 8 (1) of the Internal Security Act (ISA), which allows the person to be detained for any period not exceeding two years, in contradiction of international human rights standards. On February 26, 2008, the Kuala Lumpur High Court rejected their habeas corpus applications and upheld their detention under Malaysian law. They are consequently still in jail¹².

4. The situation of undocumented migrants and asylum seekers

4.1 There are no publicly available statistics on the number of migrants, refugees and asylum seekers in Malaysia. Estimates refer to 1,8 million registered (or documented) migrant workers and about 5 million undocumented migrant workers. Migrant workers account for about 30% to 50% of the total Malaysian labour force. In spite of the important contribution that this represents to the Malaysian economy, the authorities have not put in place any consistent national immigration policy.

4.2 Undocumented migrants usually work for the ‘3D jobs’ (Dirty, Dangerous and Difficult) and are not adequately protected against unscrupulous recruitment agencies and employers.

4.3 Domestic legislation does not provide for a specific protection for refugees, asylum seekers or trafficked persons. Only a temporary residence permit, the IMM 13 visas, can offer a de facto protection for refugees against refoulement. Domestic legislation provides for an insufficient protection of children refugees and asylum seekers, in particular as regards access to education and healthcare. Detention of children for immigration purposes is common, while it should be prohibited as a principle.

4.4 The People’s Volunteer Corps-RELA, a volunteer force composed of more than 400,000 reservists, is meant to safeguard peace and security in the country. In times of peace, it contributes to the enforcement of the immigration law. The lack of training and supervision of RELA members are major concerns. RELA carries raids against migrants, without distinction between undocumented migrants, asylum seekers and refugees and with unnecessary use of force.

4.5 The Immigration Act raises a number of concerns with regard to the administration of justice: the length of time a migrant arrested under the Act may be held before being brought before a Magistrate is overly long (14 days); detention may even be indeterminate pending removal; the possibility to sentence undocumented migrants to whipping; the exclusion of the right to challenge decisions under the Act on a number of grounds; and the absence of specific protection for migrants in case of abuse by employers or unpaid wages.

¹⁰ SUARAM, *Malaysia: Human Rights Report 2005 – Civil and Political Rights*, SUARAM Komunikasi 2006, p 80.

¹¹ P. Uthayakumar, M. Manoharan, V. Ganabathirau, R. Kenghadharan and T .Vasanthakumar

¹² For more information on their case, see the report “Mortgaging freedom for security: Arbitrary detention of five HINDRAF leaders”, May 2008, a report of the Observatory for the Protection of Human Rights Defenders, a joint programme of OMCT and FIDH, at <http://www.fidh.org/IMG/pdf/Malaisie495-20BSMAI2008.pdf>

4.6 The conditions of detention, particularly in the immigration depots, are extremely poor. Overcrowded facilities are leading to breaches of basic standards of hygiene; insufficient diet and health care, ill treatment of detainees and a failure to adequately protect women and children in detention are of particular concern.

4.7 FIDH and SUARAM urge the Malaysian authorities to immediately cease the use of RELA officers in the enforcement of immigration law, and to amend the immigration Act with a view to avoiding that violations of provisions relating to migration are treated in the criminal justice system. Meanwhile and as a minimum, the sentence of whipping should be abolished as corporal punishment is prohibited under international human rights law, and the maximum term of imprisonment provided for immigration offences should be reduced. FIDH and SUARAM also call upon the Malaysian authorities to ratify the 1951 Convention on the Status of Refugees.

5. The Human Rights Commission of Malaysia (SUHAKAM)

5.1 In Malaysia's aide-memoire on its candidature to the UN Human Rights Council, the establishment of the Human Rights Commission of Malaysia (SUHAKAM) in 1999 is stated as one of the measures taken by the government to ensure the promotion and protection of human rights.¹³ However, SUHAKAM, as a national human rights institution, has been criticised for its lack of independence and effectiveness, especially in the aspect of human rights protection.

5.2 SUHAKAM does not fully comply with the Paris Principles. SUHAKAM is placed under the jurisdiction of the Prime Minister's Department, severely undermining its credibility as an independent national human rights institution and dispels claims that it has any semblance of structural autonomy from the Executive branch of the government.

5.3 Another major concern is that the Human Rights Commission of Malaysia Act (HRCMA), under which SUHAKAM was established, is that the appointment process of commissioners, which is non-transparent and done without public consultation. It gives the prime minister unfettered discretion in appointing commissioners. Section 5 of the HRCMA states that the King is to appoint the members, based on the prime minister's recommendation. There are no checks and balances to ensure that the appointment process is politically neutral.

5.4 The criteria for selection of commissioners are also unclear. Section 5(3) of the HRCMA states that commissioners "shall be appointed from amongst prominent personalities including those from various religious backgrounds." This criterion is of concern as the meaning of "prominent personalities" is not synonymous with integrity and competence. More importantly, human rights knowledge and experience in human rights work are not stated as criteria in such appointments.

5.5 In April 2008, the International Coordinating Committee of National Human Rights Institutions (ICC), in its re-accreditation exercise on SUHAKAM, gave a notice to SUHAKAM to "provide, in writing, within one year [...], the documentary evidence deemed necessary to establish its continued conformity with the Paris Principles", failing which, SUHAKAM would be downgraded from its current "A" status to "B".¹⁴ SUHAKAM's lack of conformity with the Paris Principles raises serious questions and doubts regarding the

¹³ Malaysia "Aide-Memoire; Malaysia's Candidature to the United Nations Human Rights Council", dated 28 April 2006. (p. 1).

¹⁴ See Annex 2 for ICC's report and recommendations on SUHAKAM.

Malaysian government's commitment to uphold the promotion and protection of human rights in the country.

Annex 1

Testimony of Sanjeev Kumar A/L Krishnan (830126-08-5269) Regarding His Arrest under the Internal Security Act (ISA)

On 28 July 2007, at around 11am, Sanjeev Kumar A/L Krishnan, Identification No 830126-08-5269 was arrested at Kedai Motor Sanjeevi of the address No.3, Taman Permai, Jalan Slim Lama, 35900, Tanjung Malim, Perak. He was arrested by a number of policemen who were not in uniform and a uniformed police officer

At the time of arrest, both his hands were cuffed and he was not told the reason of his arrest. He was later brought to his residence by a Proton Wira to the address, No 799, Taman Bernam 35900, Tanjung Malim, and Perak. The police ransacked his house for about 2 hours and had confiscated a “parang” and some firecrackers that were kept in the house. The detainee was then brought back again to Kedai Motor Sanjeevi which is owned by the detainee and his brother. Police officers searched the shop but did not confiscate anything.

Although the brother of the detainee had asked police officers the reason of his brother’s arrest, police officers failed to answer him and merely stated that the family will be receiving a letter by the police later in the evening. Sanjeev Kumar was then brought to the Tanjung Malim Police Station at around 2pm. At about 2-3pm, Sanjeev Kumar’s wife, Sharmila received a detention order by the police stating that her husband had been arrested under the ISA.

The family was only allowed to see Sanjeev 2 weeks after his arrest at Bukit Aman. During his 55-day detention period, Sanjeev’s wife and family were only allowed to see him a total of 3 times. Sanjeev was sent to the Kamunting Detention Camp on the 22nd of September 2007, which was during his 55-day detention period. He was also given a detention order for 2 years during the said period.

Physical and Mental Torture and Abuse

During the detainee’s period of detention, he was subject to all kinds of torture and abuse. Among the abuses and torture suffered by the victim from the Police Special Branch (SB) are as below

Interrogations were conducted from 8am to 11am without any breaks. Should the detainee fail to have answered any questions directed by the officers, the SB would threaten him by saying that they will not release him. Sanjeev was also detained by himself in a small dark room.

Apart from that, Sanjeev was also tortured, kicked and hit brutally by the SB. His body and head had been punched and kicked at with a shoe. His left hand and leg was hit several times with a hard object, for instance, wood. He was also often hit with a filled bottle of water.

The detainee was also made to drink his own urine for 3-4 times. The SB also had hit the detainee's penis and a hard object was inserted into the detainee's anus. During his physical abuse, the detainee was also insulted by the SB with vulgar and obscene words.

At Kamunting Detention Centre

Sanjeev Kumar was sent to Kamunting Camp on the 22nd of September 2007, after his 55th day of arrest under the ISA. The detainee had frequently complained that his left hand and leg were not functioning properly. Despite his complaints, he did not receive sufficient medical treatment when he was sent to Kamunting.

On 11 April 2008, Sanjeev was sent to Klinik Kesihatan (medical clinic), located in the camp itself. However, the pain was too serious causing him to be sent to Taiping Hospital for treatment. Once he arrived at the hospital, he once again was deprived of medical attention as one of the wardens in the Kamunting Camp by the name of Sharom, said that the doctor involved was not available and therefore Sanjeev would have to be taken back to the camp. That same night (11/7/2008), Sanjeev complained of tremendous pain and hence was admitted into the hospital.

On 18 April 2008, Sanjeev was discharged from hospital. Unfortunately, he was discharged with a wheelchair as he was pronounced paralyzed as he was unable to function his left leg n hand. Therefore, Sanjeev will have to use a wheelchair to perform everyday functions due to his handicap.

Sanjeev and his family claimed that the detainee was deprived of proper care by the wardens in Kamunting Camp. The detainee is currently being cared for by other detainees in the camp. According to Sanjeev's family, the camp authorities do not want to take on this responsibility as they are afraid of looking after Sanjeev due to his current situation.

Due to his failing health, Sanjeev has lost a lot of weight and is often seen to be weak and in pain.

Annex 2

INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Geneva 21 to 23 April 2008

Report and Recommendations of the Sub-Committee on Accreditation

3.4 Malaysia: National Human Rights Commission of Malaysia (SUHAKAM)

Recommendation: The Sub-Committee informs the Commission of its intention to recommend to the ICC status B, and gives the Commission the opportunity to provide, in writing, within one year of such notice, the documentary evidence deemed necessary to establish its continued conformity with the Paris Principles. The Commission retains its “A” status during this period.

The Sub-Committee notes the following:

- 1) The independence of the Commission needs to be strengthened by the provision of clear and transparent appointment and dismissal process in the founding legal documents, more in line with the Paris Principles. The Sub-Committee refers to General Observation “Selection and appointment of the governing body”.
- 2) With regard to the appointment, the Sub-Committee notes the short term of office of the members of the commission (two years). It refers to General Observation “Guarantee of tenure for members of governing bodies”.
- 3) It further refers to General Observation “Ensuring pluralism” to highlight the importance of ensuring the representation of different segments of society and their involvement in suggesting or recommending candidates to the governing body of the Commission.
- 4) The Sub-Committee refers to General Observation “Interaction with the International Human Rights System”.