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## Unjust Order: Malaysia's Internal Security Act

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# Unjust Order: Malaysia's Internal Security Act

Nicole Fritz and Martin Flaherty

## Abstract

This Report represents the culmination of a year-long project undertaken by the Crowley Program to update the study of the use and impact of the Internal Security Act (ISA) in Malaysia in light of international law obligations. We reference first those international commitments that Malaysia has expressly adopted. However, these are very few—reflecting the antipathy felt by the Malaysian government for international obligations of this sort. Additionally, we have made reference to the generally-accepted international law provisions applicable in this context—intended both to demonstrate the extent to which the ISA deviates from widely-upheld international norms, even if those norms are not ones expressly accepted by Malaysia. We have also referenced the extent to which other States, contemplating reviving or enacting similar laws, will fall afoul of their more readily undertaken international obligations in doing so.

## SPECIAL REPORT

# UNJUST ORDER: MALAYSIA'S INTERNAL SECURITY ACT

*Nicole Fritz\* & Martin Flaherty\*\**

### INTRODUCTION

The Petronas Towers — two soaring office blocks in the heart of Kuala Lumpur — rise cleanly from their base. Few neighboring skyscrapers hem their space and it is this contrast to their surrounding landscape that makes them, arguably, even more arresting than the Twin Towers they so obviously recall. In a post-September 11 world, their symbolism, once thought principally to reflect Malaysia's formidable economic growth,<sup>1</sup> has become much more sinister: reminding also of Malaysia's vulnerability to terrorist attacks of the kind suffered in New York. Yet, paradoxically, their continued standing, the mere fact of their existence, serves to demonstrate that Malaysia has so far successfully protected against threats of this kind.

The Towers are simultaneously both indictment and affirmation: mirroring the conduct of the Malaysian government post-September 11. The government led by Prime Minister Dr. Mahathir Mohamad, seeks to emphasize the seriousness of a terrorist threat and Malaysia's potential vulnerability in order to justify the taking of special measures on its part, and to demand deference from Malaysian citizens in adopting such measures.<sup>2</sup>

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1. See JOHN HILLEY, MALAYSIA: MAHATHIRISM, HEGEMONY AND THE NEW OPPOSITION 3 (2001) (observing that the Petronas Towers have been invoked "as a celebratory statement of national achievement — perhaps even a two-fingered gesture to the old colonial order," but arguing that a more appropriate metaphor might be "the sense of duality with the West: a separation of identities standing together in tense proximity, a representation of the continuous convergence and conflict of ideas.").

2. See Prime Minister Mahathir, Budget Speech (Sept. 20, 2002), *available at* <http://www.smpke.jpm.my/WebNotesApp/PMMain.nsf/fsMainPM>.

Today, there are Muslims who have become fanatical to the extent of using violence, including bombing and resorting to murder as well as plotting to

On the other hand, the absence of attack is emphasized, too, as it validates the employment of special measures and of a strong, authoritative government.<sup>3</sup>

Although a number of different measures have been adopted,<sup>4</sup> the notorious Internal Security Act (“ISA”)<sup>5</sup> has been wielded most visibly in response to alleged security fears. The ISA is an expansive law but it is its provision for indefinite detention without trial to which the State has most frequent resort: the first sixty days of this detention are typically at the initiation of police authorities, and subsequent two-year periods occur at the authorization and renewal of the Minister of Home Affairs. In the months immediately preceding and subsequent to September 11, more than seventy individuals have been arrested and detained under its provisions, allegedly for involvement in militant Islamic activities. Government disclosure supporting such assessment, however, extends in many cases only to reports of membership in the Kumpulan Mujahideen Malaysia or, alternatively, the Kumpulan Militan Malaysia (“KKM”) — an alleged group with militant objectives, the existence of which has yet to be independently verified.

It would, however, be misleading to suggest that the use of the ISA is novel or only disturbing in the context of recent developments. The Act has existed almost as long as independence itself and has been used to delegitimize generations of political opposition and silence those considered “deviant” or “subversive” by the government. It has long attracted significant opposition from human rights groups located both in and outside the country, and the decision by the Joseph R. Crowley Program in

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overthrow the Government. If they had been successful in executing their plans, the nation will [sic] plunge into instability and utter chaos, resulting in the deterioration of the economy. We have spared the nation from this turmoil with the rule of law practised by the Government. The Internal Security Act (ISA) has indeed saved the [N]ation.

*Id.*

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

4. One of the most recent developments is the proposal that young Malaysians serve a period of national service designed to protect Malaysia from security threats. See Mustafa K. Anuar, *To Serve With Love*, 22(10) ALIRAN MONTHLY 9 (2002).

5. Internal Security Act, Act 82 of 1960 [hereinafter ISA].

International Human Rights at Fordham Law School to focus on Malaysia and the ISA was made prior to the events of September 11. Recent events, nonetheless, add urgency to the review of Malaysia and its employment of the ISA. These events have been employed to justify increased numbers of arrests and detentions of a particular set of individuals — alleged Islamic militants — and have served to substantially reverse the impetus for reform, both among the Malaysian public and, to the extent such inclination existed, within the government. Review is also of greater global application given the number of States that now seek to enact or revive similar laws in the belief that these laws are an essential component of any effective strategy in the fight against global terrorism.

This Report represents the culmination of a year-long project undertaken by the Crowley Program to update the study of the use and impact of the ISA in Malaysia in light of international law obligations. We have been concerned to reference first, those international commitments that Malaysia has expressly adopted. However, these are very few — reflecting the antipathy felt by the Malaysian government for international obligations of this sort.<sup>6</sup> Additionally, we have made reference to the generally accepted international law provisions applicable in this context — intended both to demonstrate the extent to which the ISA deviates from widely upheld international norms, even if those norms are not ones expressly accepted by Malaysia, and the extent to which other States, contemplating reviving or enacting similar laws, will fall afoul of their more readily undertaken international obligations in doing so.

The Fordham delegation was led by Professor Martin Flaherty and Nicole Fritz, the 2001-02 Crowley Fellow, and included Judge Azhar Cachalia of the Johannesburg High Court of South Africa; Lauris Wren of the New York City Bar Association's Refugee Assistance Program; and six second-year Fordham law stu-

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6. Only the following conventions are binding on Malaysia by express acceptance: the Universal Declaration of Human Rights; the Convention on the Elimination of all Forms of Discrimination Against Women (with a number of reservations); Convention on the Rights of the Child (with a number of reservations); Convention on the Abolition of Slavery; Convention on the Nationality of Married Women (with a number of reservations); Convention on the Prevention of the Crime of Genocide; ILO Convention 98 on Principles of the Right to Organize and to Bargain Collectively. See Meredith L. Weiss, *The Malaysian Human Rights Movement, in SOCIAL MOVEMENTS IN MALAYSIA: FROM MORAL COMMUNITIES TO NGO'S* (Meredith L. Weiss & Saliha Hassan eds., 2003).

dents: John Anderson, Jean Del Colliano, Lissett Ferreira, Diana Masone, Gregory Milne and Vivianna Stubbe.<sup>7</sup> Following the practice established in previous missions, the Crowley delegation participated in an intense program of study throughout the academic year preceding the mission.<sup>8</sup> This included a seminar addressing human rights issues in Malaysia specifically. While in Malaysia from June 1 to June 14, 2002, the delegation met with a broad range of individuals: lawyers, former judges, government-appointed human rights commissioners, non-governmental organization (“NGO”) activists, former detainees, families of detainees, members of the political opposition, and academics.<sup>9</sup> Despite repeated requests for meetings with government officials during the mission, all requests either met with no response or were declined.<sup>10</sup> The delegation conducted approximately 100 ISA-related interviews in all.

These interviews were conducted principally in Kuala

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7. The recommendations contained in this report are those of the Joseph R. Crowley Program in International Human Rights at Fordham Law School and do not necessarily reflect the views of every delegation member. Professor Bridget Welsh of the School of Advanced International Studies (“SAIS”), Johns Hopkins University, and a Johns Hopkins SAIS student, Amy Goad, also accompanied the delegation during the first week of the mission, but did not participate in subsequent deliberations informing the Report.

8. See Crowley Program in International Human Rights & Lawyers Committee for Human Rights, *Justice on Trial: State Security Court, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey*, 22 *FORDHAM INT’L L.J.* 2129 (1999); Crowley Program in International Human Rights, *One Country, Two Legal Systems*, 23 *FORDHAM INT’L L.J.* 1 (1999); Crowley Program in International Human Rights & Centro de Derechos Humanos, *Miguel Agustín Pro Juárez Presumed Guilty?: Criminal Justice and Human Rights In Mexico*, 24 *FORDHAM INT’L L.J.* 801 (2001); Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture and Women’s Inheritance Rights in Ghana, Report of the Joseph R. Crowley Program in International Human Rights*, 25 *FORDHAM INT’L L.J.* 259 (2001).

9. The Crowley Program wishes to thank everyone who met with our delegation and who gave their time and assistance. We are especially indebted to Suaram, without whom our ISA-related investigations would not have taken place. We would like to thank particularly Cynthia Gabriel and Yap Swee Sang. Additionally we wish to thank the many individuals who, prior to the mission, gave generously of their advice, contacts and information: Irene Fernandez, Malik Imtiaz Sarwar, Jomo K.S, Pawancheek Marican, Patricia Martinez, Anil Netto, Sivarasa Rasiah, Karim Raslan, Meredith Weiss and Bridget Welsh all provided invaluable assistance and insight, even if the final report and its focus strays from their initial advice. Finally, we would like to thank Judge Azhar Cachalia for accompanying our delegation. Once a political activist against apartheid who suffered detention under South Africa’s own Internal Security Act, he now serves as a judge in a democratic South Africa. His dual insights — as former detainee and now as upholder of the law — enriched our understanding immeasurably.

10. A draft version of this Report was, however, made available to the Malaysian government for comment.

Lumpur and it was here that members of the mission were able to observe a *habeas corpus* petition brought on behalf of an ISA detainee, allegedly involved in militant Islamic activities.<sup>11</sup> Members of the mission also traveled to Terengganu and Kelantan, States controlled by the Parti Islam Se-Malaysia (“PAS”) — regions from which a number of the most recent ISA detainees are drawn — and to Malaysia’s second city, Penang.

Based on international human rights standards, as well as Malaysia’s own domestic law, the mission identified five areas of focus in respect of ISA-authorized arrests and detentions: (1) the emergency framework of preventive detention laws; (2) reasonable suspicion or probable cause triggering arrest and detention; (3) legal defense and access to counsel; (4) forms of review; and (5) conditions of detention. The delegation paid particular attention to factors which contribute to and exacerbate the ISA’s repressive effect, including: measures against judges that might be characterized as punitive or retaliatory in those rare instances in which *habeas corpus* petitions are upheld; and government-sponsored initiatives that seek to mold a more pliant, less independent Bar Council. The mission further examined the social, economic, and particularly political context, in which ISA arrests and detentions take place. The ISA, although often the most ferocious, is merely one of a number of laws on Malaysia’s statute books that serves to severely curtail and undermine civil liberties and human rights.<sup>12</sup> Together these laws contribute to the creation of a deeply authoritarian political environment, in which attacks on independent voices — whether they emanate from the media, academia or the opposition — are routine.

As this Report documents, substantial evidence points to pervasive State-driven or sponsored violations of the rights of ISA

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11. The *habeas corpus* petition was brought on behalf of Sejahtul Dursina, a.k.a. Chomel Mohamad, wife of Yazid Sufaat.

12. See Memorandum from the Malaysian Bar Council on the Repeal of Laws Relating to Detention Without Trial (1998). The Memorandum identifies three major laws in force in Malaysia that provide for detention without trial: the Internal Security Act (1960); the Emergency (Public Order and Prevention of Crime) Ordinance 1969; and the Dangerous Drugs (Special Prevention Measures) Act 1985. It further identifies “eleven other pieces of legislation that curtail and/or marginalize civil rights”: the Restricted Residence Act 1933; the Sedition Act 1948; the Public Order (Preservation) Act 1958; the Prevention of Crimes Act 1959; the Trade Unions Act 1959; the Police Act 1967; the Societies Act 1966; the Universities and University Colleges Act 1971; the Official Secrets Act 1972; the Essential (Security Cases) Regulations 1975; and the Printing Presses and Publications Act 1984. *Id.*

detainees, including: the arbitrary arrest and detention of suspects; the failure to provide adequate access to legal counsel; the absence of any effective forms of review of arrest and detention, or of the conditions in which detainees are kept; and the infliction of intolerable conditions of detention and treatment, that if not torture (and sometimes it is), nonetheless systematically exceeds the point at which treatment becomes cruel, inhuman, and degrading.<sup>13</sup>

These abuses should, without more, merit the gravest concern. However, ISA arrests and detentions have an additionally egregious face, beyond the individual abuse and violation they effect. They serve, as the delegation was told time and again during interviews, to remove opposition leaders or potential leaders, effectively silencing their critical voices. Their detentions create vacuums and often leave the respective groups in disarray. The arrests and attendant abuses also discourage any other individuals from voluntarily assuming the leadership positions that have been left vacant.<sup>14</sup> The ISA is thus critically deployed to impede mobilization on the part of the political opposition and any other groups deemed undesirable by the government. In the result, freedom of association, assembly, expression, and even religion (given that many of the groups deemed undesirable are *Shi'ite* Muslims) are severely narrowed.<sup>15</sup> Obviously, not every arrest and detention will be prompted by these ulterior motives. Some arrests presumably respond to legitimate security considerations and recent events and developments suggest the existence of very real threats that Malaysia must treat seriously. The delegation was conscious of the fact that it was

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13. Violations mandated or encouraged by the ISA are not limited to those documented in this Report. For instance, Section 57 of the ISA provides that in certain circumstances, individuals found in possession of a fire-arm "without lawful excuse, the onus of proving which shall be on that person . . . shall be guilty of an offence and shall, on conviction be punished with death." ISA, *supra* n.5, Sec. 57. These provisions have merited and continue to merit severe criticism. However, the mission focused on those violations typically experienced by individuals detained under the ISA for ostensible security purposes.

14. See Interview with Ngeow Yin Hgee, Lawyer for ISA detainees in 1980s (June 2, 2002) (noting that without the six KeADILan detainees "the entire party is defunct.").

15. The Report might plausibly have focused on the effect of the ISA on any or all of these rights and the Report makes a number of observations with respect to these rights. However, the mission chose to concentrate on those violations brought about through the detention process and those manifested in the operations of the criminal justice system.



not equipped to evaluate the extent or seriousness of security threats facing Malaysia. Nonetheless, Malaysia's history of spuriously motivated arrests raises the presumption of bad-faith on the part of the government — one that is difficult to rebut.

Despite the disincentives for political activism, Malaysia nonetheless boasts a large number of courageous opposition activists. Opposition political parties continue to mobilize and critique the government. Outside of the strictly party-political sphere, groups like Suaram, Aliran, Hakam, and Chandra Muzaffar's Movement for a Just World, draw attention to the government's pervasive failure to respect fundamental human rights, notwithstanding their own members' susceptibility to ISA arrest and detention. The ISA itself has become the subject of a mass-based campaign — the Abolish ISA Movement ("AIM") — and groups like the Malaysian Bar Council have called for its repeal.<sup>16</sup> Sectors within Malaysia's civil society have thus consistently acted to protect and promote human rights. The state sector too has evidenced, at least in some respects, a more serious treatment of human rights and civil liberties. In July 1999, the National Human Rights Commission ("SUHAKAM") was established, and expressly mandated to have regard in the performance of its functions to the Universal Declaration of Human Rights ("UDHR").<sup>17</sup> Among its more notable accomplishments, the Commission has conducted a high-profile investigation into alleged police abuse during a public demonstration,<sup>18</sup> called for Parliament to review several oppressive laws, including the ISA, and urged the Parliament to ratify the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").<sup>19</sup> Nonetheless,

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16. Memorandum from the Malaysian Bar Council, *supra* n.12, at 1. At the Malaysian Bar Council's general meeting on October 10, 1998, attended by some 2,480 lawyers, a unanimous resolution was adopted calling for the repeal of the ISA, the Emergency (Public Order and Prevention of Crime) Ordinance 1969, and the Dangerous Drugs Act 1985.

17. A substantial caveat was attached to this injunction. *See* Human Rights Commission of Malaysia Act 597 of 1999, art. 4(4) [hereinafter Act 597 of 1999].

18. *See* SUARAM, MALAYSIAN HUMAN RIGHTS REPORT 2001: CIVIL AND POLITICAL RIGHTS 181 (2001) [hereinafter SUARAM REPORT] (documenting the Kesas Highway Report).

19. *Id.* at 174.

its overall record is mixed and a number of recent controversial appointments have served to erode confidence in its willingness to substantially challenge government policy.<sup>20</sup> However, as this Report went to press, SUHAKAM launched a thorough-going critique of the ISA, calling for its repeal.<sup>21</sup> It is hoped that this Report — many of its recommendations and conclusions similar to those of SUHAKAM — adds to public impetus for repeal of the ISA and other wide-ranging, ancillary reform.

The structure of the main body of the Report (Part II) mirrors the issues that the mission examined. Section I examines the justificatory framework for detention without trial laws, namely emergency conditions, and the extent to which Malaysia's reliance on such a framework in current conditions is invalid. Section II documents the absence of reasonable suspicion or probable cause supporting ISA-authorized arrests and detentions. In Section III, the Report addresses the issue of legal representation and the restrictions on access to counsel, including absolute denial of access at stages during detention at which the detainee is most vulnerable. The almost complete absence of any effective form of review of the ISA-authorized arrests and detentions is the subject of Section IV. Section V examines the conditions of detention to which detainees are subject and the treatment shown them by officials. Each section chronicles the mission's evidence, discusses applicable international and human rights standards, and concludes with findings and recommendations. While findings and recommendations are documented in discrete sections of the Report, realization of many of these recommendations, ostensibly applicable to only one sec-

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20. In order for these appointments to take place, three of the original commissioners failed to have their contracts renewed. Two of the three were the commissioners who conducted the inquiry into the Kemas Highway incident. The other had conducted an examination of the situation of indigenous people in Sarawak. The new head of SUHAKAM is a former Attorney-General who, in the past, explicitly endorsed the ISA. See Interview with Yap Swee San and Cynthia Gabriel, members of Suaram (June 2, 2002).

21. SUHAKAM, *Review of the Internal Security Act 1960* (April, 2003) available at <http://www.suhakam.org.my>. While SUHAKAM deservedly merits acclaim for its report, we note with concern its recommendation that new anti-terrorist legislation be enacted. The report makes no enquiry as to whether already existing legislation might serve this purpose. Moreover, it frames the proposed legislation by reference to recently enacted comparative laws, like the USA PATRIOT Act of 2001, the UK's Anti-terrorism, Crime and Security Act 2001 and India's Prevention of Terrorism Ordinance 2001 — all of which themselves raise serious human rights concerns.

tion of the Report, would in many cases act to ameliorate abuses documented in other sections.

These divisions have been drawn to allow for a clear appreciation of abuses brought about by the ISA; however, they inadequately capture the context in which ISA arrests and detentions take place — a context essential for understanding the chilling effect of this Act, its many-tentacled reach beyond the individual arrests and detentions it affects, and its position as the government's most potent weapon of repression.

Part I of the Report attempts to provide this contextual perspective by briefly examining the history of the ISA, and examining the circumstances of two recent, high-profile bouts of ISA arrests and detentions — those of the “KeADILan-10” and the even more recent arrests of a much larger group of individuals allegedly involved with militant Islam.

## PART I

### A. *Introduction*

In the more than forty years of the ISA's existence, motivations for ISA arrests and detentions have varied — as subsequent sections elaborate — but the typical experience of the ISA detainee has gone relatively unchanged. He (more often than she) is arrested by police officials, ostensibly for having acted “in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof,” and kept in police custody for a period of sixty days (although the duration may sometimes be slightly less).<sup>22</sup> During this period, he is kept in a small, unventi-

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22. See ISA, *supra* n.5, Sec. 73. Section 73 of the ISA provides:

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

lated cell with few amenities, denied access to counsel and more often than not to his family and subjected to prolonged periods of interrogation during which mental and often physical stress is applied. At the end of the sixty-day period, the detainee is typically transferred to the Kamunting Detention Camp, located several hours from Kuala Lumpur, under orders of the Minister of Home Affairs.<sup>23</sup> Conditions at the camp are marginally better than those in police custody, but the prospect of indefinite detention — two-year detention orders may be endlessly renewed — make the experience intolerably bleak. At no point in this process is the detainee given the opportunity of contesting and disproving the government's allegations at trial. Although the ISA mandates an internal review process,<sup>24</sup> the statute offers no

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(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under [S]ection 8:

Provided that —

(a) he shall not be detained for longer than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the inspector-General in that behalf, who shall forthwith report the same to the Minister.

*Id.*

23. *See* ISA, *supra* n.5, Sec. 8. Section 8(1) of the ISA provides:

If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

*Id.*

24. *See* ISA, *supra* n.5, Sec. 11 and Sec. 12. Section 11(1) of the ISA provides: A copy of every order made by the Minister under section 8(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every person shall be entitled to make representations against the order to an Advisory Board.

*Id.* Section 12(2) of the ISA provides:

Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to section 13, be final, and shall not be called into question in any court.

*Id.*

meaningful prospect of release and opportunities to challenge the legality of the detention before a court are few — constrained by statutory provision<sup>25</sup> and limited access to counsel.

The sections that follow examine the history of this law — the circumstances in which it has been deployed and the ends it has served — in an attempt to show the broader civil and political distortions created by the ISA that go beyond the individual violations extensively documented in Part II of the Report. The last section of Part I, as a precursor to Part II, looks at the standards by which the delegation assessed these individual violations — principally those set by international human rights law — and outlines why Malaysia, despite its antipathy, may justly be held to these standards.

### B. *History of the ISA*

In the years preceding the end of colonial rule in Malaysia, a communist insurgency arose that agitated for independence more aggressively than other nationalist forces then established in the country. The British colonial authorities responded with Emergency Regulations, the ISA's precursor, that similarly provided for detention without trial. Malaysia retained the Regulations at independence in 1957 but in 1960, the new Parliament enacted the ISA, aimed at suppressing the insurgent militants who continued to mobilize, particularly along the borders.<sup>26</sup>

Throughout the 1960s, ISA-arrests and detentions targeted those ostensibly involved in communist activities, most particularly members of the then Labour Party which formed part of

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25. See ISA, *supra* n.5, Sec. 16. Section 16 of the ISA provides:

Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents [even before a Court] which he considers it to be against the national interest to disclose or produce.

*Id.* See also *id.* Sec. 8B. Section 8B, introduced by a 1988 amendment, provides:

There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

*Id.*

26. For overviews of this period, see SAID ZAHARI, *DARK CLOUDS AT DAWN: A POLITICAL MEMOIR* (2001). See also EDMUND TERENCE GOMEZ & JOMO K.S., *MALAYSIA'S POLITICAL ECONOMY: POLITICS, PATRONAGE AND PROFITS 10-23* (1997).

the Socialist Front, but the late 1960s provided yet another ostensible justification for ISA arrests and detentions. In 1969, the country's most explosive race riots erupted against a backdrop of the ruling Alliance's first-time ever loss of its two-thirds parliamentary majority. In the wake of these riots in which over 200 people were killed and sections of Kuala Lumpur were left devastated, the Yang di-Pertuan Agong (the King) declared a state of emergency, Parliament and the Constitution were suspended, and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("EPOPCO") was enacted.<sup>27</sup> But although EPOPCO was devised as the direct response to the riots and remains in force, the ISA was then upheld and continues to be upheld as a shield against renewed racial hostility.

The end of the 1960s, however, did not only usher in a new justification for the use of the ISA. Loss of political support for the ruling Alliance's dominant party, the United Malays' National Organization ("UMNO"), and the violence of the riots, signaled an increasing discontent on the part of many ethnic Malays with the prevailing status quo. The New Economic Policy ("NEP"), unveiled in 1970, was intended to address these grievances. The NEP aimed to stimulate growth generally, reduce poverty and achieve "inter-ethnic economic parity between the predominantly Malay Bumiputeras and the predominantly Chinese non-Bumiputeras,"<sup>28</sup> and consequently, entailed a much greater emphasis in government policy on economic well-being. Alongside this government-led empowerment project, more organic grass-roots initiatives aimed at political and economic advancement also became more pronounced. Groups such as the Angkatan Belia Islam Malaysia ("ABIM")<sup>29</sup> and other Islamic associations promoting an Islamic resurgence and an embrace of

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27. Ordinance 5 of 1969. Its provisions are substantially similar to those of the ISA, but in the case of EPOPCO, police officers must have reason to believe when effecting arrest and the Minister must be satisfied when issuing a detention order that such arrest or detention is necessary to prevent the individual from acting in a "manner prejudicial to public order," or that it is necessary for the "suppression of violence or the prevention of crimes involving violence."

28. GOMEZ & JOMO, *supra* n.26, at 24. The term "Bumiputeras" is a Malay word meaning "sons of the soil," and is used in Malaysian political discourse generally to indicate ethnic Malays.

29. Translated as the Malaysian Islamic Youth Movement, then led by Anwar Ibrahim who was later to become a member of UMNO and Deputy Prime Minister under Prime Minister Mahathir.

“authentic” Islamic identity, enjoyed widespread popularity.<sup>30</sup> Yet, despite the intersection of their objectives with those of the government in seeking ethnic Malay advancement, their tendency to vocally criticize the government and take to the streets in protest provoked both the ire of the executive and its power to exercise the ISA. It was this bid to silence student activists that became characteristic of ISA-authorized arrests and detentions carried out during the 1970s.

The 1980s promised change: the new Prime Minister, Mahathir Mohamad, had himself expressed criticism for the ISA early in his career, and a diminished resort to the ISA in the early years of the 1980s fueled expectations that the government’s use of repressive legislation would abate.<sup>31</sup> Nonetheless, in 1987, the ISA was deployed to widespread, notoriously abusive effect.<sup>32</sup> Amidst faltering economic growth, an acrimonious, divisive leadership struggle within UMNO, and heightening Malay-Chinese tensions, over one hundred opposition figures were arrested under the ISA. Trade unionists, academics, church workers, public intellectuals, NGO activists and opposition leaders were all targeted in what was known as “Operation Lalang.” The media was also subject to increased restrictions and a day before the Supreme Court was to oversee a challenge to Mahathir’s UMNO leadership, Federal Court President Tun Salleh Abbas was dismissed.

Political turmoil seemed less a feature of the Malaysian landscape once economic prosperity resumed in the late 1980s and early 1990s — then at such levels that Malaysia was heralded as one of the East Asian economic miracles. Impressive economic performance was credited, in large part to responsible, forward-thinking leadership on the part of the Malaysian political elite and Mahathir’s pronouncements that “Western-orientated” human rights were incompatible with an “Asian” emphasis on community and public order, and an apparent East Asian aptitude for economic growth, if internationally provocative, none-

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30. Meredith L. Weiss, *What Will Become of Reformasi? Ethnicity and Changing Political Norms in Malaysia*, in *CONTEMP. SOUTHEAST ASIA* 424 (1999).

31. AMNESTY INTERNATIONAL REPORT ON MALAYSIA, HUMAN RIGHTS UNDERMINED: RESTRICTIVE LAWS IN A PARLIAMENTARY DEMOCRACY, A.I. Index: ASA 28/06/99, available at <http://www.web.amnesty.org/ai.nsf/index/ASA280061999>.

32. Gomez & Jomo note that it was the “the worst abuse of the ISA” in the 1970s. See GOMEZ & JOMO, *supra* n.26, at 2.

theless won tacit compliance at home. By 1998, that compliance had dissipated as the economy imploded and yet another leadership struggle emerged — this time between Mahathir and his deputy, Anwar Ibrahim, which resulted in Anwar's dismissal from his Cabinet posts as Deputy Prime Minister and Finance Minister and his suspension from UMNO.<sup>33</sup> In the days following his departure, Anwar took his challenge beyond the precincts of UMNO's political structures and toured the country. Anwar's history of activism within ABIM and other Islamic NGOs, and the perception of him by non-Islamic, non-Malay groups as having acted as a modernizing influence within the government, allowed Anwar to enjoy popular appeal and enabled him to bring about a broad-based alliance of opposition groups. The Reformasi movement, as it was popularly known, with its spirit of inter-ethnic cooperation challenged traditional Malaysian political discourse and the political structures and prompted severe response.<sup>34</sup> A few weeks after his dismissal, Anwar<sup>35</sup> and a number of his followers were arrested and detained under the ISA. The physical abuse he suffered during detention and disclosed when he appeared in court, after intense domestic and international pressure, only spurred the Reformasi movement and its call for "Justice for Anwar."<sup>36</sup> Huge public protests, unparalleled in the country's history resulted. The violent repression these protests occasioned and, in part, signs of economic recovery served to subdue the unrest. The Reformasi movement, however, remained active and was to be-

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33. Weiss, *supra* n.30, at 424. As Weiss explains, although Anwar was ostensibly fired for sexual misconduct, the reason behind the dismissal was said to be a disagreement between Anwar and Mahathir about aspects of national economic policies — an explanation seemingly corroborated by the fact that "the sacking coincided precisely with the sudden imposition of stringent currency and capital controls." *Id.*

34. *Id.*

35. On September 20, 1998, Anwar was detained under the ISA but a few days thereafter he was held on criminal charges. In 1998, he was tried for four counts of corruption — allegedly having instructed police officials to conceal evidence of his sexual misconduct — and in 1999 for sodomy. Both trials resulted in conviction and prison sentences. Each was widely criticized for failing to conform to fair trial standards. Subsequently, two appeals on the corruption convictions have been dismissed. Currently, Anwar remains imprisoned, despite reports of serious ill-health. In his last public appearances Anwar was seen in a wheelchair and a neck-brace, raising concern that the beating he suffered while in police custody has resulted in permanent damage. During the mission, the delegation met with several individuals who expressed their concern that Anwar's health had been deliberately endangered during his imprisonment.

36. Weiss, *supra* n.30.



come the subject of yet more high-profile ISA arrests and detentions — notably the “KeADILan 10”.

Before discussing these arrests in more detail, it is worth presenting certain features that have characterized previous waves of ISA arrests — not only because they are illustrative in themselves, but because these help predict current and future circumstances in which ISA arrests will take place. Many of the high-profile bouts of arrests and detentions have occurred during periods of economic downturn. While economic instability may, without more, act as a partial trigger for ISA arrests (arrests may serve as diversionary measures), far more significant in the eyes of public officials is the popular unrest it prompts. In periods of economic well-being, it is unlikely that “the average Malaysian will choose transparency, accountability and ‘justice for all’ over a proven record of economic development . . . and relative stability.”<sup>37</sup> This is not the case during economic difficulties, when the population exhibits far less tolerance for repressive government policies and is far more prepared to vocally criticize the government, and risk detention under the ISA.

A related and more important indicator is the appearance of political movements and structures that challenge traditional Malaysian political mobilization. Malaysia generally enjoys peaceful, ordered relations among the different ethnic groups; yet, this co-existence is more a function of political accommodation of the separate groups than real integration. Although the ruling alliance, the Barisan Nasional (“BN”) (National Front) draws support from all three major ethnic groups, it does so because it comprises parties that appeal to the separate ethnic groups individually.<sup>38</sup> Political movements that attempt to mobilize across ethnic lines, and so muddle traditional constituencies, challenge the political predicate of ethnic “apartness” that is harnessed for political gain. Consequently, leaders and activ-

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37. *Id.* See also Patricia Martinez, *The Islamic State or the State of Islam in Malaysia*, CONTEMP. SOUTHEAST ASIA 474, at 484 (2001) (stating that “[a] privileging of economic well-being is a major factor in the lack of resistance to the loss of fundamental freedoms and civil rights by most of the Malaysian middle-class, regardless of the ethnic group, the rationale being ‘don’t disturb a good thing.’”).

38. Primarily, the United Malays National Organization (“UMNO”) directed at Malays; the Malaysian Chinese Association (“MCA”) directed at the Chinese; and the Malaysian Indian Congress (“MIC”) directed at Indians.

ists within these movements have often been targets of ISA arrests and detentions.

ISA arrests and detentions also often coincide with periods of heightened Islamic discourse within the Malaysian political arena. Ethnic Malays are by definition Muslim<sup>39</sup> and UMNO, promoted as the political home of ethnic Malays, engages and accommodates Malay Islamic identity. Mahathir, in particular, has “sought to consecrate the idea that UMNO speaks not only for Malays, but for Islam.”<sup>40</sup> When other groups — political parties or NGOs — attempt successfully to appeal to the same constituency on the basis that they are more legitimate, sincere guardians of Islamic identity, individuals within these groups are often likely to be subject to ISA arrests and detentions. These features are identifiable in the following section in which the ISA arrests and detentions of the “KeADILan” ten and of alleged Islamic militants are discussed.

### C. *Recent Arrests*

#### 1. Arrests of the “KeADILan 10”

In April 1999, days before the verdict in Anwar Ibrahim’s first trial, his wife, Wan Azizah, announced the formation of the Parti KeADILan Nasional (“KeADILan”).<sup>41</sup> In orientation it explicitly attempted to surmount the country’s inter-ethnic divides, and espoused multi-racial aspirations.<sup>42</sup> It very rapidly assumed the role of primary opposition party, explained to some degree by the fact that it “offered a meaningful alternative for Malay-

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39. See MALAY. CONST., art. 160. Article 160 defines a “Malay” as: a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and –

(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or

(b) is the issue of such a person.

*Id.*

40. See HILLEY, *supra* n.1, at 185.

41. Translated as the “National Justice Party.” The party followed Wan Azizah’s earlier formation in December 1998 of the Pergerakan KeADILan Sosial (Movement for Social Justice), known as “ADIL.” *Id.* at 152.

42. It should be noted that like the Reformasi movement itself, of which it was a major constituent, KeADILan’s leaders are primarily young, middle-class Malay men, suggesting that the party is not as multiracial and egalitarian as its leaders profess. See Weiss, *supra* n.30, who makes this point with respect to the Reformasi movement more broadly.

sians uncomfortable with the perceived religio-ethnic options of PAS [Parti Islam SeMalaysia] and DAP [Democratic Action Party].<sup>43</sup> By late 1999, KeADILan together with other prominent opposition groups — PAS<sup>44</sup>, DAP and Parti Rakyat Malaysia<sup>45</sup> (“PRM”) — had formed the Barisan Alternatif (“BA”)<sup>46</sup> and readied itself to contest elections on this basis. The selection of Anwar Ibrahim as the BA’s nominal leader confirmed the primacy of KeADILan within the alliance, because while he had no official role within the party, he was, nonetheless, perceived as its guiding force.

Yet, despite indications to the contrary, the BA failed to significantly erode the BN’s electoral majority, as evidenced during the November 1999 elections where the BN retained its long-standing two-thirds majority and secured Mahathir a fifth successive term in office.<sup>47</sup> Election tallies, however, fail to accurately reflect the real shift that had occurred — the BA seized 40% of the popular vote and the State of Terengganu, formerly controlled by UMNO, was won by PAS, signalling the emergence of “a rural-urban/north-south divide.”<sup>48</sup> The resumption of Anwar’s second trial in January 2000, refocused attention on the issues that had initially sparked Reformasi and inspired a government crackdown on BA-aligned media. This censorship, together with the upholding of Anwar’s original conviction for corruption, reaffirmed the government’s heavy-handed approach. Significantly, Malaysians newly discomfited by this approach were presented with a credible alternative to the BN in the form of the BA and the survival of the alliance beyond the period of the elections disproved accusations of cooperation solely for the purpose of political convenience.

Early in 2001, KeADILan won the symbolically important Lunas by-election, a traditionally safe BN seat. This electoral victory in an ethnically mixed constituency indicated that Mahathir’s frequent invocation of the Indonesian race riots, which had effectively frightened Malaysians, particularly the Chinese, against supporting Reformasi objectives, had lost much of

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43. See HILLEY, *supra* n.1, at 227.

44. Translated as “the Islamic Party of Malaysia.”

45. Translated as “the Malaysian People’s Party.”

46. Translated as “the Alternative Front.”

47. HILLEY, *supra* n.1, at 260.

48. *Id.* at 264.

its power. This scare-mongering was buttressed by far more severe means of instilling fear in April 2001 when ten young, prominent individuals associated with KeADILan, many of them leaders of the party,<sup>49</sup> were arrested and detained under the ISA.<sup>50</sup> A press statement on April 11, issued by the Inspector General of the Police, Norian Mai, suggested that all ten were arrested to prevent their using bombs and grenade launchers to topple the government.<sup>51</sup>

Four of these ten have subsequently been released: two (Badaruddin Ismail and Raja Petra Kamaruddin) at the initiative of the police authorities; and two others (N. Gobalakrishnan and Abdul Ghani Haron) by habeas corpus petition – an outcome notable in Malaysia for its rarity. The remaining six (Mohd Ezam Mohd Nor, Hishamuddin Rais, Chua Tian Chang, Lokman Nor Adam, Dr. Badrulamin Bahron and Saari Sungib)<sup>52</sup> had their initial sixty day detentions extended to two years and are currently in the Kamunting Detention Center.<sup>53</sup>

The affidavits of all ten confirm that police interrogation during their sixty-day detention periods routinely failed to canvass their alleged involvement in insurgency efforts, despite the Inspector General's earlier pronouncement.<sup>54</sup> As Judge Mohamed Dzaidin noted in their Federal Court Appeal:

[D]espite the press statement of the respondent that the appellants were detained because they were a threat to national security, it is surprising to note from the appellants affidavits that they were not interrogated on the militant actions and neither were they questioned about getting explosive materi-

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49. See Interview with YB Ramil B. Ibrahim, KeADILan MP, (June 5, 2002) (explaining that "the six who were detained were key figures because they had the ability to unite people and organize the masses. They were young, up-and-coming people within the party."). Interview (June 5, 2002).

50. Seven were detained several days before a huge gathering was to take place before the National Human Rights Commission, SUHAKAM, in order to commemorate the second anniversary of the conviction of Anwar Ibrahim. See SUARAM REPORT, *supra* n.18, at 24.

51. *Id.*

52. Mohamad Ezam Mohd Noor and Chua Tian Chang are also facing criminal charges for offences they allegedly committed during the Lunas by-election. SUARAM REPORT, *supra* n.18, at 149.

53. *Id.* Dr. Badrulamin Bahron was released from Kamunting on November 3, 2001 and placed under a Restricted Residence order, but has subsequently been sent back to the Kamunting Detention Center. *Id.* at 27.

54. Much more detail about the nature of the interrogations is provided in a subsequent section of the Report.

als and weapons. Clearly, . . . the questions that were asked were more on the appellants' political activities and for intelligence gathering. I find that there is much force in the contention of learned counsel for the appellants that the detentions were for an ulterior purpose and unconnected with national security.<sup>55</sup>

The circumstances of their detentions are elaborated in greater detail in a later section of the Report.

## 2. Arrests of Alleged Islamic Militants

Anwar's arrest and the emergence of the Reformasi movement didn't only allow for the establishment of a new social justice party, KeADILan; it also promoted the revival and enhancement of already existing opposition parties — most notably PAS.<sup>56</sup> PAS has long promoted itself as the political home of Islam in Malaysia, setting itself up in direct competition with UMNO, which has also sought to “mandate, control and harness the icons, symbols and images of Islam.”<sup>57</sup> UMNO has responded to the challenge brought by political parties and Islamic-orientated NGOs to the legitimacy of its invocation of Islam with a variety of strategies. In an attempt to win over traditional elements to its more modernist elaboration of Islam, UMNO has attempted to assimilate leaders of more traditional groupings: UMNO's co-optation of Anwar, previously leader of ABIM, is one such illustration.<sup>58</sup> It has also, through the machinery of government, employed more authoritarian measures as was the case in the 1970s when student leaders of ABIM and other Islamic revival groups were targeted and subject to ISA arrests and detention. In the aftermath of the Reformasi movement this is again true.

PAS' outspoken criticism of the government's treatment of Anwar and its strong support for Reformasi had positioned PAS as an “egalitarian party, engaged in mainstream social issues and

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55. Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals, 2002-4 M.L.J. 449. Despite the Federal Court's finding that the arrests and detentions had been made *ultra vires* and were unlawful, the Court stopped short of ordering release of the appellants, constrained by their inability to review detention orders issued by the Minister under Section 8 of the ISA.

56. HILLEY, *supra* n.1, at 207.

57. *Id.* at 12.

58. *Id.*

receptive to other opposition parties, NGO's and civil organizations."<sup>59</sup> Despite or because of this new image and the enhanced reception afforded PAS, UMNO continued to push the line that PAS represented a fundamentalist conception of Islam, unsuited to Malaysia's overall objectives of economic growth and development. In elaborating this point, Abdullah Ahmad, then the government's special envoy to the United Nations ("U.N."), stated that: "[t]he 'Islamic tiger' is as dangerous as the once powerful 'communist tiger' . . . The [N]ation continues to need a strong leader, otherwise our efforts to rescue the economy could be stymied by reformasi and the Islamists."<sup>60</sup> During the November 1999 elections, Mahathir vigorously advanced the same position, depicting PAS as a grouping of devious fanatics, intent on manipulating the BA in order to advance Islamic goals.<sup>61</sup> The strategy aimed not only at scaring the electorate, but also at fomenting division between PAS and its BA allies.

These elections secured UMNO yet another resounding majority in Parliament; yet, the BA obtained more than forty percent of the popular vote, and perhaps, more significantly, PAS won the state of Terengganu. Its control of two North-Eastern Peninsula States signalled a powerful endorsement of its Islamic countervision and provoked the adoption of more coercive strategies on the part of the government in an effort to stem its expansion. In March 2000, PAS' newspaper, HARAKAH, had severe constraints imposed: restricted from its twice-weekly publication, it was permitted to publish only twice monthly. Criminal prosecutions were also employed to tighten the screws. That same year, HARAKAH's editor and printer were arrested and charged under the 1948 Sedition Act.<sup>62</sup>

Government attempts to demonize PAS accelerated in 2001. Mahathir and an assortment of ministers all sought to present PAS as fundamentalist and a source of nascent insurgency.<sup>63</sup> Consistent with this political strategy were the ISA-authorized arrests of ten individuals, all closely associated with PAS. All ten were reported to be members of an alleged group, the KMM,

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59. *Id.* at 207.

60. As quoted in HILLEY, *id.* at 208.

61. *Id.*

62. *Id.* at 265.

63. See SUARAM REPORT, *supra* n.18, at 32. Even Singaporean Senior Minister, Lee Kuan Yew, allegedly expressed his concern at the growing influence of PAS in Malaysia.

said to be intent on violently toppling the government. Nine eventually had their sixty day detention periods extended under two year detention orders. While uncertainty about the group and its existence was reflected in the media's alternate labelling of the group – as the Kumpulan Mujahideen Malaysia or the Kumpulan Militan Malaysia – and by the fact that no group structures or leadership of the organization had been independently verified, Mahathir nonetheless insisted that the KMM had formed an alliance with groups in Indonesia and the Philippines aimed at establishing Islamic states in the respective countries.<sup>64</sup>

The Prime Minister's pronouncement came only a week before September 11. In the immediate aftermath of the attacks, Malaysian officials were quick to argue that use of the ISA had been vindicated.<sup>65</sup> Several more individuals also allegedly involved in Islamic militancy were arrested and detained under the ISA in the following months, with little explanation given as to the reason for their arrests, prompting Human Rights Watch to style these measures "opportunism in the face of tragedy."<sup>66</sup> At present, more than seventy persons allegedly involved with the KMM and other Islamic militant groups have been arrested and detained under the ISA.

The congruency of these recent arrests with the government's past attempts to discredit PAS not only raise suspicion that the threat Malaysia suffers from Islamic extremists, particularly those affiliated with PAS, is exaggerated, but also that some of these arrests have been effected with the specific aim of further criminalizing PAS in the public's eye. Although not all those arrested have explicit ties to PAS, these ties, such that they are, have been repeatedly emphasized ensuring that all the arrests have negatively effected the general public's perception of PAS.<sup>67</sup> It should be noted that a number of PAS' policies pre-

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64. *Id.*

65. Prime Minister Mahathir is reported to have said: "[The ISA] is more necessary than ever. Even the rich countries, the so-called liberal democracies, have decided that there is a need for some preventive action to stop people from doing things that are harmful. People have been detained in other countries now, just as we detain people because they are a threat to security." HUMAN RIGHTS WATCH, WORLD REPORT 2003, available at <http://www.hrw.org/wr2k3/asia.html>.

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

67. In June 2002, at UMNO's Annual Assembly, Mahathir insisted that there was a direct link between PAS and terror networks. See NEW STRAITS TIMES, June 22, 2002.

sent problems for a government ostensibly committed to ethnic, cultural and religious plurality and equality. PAS' administration of Terengganu and Kelantan, and its attempt to implement the Hudud laws<sup>68</sup> raise serious questions about PAS' commitment to fundamental human rights and civil liberties — particularly those owed gender and religious minorities. The austerity of its vision invites speculation that PAS members have had contact with other groups in the region, seeking the establishment of similar Islamic States, but by more militant means.<sup>69</sup> Yet, this in itself is insufficient to warrant heightened security concerns, and the government has made no suggestion that it does. Instead, government disclosures supporting the recent arrests have often extended only to assertions of KMM membership and allegations that some of the detainees had fought in Afghanistan against the Soviets and attended Pakistani Madrasas, again without any substantial evidence indicating that security concerns are the real motivation for the arrests.

Nevertheless, genuine concern for security threats must complicate the assessment of this recent wave of arrests. In the wake of the Bali bombing, the International Crisis Group has released a report on the *Jemaah Islaamiah* network, suggesting that Malaysia may, in fact, be the site of certain terrorist activity, or at least planning.<sup>70</sup> The Mahathir-led government, however,

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68. The Kelantan Syariah Criminal Code Bill (II) of 1993 lists *zina* (unlawful sexual intercourse) and *irtidat* as *Hudud* offences. Under the evidentiary provisions applicable to *zina*, a woman alleging rape must produce not less than four witnesses, each of which "shall be an adult male Muslim who is *akil Baligh*, and shall be a person who is just." Should she fail to prove rape, she herself may be found guilty of *zina*, the punishment for which includes "stoning the offender with stones of medium size to death." The general evidentiary provisions applicable to *Hudud* offences and those pertaining specifically to *zina*, require that all witnesses be adult males and Muslim, evidencing both religious and gender discrimination. See generally *SISTERS IN ISLAM, HUDUD IN MALAYSIA: THE ISSUES AT STAKE* (Rose Ismail ed., 1995).

69. In October 2002, a controversy erupted when the United Nations ("U.N.") published a report citing "terrorist expert" Rohan Gunaratna's thesis that PAS had links to Al Qaeda. However, he made this same claim with respect to the ruling Barisan Nasional and alleged that links had been forged through the Moro Islamic Liberation Front, operational in southern Philippines. See Anil Netto, *Terror Link Shakes Malaysia Coalition*, *ASIA TIMES ONLINE*, Oct. 23, 2002, available at <http://news.bbc.co.uk/2/hi/asia-pacific/2340449.stm>. The U.N. has subsequently retracted these allegations.

70. INTERNATIONAL CRISIS GROUP, *INDONESIA BACKGROUNDER: HOW THE JEMAAH ISLAMIAH TERRORIST NETWORK OPERATES*, *ASIA REPORT* No. 43 (2002). The Report makes the following findings, among others:

The top strategists appear to be protégés of Abdullah Sungkar, the co-founder with Abu Bakar Ba'asyir, of Pondok Ngruki, a *pesantren* (a religious boarding



while using the changed global context to justify increased detentions, has adamantly rejected any suggestion that Malaysia operates as a hub of terrorist operations.<sup>71</sup> Surprisingly, no arrests have been made in connection with the highly publicized alleged meeting in 2000 of some of the September 11 hijackers in Kuala Lumpur. The meeting is reported to have brought together Khalid Almihdhar and Nawak Alhazmi, two of the September 11 hijackers, at least one of the suspects in the U.S.S. Cole attack and Zacarias Massaoui (the alleged 20th hijacker) in the home of Malaysian, Yazid Sufaat.<sup>72</sup> Yazid Sufaat is currently detained under the ISA for reportedly ordering four tons of the explosive, ammonium nitrate, but media investigations contend that he also arranged the visit to Malaysia of Zacarias Massaoui and paid him a large sum of money.<sup>73</sup> Malaysian officials have fiercely denied these reports.<sup>74</sup> This failure by Malaysian authorities to give any credibility to reports that Malaysia might be the site of internationally directed terrorist activity is curious. So, too, is its failure to more fully identify the threat posed by *Jemaah Islamiyah*<sup>75</sup> (an organization, unlike the KMM, whose structures and leadership have been identified), particularly in the context of the recent arrests and detentions. These failures suggest that

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school) in Central Java, *mostly Indonesian nationals living in Malaysia*, and veterans of the anti-Soviet resistance or, more frequently, the post-Soviet period in Afghanistan . . .

Abu Bakar Ba'asyir, now under arrest in a police hospital in Jakarta, is the formal head of *Jemaah Islamiyah*, but a deep rift has emerged between him and the *Jl leadership in Malaysia*, who find him insufficiently radical.

*Id.* at Executive Summary, i-ii (emphasis added).

71. In an interview with CNN on May 16, 2002, Mahathir made the following comment:

From what we have discovered they (terrorists) functioned as cells which do not know what the other cells are doing. I doubt whether they revealed the things they wanted to do to each other. Each has apparently got its own mission and those in Malaysia were mainly concerned with how to overthrow the (Malaysian) government.

Transcript available at [http://pgoh.free.fr/cnn\\_interview.html](http://pgoh.free.fr/cnn_interview.html).

72. John Riley, *Probes Show Terror's Global Span*, NEWSDAY, Dec. 18, 2001.

73. Simon Elegant, *Eye of the Storm*, TIME ASIA, Feb. 11, 2002.

74. *Id.* See also *Malaysia Suggests Jailed 9/11 Suspect had an Innocent Role*, N.Y. TIMES, Sept. 28, 2002, at Sec. A, at 9. The article reports Malaysian Minister of Home Affairs, Abdullah Ahmad Badawi stating that Sufaat had been unaware of the identity of those attending the meeting and of what had been discussed.

75. In the International Crisis Group Report, Sufaat is listed as a senior *Jemaah Islamiyah* and is said to be responsible for the Christmas Eve 2000 bombings in Medan. INTERNATIONAL CRISIS GROUP REPORT, *supra* n.70, at 36.

the Malaysian government has at best undertaken an overbroad sweep of arrests without justifying why so blunt an instrument as the ISA should be employed. At worst, however, they suggest that the Malaysian government has used recent tragic events to undercut legitimate political opposition, while downplaying a genuine security threat directed internationally.

Ultimately, whether the recent arrests have been undertaken in bad faith is an open and colorable question. The large numbers of those arrested and the lack of information makes any definitive conclusion impossible. Given these circumstances and a history of the ISA's pretextual use, the government bears a much greater burden of justifying its actions in a credible and transparent manner. However, the recent arrests are not disturbing only because those detained may not merit suspicion. Even in circumstances of valid suspicion, the government must still make the case for the necessity of resorting to measures like the ISA. Accordingly, the Malaysian government may be said to bear a double burden: it is required to show that the recent arrests are not prompted by ulterior motives, and to show that the emergency measures are necessary. Even in circumstances of genuine security threat, the presumption of international law is that individuals must be tried before a public court and their conditions of detention overseen by accountable authorities – not least because without such checks grave abuses of the type chronicled in the following sections of the Report become commonplace.

#### D. *The ISA and International Human Rights Law*

The second part of the Report documents human rights violations carried out under the ISA and the Report does so primarily through the lens of international human rights law, in an effort to urge reform.<sup>76</sup> That said, the Malaysian government's not infrequent expressions of ambivalence for human rights<sup>77</sup>

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76. Although the Report also examines these violations against applicable domestic standards.

77. The government's leading role in the formulation of the Bangkok Declaration, a regional document circulated prior to the 1993 Vienna Conference on Human Rights that was critical of the existing human rights regime and called for attention to regional historical, cultural and religious particularity, demonstrated most notably its ambivalence towards human rights. The Declaration provoked the assertion of an "Asian values" discourse, in contradistinction to "human rights" and in turn has led to an enor-

and its failure to sign on to many of the most significant human rights instruments may make this approach appear both ineffective and even unfair. Yet, despite its often truculent position, Malaysia both believes itself to be, and actively seeks to be, a part of an international community endorsing and upholding human rights. As a member of the U.N., it is bound by the Charter's stated purpose of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,"<sup>78</sup> and by the protections listed in the UDHR.<sup>79</sup> Legislation establishing the Malaysian National Human Rights Commission evidences express commitment to the provisions of the UDHR, although admittedly in far from unambiguous terms.<sup>80</sup> Significantly, the establishment of the Commission itself demonstrates support for human rights more generally.

Under international law, States are not only obligated to respect those human rights they have undertaken to respect by international agreement; they are also required to respect those which form part of customary international law and are evidenced by general principles of law common to the major legal systems of the world.<sup>81</sup> Customary international law, established by the consistent recurrence and repetition of an act (practice or *usus*) together with "the mutual conviction that the recurrence . . . is the result of a compulsory rule" [*opinio juris*],<sup>82</sup> requires that Malaysia observe human rights protections when they meet these criteria. At a minimum this includes, among others, the

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mous amount of scholarly comment. See generally Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000); Michael C. Davis, *Constitutionalism and Political Culture: the Debate over Human Rights and Asian Values*, 11 HARV. H.R. J. 109 (1998). For a more recent demonstration of Malaysian officialdom's antipathy for human rights, see the speech given by Prime Minister Mahathir at the Asian Global Leadership Forum on September 8, 2002, available at <http://www/smpke.jpm.my>.

78. U.N. CHARTER art. 1(3). See also *id.* arts. 55-56 (providing for promotion of similar human rights and freedoms).

79. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

80. Act 597 of 1999, *supra* n.17, Sec. 4(4). Section 4(4) provides: "For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Constitution." *Id.* (emphasis added).

81. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Sec. 701 (1987) [hereinafter RESTATEMENT].

82. BARRY E. CARTER, PHILLIP R. TRIMBLE, INTERNATIONAL LAW 111 (1991).

prohibitions on torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and consistent patterns of gross violations of internationally recognized human rights.<sup>83</sup> The Report frequently cites human rights treaties and conventions, not ratified by Malaysia, and other human rights instruments — such as Declarations and Statements of Principles. It does so to highlight the consistency in expression of these contemporary pronouncements, evidencing that the rights have become part of customary international law, or at the very least, represent emerging norms of international customary law.

These standards, even if not yet part of customary international law, serve to underline the extent to which Malaysia's State practice deviates from the practices generally endorsed and upheld by the international community. At intervals, the Report also makes reference to comparative experience — examining the practices in comparable jurisdictions — both to underscore Malaysia's departure from accepted practices, but more importantly, to suggest that States facing similar challenges to Malaysia have adopted effective measures, that are nonetheless consistent with human rights.

## PART II

### A. *The Emergency Framework*

#### 1. Introduction

Due process is often said to be impossible to guarantee in periods of national emergency and insistence on its enforcement may further undermine the security of the State. For these reasons, preventive detention laws are commonly thought justified during periods of emergency: when the balance requires that State and public security weigh heavier than rights to freedom and dignity of the individual. Even in periods of emergency, however, resort to preventive detention laws should not be the default position; rather, the State must make a case for the necessity of resorting to measures of this type — as compelled by the provisions of international law. Nonetheless, Malaysia continues to enforce the ISA, notwithstanding the absence of any iden-

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83. RESTATEMENT, *supra* n.81, Sec. 702.

tifiable emergency or even any colorable claims by the government that such circumstances pertain.

This section first elaborates the justificatory framework for preventive detention laws sanctioned under international law — namely, periods of verifiable emergency. It then looks to Malaysian domestic law and its own restricted authorization for preventive detention laws. Thereafter, the section examines the extent to which the ISA and its current deployment fail to meet justificatory thresholds elaborated under these international and domestic law regimes. The section concludes with applicable findings and recommendations of the mission.

## 2. Malaysia's Human Rights Obligations

### a. International Law Provisions

International human rights instruments have been drafted carefully to allow for sufficient flexibility and derogation in times of need. The UDHR, applicable to Malaysia by virtue of its status as a U.N. Member State, is the archetype. Its protections include the individual's right to liberty,<sup>84</sup> to effective remedy for acts violating fundamental rights,<sup>85</sup> and to a "fair and public hearing by an independent and impartial tribunal, in the determination of his rights."<sup>86</sup> The UDHR, nonetheless, also makes provision for circumstances in which rights might be abrogated, providing in Article 29(2) that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, *public order* and the general welfare in the democratic society.

The Article serves as a precursor to the more specific derogation regimes and limitations clauses included in subsequent human rights conventions, most notably the ICCPR.<sup>87</sup> Intended as an elaboration of the rights inscribed in the UDHR, the ICCPR has met with such consistent endorsement and compliance that

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84. UDHR, *supra* n.79, art. 3.

85. *Id.* art. 8.

86. *Id.* art. 10.

87. International Covenant on Civil and Political Rights, U.N. G.A. Res. 2200 A (xxi), 999 U.N.T.S. at 171 & 1057 U.N.T.S. at 407 (Dec. 16, 1966) [hereinafter ICCPR].

many of its provisions are now said to reflect customary international law.<sup>88</sup> Article 4 of the ICCPR provides for derogation in times of “public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”<sup>89</sup> Such measures must be “strictly required by the exigencies of the situation,” not prove “inconsistent with other obligations under international law,” and must “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”<sup>90</sup> In addition, States Parties to the ICCPR wishing to avail themselves of the right to derogation must provide notice to the U.N. Secretary-General of the provisions from which it has derogated and the reasons therefore, and must further communicate the date at which derogation is terminated.<sup>91</sup> The exacting demands of derogation are intended to guard against disingenuous suspensions of rights. Enhanced protection is further provided by the fact that derogation is not permitted from certain Articles — the so-called non-derogable rights.<sup>92</sup> Articles 9<sup>93</sup> and

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88. See General Comment No. 24, U.N. GAOR Human Rights Committee, 52d Session, U.N. Doc CCPR/C/21/Rev1/Add 6, (1994).

89. ICCPR, *supra* n.87.

90. ICCPR, *supra* n.87, art. 4(1).

91. ICCPR, *supra* n.87, art. 4(3).

92. These include Article 6: inherent right to life; Article 7: freedom from torture, cruel, inhuman or degrading treatment or punishment; Article 8 (paras. 1 and 2): freedom from slavery and servitude; and Articles 11, 15, 16 and 18.

93. ICCPR, *supra* n.87, art. 9. Article 9 provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

*Id.*

10,<sup>94</sup> prohibiting preventive detention laws like the ISA, however, are not among these non-derogable rights.<sup>95</sup>

#### b. Domestic Law

Part II of Malaysia's Federal Constitution enshrines several fundamental rights, but like international instruments, it too provides for derogation. Article 149 of the Constitution authorizes the enactment of legislation targeting subversion and other action prejudicial to the public order and which is valid notwithstanding its inconsistency with certain fundamental rights in the Constitution. In order to be lawfully enacted pursuant to Article 149, an Act of Parliament need only recite that "action has been taken or threatened by a substantial number of persons" intended to realize certain prohibited purposes and ends elaborated in Article 149.<sup>96</sup> The rights, from which derogation is expressly contemplated, include the right to liberty of the per-

94. *Id.* art. 10. Article 10 provides:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

*Id.*

95. Article 4 of the ICCPR mirrors the delegation clause included in Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR], which also makes provision for certain non-derogable rights. Limitation of rights is also provided for in the African Charter on Human and Peoples Rights, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (Article 27(2)) [hereinafter African Charter], and the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota (1948) (Article XXVIII) [hereinafter American Declaration]; yet, these resemble the general limitations clause of the UDHR and do not exempt certain non-derogable rights.

96. The following ends and purposes are prohibited under MALAY. CONST., art. 149:

Action "taken or threatened by any substantial body of persons, whether inside or outside the Federation—

(a) to cause, or to cause a substantial number of citizens to fear organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

son;<sup>97</sup> prohibition of banishment and freedom of movement;<sup>98</sup> freedom of speech, assembly and association;<sup>99</sup> and rights to property.<sup>100</sup>

However, Article 151 of the Constitution prescribes certain restrictions on preventive detention, requiring that legislation passed under Article 149, although entailing abridgements to the right to liberty, nonetheless continue to observe certain core protections. These protections include disclosure to the detainee — as soon as may be — of the grounds of his detention and allegations of fact on which the order is based, and affording him the opportunity to make representations against the order as soon as may be.<sup>101</sup> The manner in which representations are to be made is also elaborated: detainees make representations before an advisory board which must consider and issue recommendations to the Malaysian king, the Yang di-Pertuan Agong, within three months<sup>102</sup> of receiving such representations, failing which the detention becomes unlawful. Significantly, the Article, while granting the right of disclosure, also renders it illusory in several respects. Article 151(3) does not “require any authority to disclose facts whose disclosure would in its opinion be against the national interest.”

These constitutional provisions provide the framework within which the ISA was enacted. Although Article 149-authorized legislation must clearly be addressed to a substantial threat, this legislation, including the ISA, is not dependent for its validity upon the declaration of any formal state of emergency.

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to the public order in, or the security of, the Federation or any part thereof . . .

*Id.*

97. *Id.* art. 5.

98. *Id.* art. 9.

99. *Id.* art. 10.

100. *Id.* art. 13.

101. *Id.* art. 151(1)(a).

102. Or for such longer period as the Yang di-Pertuan Agong may allow. *See id.* art. 151(1)(b).



There have, in fact, been several states of emergency declared in the course of Malaysia's independence and the last has never been expressly revoked.

The preamble to the ISA states that the Act was intended to provide "for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto." It goes on to recite that:

action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia

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(1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and  
 (2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established," and that "the action taken and threatened is prejudicial to the security of Malaysia.

The Preamble thus expressly employs the language of subclauses (a), (d), and (f) of Article 149 of the Constitution and after asserting that "Parliament considers it necessary to stop or prevent that action," affirms that the law is enacted "pursuant to Article 149 of the Constitution."

### 3. Problems

As previously discussed, subclause (1) of Article 149 requires that legislation enacted pursuant to its provisions must recite that "action has been taken or threatened by any substantial body of persons" and proceeds to enumerate in (a) through (f) the prohibited action or threat.<sup>103</sup> A close reading of this Article makes obvious the requirements that the action taken or the threat made must already have taken place, i.e. have occurred, in the past-tense; that it must be both specific and identifiable; and that a substantial body of persons must be behind the action or threat. Manifestly, Article 149 does not authorize catch-all or omnibus-type legislation — that is, legislation designed to target any threat whatsoever, even those not yet materialized and which the Parliament could not yet have considered.

This understanding reflects the circumstances under which

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103. See n.96 and accompanying text.

the ISA was enacted. The twelve-year emergency declared by British authorities in 1948 in response to the Communist insurgency was suspended in 1960 by the new Malaysian government. Preventive detention powers embodied in Regulation 17 of the Emergency Regulations 1948 were, with the repeal of the Regulations, inserted in the ISA — plainly demonstrating a continuity of purpose.<sup>104</sup> The Parliamentary debates in the Dewan Rakyat (the Malaysian Parliament), which took place at the time of the Bill's passage, further reflect that the ISA was enacted for the purpose of fighting the Communist insurgency and that it was intended as a temporary measure until the threat was removed.<sup>105</sup>

That Article 149 continues to be understood as only providing for the passage of extraordinary laws in cases of specific, identifiable threat, is reflected in the comparatively recent enactment of the Dangerous Drugs (Special Preventive Measures) Act 1985. The Act, as made clear in its Preamble, is intended to provide for "the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs." Both a specific act or threat and an identifiable body of persons are set forth — namely, drug trafficking and drug traffickers.

So far, Malaysian courts have dismissed arguments challenging the validity of the ISA on the basis that it is *ultra vires*, or exceeds the scope of Article 149. In *Theresa Lim Chin Chin Ors v. Inspector General of Police*,<sup>106</sup> the Federal Court was asked to find

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104. *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129 [Jld 2/11], 140.

105. In response to the opposition's stated fears that the ISA would be used to target legitimate political opposition, various government officials publicly stated that the ISA was intended only to fight militant Communism. The Minister of Finance (Enche Tan Siew Sin) explained: "For the past 12 years, we have been waging a bitter, long, costly and bloody struggle against militant Communism and terrorism." Memorandum from the Bar Council Malaysia on the Repeal of Laws Relating to Detention Without Trial 108. Additionally, the Deputy Prime Minister and Minister of Defence (Tun Abdul Razak) stated:

As Honourable Members are aware, although armed terrorism is coming to an end, the communists are endeavouring to achieve by subversive means what they have failed by force of arms, and it is the intention of the communists to overthrow the democratic Government of this country by subversive means. Therefore, it is essential that we should have a law dealing with subversion.

*Id.* at 120.

106. 1988-1 M.L.J. 293.

that Article 149(1) limits the application of the ISA only to Communist insurgency and subversion — a request the Court denied in perfunctory fashion.<sup>107</sup> In a more recent challenge, lawyers for the KeADILan detainees made the same argument, which was again rejected.<sup>108</sup> The Federal Court held that “the purpose of the ISA is for all forms of subversion but was more directed to communist activities which was [sic] prevailing at the time the law was enacted.”<sup>109</sup>

These decisions offer no persuasive reasoning for why Article 149 should be read contrary to its express provisions and, indeed, contrary to the statements of Tunku Abdul Rahman, first Prime Minister of Malaysia who insisted that “[t]he Internal Security Act was designed and meant to be used solely against the Communists and their allies in order to finally overcome and prevent a repetition of the Communist insurgency and subversion.”<sup>110</sup> Even assuming that the Federal Court’s conclusion is justifiable, international standards, nonetheless, pertain. The UDHR allows a limitation of rights and freedoms where these meet the requirements of public order. In the case of the ISA, however, there is no mere limitation on an individual’s right to liberty or to take proceedings before a court — but wholesale deprivation.

In addition, the Malaysian government has failed to assert that the ISA has been tailored to the just requirements of public order, or necessitated by public emergency, which threatens the life of the Nation, as required by the ICCPR. Although the delegation was refused interviews with government officials, the Deputy Chairman of SUHAKAM, Tan Sri Dato’Harun Mahmud Hashim, explained to members of the mission that the Commission, even post September 11, was not “fully satisfied that there is

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107. *Id.* “The expression ‘that action’ in our review has no consequence to determine or limit the scope of the Act. The Act is valid and from the wording of the provision of the Act there is nothing to show that it is restricted to communist activities.” *Id.*

108. Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals, *supra* n.55.

109. *Id.* Judgment of Justice Abdul Malek Ahmad.

110. Aff. of Tunku Abdul Rahman Alhaj ibni Al-marhum Sultan Abdul Hamid Halimshah, filed in support of a *habeas corpus* application before the Criminal Division of the High Court at Kuala Lumpur on behalf of Dr. Chandra Muzaffar. See Memorandum from the Malaysian Bar Council, *supra* n.12.

a real security threat to justify the ISA.”<sup>111</sup> In fact, the government has been so adamant in insisting that there is scant threat to public order and national security that some of the most recent ISA arrests and detentions have ironically been directed at persons allegedly responsible for spreading false information about impending terrorist attacks on Kuala Lumpur.<sup>112</sup> While the mission concedes that there may well be circumstances of exceptional security threat in which extraordinary measures are required, in such circumstances the burden falls on the government to show the necessity of deploying the extraordinary measures, i.e. detention without trial laws. In the case of Malaysia with its history of ISA abuse, the government incurs a double burden — not only of justifying the necessity of the ISA, but also of demonstrating that the particular arrests are not motivated by ulterior purposes.

#### 4. Recommendations

The Report records throughout recommendations that, if implemented, would serve to ameliorate the egregious workings of the ISA. These recommendations should not imply any equivocation on the delegation’s part — that it departed from Malaysia believing that the ISA should be retained, but reformed. The mission’s position, fundamentally, is that the ISA should be abolished, but in the absence of this outcome, second-best measures could involve reform. Nonetheless, it is fitting that this first section should contain only one recommendation: that the ISA be repealed in its entirety. Absent a justificatory framework — any credible claim that threats to public order or national security necessitate the denial of the right to liberty — there can be no basis for the continued existence of the ISA.

#### B. *Probable Cause/Reasonable Suspicion*

##### 1. Introduction

It is a fundamental premise of almost all criminal justice systems that arrest and the consequent deprivation of liberty can only be carried out where probable cause exists to support such arrest — in other words, that the person arrested is reasonably

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111. Interview with Tan Sri Dato’Harun Mahmud Hashim, Deputy Chairman of SUHAKAM (June 10, 2002).

112. Aliran Press Statement, Dec. 21, 2002.

suspected of having committed a proscribed act or, and especially in the case of preventive detentions, is reasonably suspected of being likely to commit the proscribed act. Even assuming that times of emergency may act to qualify the reasonableness of the suspicion, a degree of suspicion is nonetheless required to trigger the authority to make arrests. Without reasonable suspicion, arrests simply become a tool for persecution — a means of targeting individuals for unlawful, spurious purposes.<sup>113</sup>

The ISA, as currently formulated, does not permit arbitrary arrests and detention of this type. Section 73 specifically requires that police officers make arrests only in respect of persons they have “reason to believe”<sup>114</sup> have acted in the proscribed fashion and Section 8 requires that the Minister “is satisfied”<sup>115</sup> that the detentions are effected with a view to preventing the detainee from acting in the proscribed fashion. Nonetheless, arrests and detentions under the ISA have been consistently undertaken in violation of these provisions. This section first describes international standards prohibiting arbitrary arrests and

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113. See Steven Greer, *Preventive Detention and Public Security — Towards a General Model*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 36 (Andrew Harding & John Hatchard eds., 1993).

114. See ISA, *supra* n.5, Sec. 73. Section 73 of the ISA provides that:

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —

(c) that there are grounds which would justify his detention under section 8; and

(d) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

*Id.*

115. See ISA, *supra* n.5, Sec. 8(1). Section 8(1) of the ISA provides:

If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

*Id.*

detentions. It then examines Malaysian domestic law and the protections provided against abuse of this kind. Finally, the section documents patterns and procedures of arrest, detention and interrogation that reflect the absence of reasonable suspicion and establish violation of international law.

## 2. Malaysia's Human Rights Obligations

### a. International Human Rights Norms

Numerous international human rights instruments reflect a global consensus against arbitrary arrest and detention.<sup>116</sup> So widespread and consistent is this consensus, both in doctrine and in practice, that the bar on arbitrary arrest and detention is accepted as settled customary international law.<sup>117</sup> Article 2 of the UDHR provides that “[n]o one shall be subjected to arbitrary arrest and detention.”<sup>118</sup> Article 9(1) of the ICCPR reiterates this protection and Article 9(2) guarantees that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”<sup>119</sup> The U.N. General Assembly has articulated the core, non-derogable protections availing persons under any form of detention or imprisonment in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”).<sup>120</sup> Principle 10 guarantees that persons arrested shall be informed at the

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116. Article 6 of the African Charter, *supra* n.95 provides that “no one may be arbitrarily arrested and detained.” *Id.* See also American Convention on Human Rights July 18, 1978, art. 7, 1144 U.N.T.S. 123 (inscribing the same protection and guarantees the right to be informed of the reasons for detention and of prompt notification of the charge or charges); see also Article 5 of the ECHR, *supra* n.95 (guaranteeing analogous protections).

It should be noted that the international requirement that arrest and detention be non-arbitrary is not met by averring simply that arrest and detention have been carried out under the color of law — i.e. those responsible for the arrest and detention were authorized to do so under law.

Were this the case, there would be no reason to provide, as do most international instruments in this regard, not only that arbitrary arrest and detention is proscribed, but also that persons shall not be deprived of their liberty save on such grounds and in accordance with such procedures as are established by law. The requirement of non-arbitrary arrest and detention is thus deeper, and compels that there be reasonable grounds to trigger the workings of the law.

117. See RESTATEMENT, *supra* n.81, Sec. 702.

118. UDHR, *supra* n.79, art. 2.

119. ICCPR, *supra* n.87, art. 9(1).

120. Adopted by G.A. Res. 43/173 of Dec. 9, 1988.

time of their arrest of the reasons for their arrest and shall be promptly informed of any charges against them.<sup>121</sup> Principle 12 requires that there be due record of the arrest and that such records “shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”<sup>122</sup> The Standard Minimum Rules for the Treatment of Prisoners similarly reflects a concern that all persons arrested and detained shall have the reasons for their detention and the authority therefore publicly recorded.<sup>123</sup>

#### b. Domestic Law

Article 5(3) of the Malaysian Constitution, guaranteeing “liberty of the person,” entitles all persons arrested to the right to be informed of the grounds of their arrest,<sup>124</sup> presupposing that some lawful grounds for the arrest must exist. Subsection (5), however, makes clear that this right, together with the right to be produced before a magistrate without unreasonable delay,<sup>125</sup> does not apply to enemy aliens.<sup>126</sup> No other categories of persons are similarly excluded,<sup>127</sup> providing further textual evidence that individuals arrested and detained under the ISA are also guaranteed the right to be informed of the grounds for their arrest.

Article 149 of the Constitution, authorizing legislation against, among other things, subversion, and action prejudicial to public order, does provide that the rights guaranteed under Article 5 may be lawfully restricted — but only to the extent that provisions of Article 149-authorized legislation itself are inconsistent with these rights. For example, Section 73 of the ISA allows for detention of more than twenty-four hours without the order of a magistrate and is, on its face, contrary to Article 5(4) of the Constitution.<sup>128</sup> Yet, it remains valid law, given the stipulations

121. *Id.*

122. *Id.*

123. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF 6/1 at 67(1956).

124. MALAY. CONST., art. 5(3). Article 5(3) provides: “Where a person is arrested he shall be informed as soon as may be of the grounds for his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.” *Id.*

125. MALAY. CONST., art. 5(4).

126. MALAY. CONST., art. 5(4).

127. With respect to article 5(3).

128. MALAY. CONST., art. 5(4). Article 5(4) provides:

of Article 149, where otherwise it would be void for being inconsistent with Article 5(4) and accordingly unconstitutional.<sup>129</sup> In this instance, there is no provision in the ISA that provides that persons arrested shall be denied information as to the grounds for their arrest — a provision that would be inconsistent with Article 5(3)'s requirement that persons arrested shall be informed as soon as may be. It follows, therefore, that those subject to arrests and detentions under the ISA may still avail themselves of these constitutional protections.

Supporting this conclusion are the requirements in the ISA that the Minister's order of detention shall be served on the person to whom it relates "as soon as may be after the making thereof"<sup>130</sup> and shall be accompanied by a statement in writing furnished by the Minister setting out the "grounds on which the order is made"<sup>131</sup> and the "allegations of fact on which the order is based."<sup>132</sup> While there are no similarly express provisions relating to initial arrests and detentions carried out by police authorities under Section 73 of the ISA, the absence of such provisions does not excuse the police authorities' failure to provide grounds for the arrest and detention, and certainly does not allow for these arrests and detentions to be "groundless." Section 73(3) requires that at prescribed intervals during the initial sixty-day detention, the approval of increasingly senior authorities must be attained if detention is to continue<sup>133</sup> — a procedure

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Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

*Id.*

129. This reasoning is drawn from the legal arguments submitted by the appellants in *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals*, Outline of Arguments for the Appellants 64, para. 4.7 (on file with the Crowley Program).

130. ISA, *supra* n.5, Sec. 11(1).

131. ISA, *supra* n.5, Sec. 11(2)(b)(i).

132. ISA, *supra* n.5, Sec. 11(2)(b)(ii).

133. ISA, *supra* n.5, Sec. 73(3). Section 73(3) provides:

Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under [S]ection 8:

Provided that —

(d) he shall not be detained for longer than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(e) he shall not be detained for more than forty-eight hours except with the



that can only make sense if construed to ensure that continued detention is merited and based on valid grounds.

Finally, as has already been asserted, police officers carrying out arrests and detentions under Section 73 must have “reason to believe” that there exist grounds that would justify the individual’s arrest under Section 8 and that “he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services or to the economic life thereof.”<sup>134</sup> The phrase “reason to believe” has considerable weight. This is shown by comparison with the following subsection authorizing police officers to make arrests and effect detentions in respect of those persons “who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found.”<sup>135</sup> In these circumstances, the police officer need only “suspect” that the person “has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.”<sup>136</sup> In respect of the Minister when exercising his powers authorized under Section 8, he must be satisfied that the detention of the person is necessary with a view to preventing him from acting in the prohibited manner.<sup>137</sup> All these provisions make plain that the ISA, however excessive in its reach and impact, nonetheless contains safeguards against arbitrary arrests and detentions. As the following section illustrates, in practice these safeguards are almost only ever observed in the breach.

### 3. Violations

The extent to which arbitrary arrests and detentions are ef-

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authority of a police officer of or above the rank of Assistant Superintendent; and

(f) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

*Id.*

134. ISA, *supra* n.5, Sec. 73(1).

135. ISA, *supra* n.5, Sec. 73(2).

136. ISA, *supra* n.5, Sec. 73(2).

137. ISA, *supra* n.5, Sec. 8(1).

fectured under provisions of the ISA is most vividly illustrated by reference to the circumstances surrounding the arrest and detention of ten individuals in April 2001, all associated with the political party, KeADILan — hence the collective term, “the KeADILan 10.” These circumstances are comprehensively documented in affidavits submitted by all ten to the Malaysian Federal Court, and accepted by the Court as authentic accounts.<sup>138</sup>

At the time of their respective arrests — all in different locations and at different times<sup>139</sup> — none of the individuals was informed as to the reason for his arrest and subsequent detention.<sup>140</sup> However, at a press conference on April 11, 2001, the Inspector General of Police, Tan Sri Norian Mai, released a statement alleging that the arrests of the initial seven on April 10, 2001 had been triggered by concerns for national security. His statement gave examples of their purported military activities, including efforts to obtain explosive materials, such as bombs and

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138. *See* Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals, 2002-4 M.L.J. 449. Judge Dzaiden made the following finding:

[D]espite the press statement of the respondent that the appellants were detained because they were a threat to national security, it is surprising to note from the appellants' affidavits that they were not interrogated on the militant actions and neither were they questioned about getting explosive materials and weapons. Clearly, . . . the questions that were asked were more on the appellants' political activities and for intelligence gathering. I find that there is much force in the contention of learned counsel for the appellants that the detentions were for an ulterior purpose and unconnected with national security.

*Id.*

139. Abdul Ghani bin Haroon, arrested on April 11, 2001 at Kuching Airport. *See* Aff. of Abdul Ghani bin Haroon. Badaruddin Bin Ismail, arrested on April 26, 2001 at Taman Melawati. *See* Aff. of Badaruddin Bin Ismail. Badrulamin Bin Bahron, arrested on April 20, 2001 at his home. *See* Aff. of Badrulamin Bin Bahron. Chua Tian Chang, arrested on April 10, 2001 at his office. *See* Aff. of Chua Tian Chang. Gobalakrishnan a/l Nagappan, arrested on April 10, 2001 at Langkawi. *See* Aff. of Gobalakrishnan a/l Nagappan. Hishamuddin Bin Md Rais, arrested on April 10, 2001 at his office. *See* Aff. of Hishamuddin Bin Md Rais. Lokman Noor Bin Adam, arrested on April 13, 2001 while leaving the PAS office at Shah Alam. *See* Aff. of Lokman Noor Bin Adam. Mohamad Ezam bin Mohd Nor, arrested on April 10, 2001 at Subang Airport. *See* Aff. of Mohamad Ezam bin Mohd Nor. Raja Petra Bin Raja Kamarudin, arrested on April 11, 2001 at Damansara Road. *See* Aff. of Raja Petra Bin Raja Kamarudin. Saari bin Sungib, arrested on April 10, 2001 at his house. *See* Aff. of Saari bin Sungib.

140. *See* Affs. of Abdul Ghani bin Haroon, Badrulamin Bin Bahron, Chua Tian Chang, Gobalakrishnan a/l Nagappan, Hishamuddin Bin Md Rais, Lokman Noor Bin Adam, Mohamad Ezam bin Mohd Nor, Saari bin Sungib, Badaruddin Bin Ismail, and Raja Patra Bin Raja Kamarudin, *supra* n.140. These individuals were informed that they were arrested under Section 73 of the ISA, as they constituted threats to national security. No reasons were given for such an assessment.

grenade launchers; the use of Molotov cocktails, ball bearings, and other dangerous weapons to attack security personnel during street demonstrations in October 1998; obtaining the assistance and support of martial arts experts; and attempting to influence former security officers and personnel.<sup>141</sup> Given the proximity of the subsequent three arrests made later in April<sup>142</sup> to those made on April 10 and 11 and the personal and professional contacts between all ten, through the workings of KeADILan and other aligned civic bodies, it must be fairly concluded that the Inspector General of Police's media statement implicated all ten and was the purported reason for all of the arrests.

Yet, in none of the interrogations endured by the ten detainees, were they ever asked about alleged military activities. No mention was made of attempts to acquire explosive materials and weapons.<sup>143</sup> Instead, they were asked about their political activities and involvement, the funding they received for these activities, and the sources of this funding.<sup>144</sup> Those responsible for the interrogation appeared particularly anxious to establish whether these sources of funding were foreign,<sup>145</sup> at times accus-

141. Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 39; Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at 15, para. 29; Aff. of Lokman Noor Bin Adam, *supra* n.140, at 7, para. 23; Aff. of Mohamad Ezam bin Mohd Nor, *supra* n.140, at 5, para. 16; and Aff. of Saari bin Sungib, *supra* n.140, at 17, para. 32.

142. Badaruddin Bin Ismail, arrested on April 26, 2001; Badrulamin Bin Bahron, arrested on April 20, 2001; Lokman Noor Bin Adam, arrested on April 13, 2001.

143. *See especially* Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 12: "I categorically state that I was never questioned or interrogated on any alleged militant groups or militant activities, in particular, on alleged explosives such as bombs, ball bearings, Molotov cocktails and grenade launchers." *Id.* Aff. of Saari bin Sungib, *supra* n.140, at 17, para. 32: "Throughout the period of my detention, I was not asked at all about the allegations on trying to get explosive materials and weapons." *Id.* Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at para. 31: "I was never asked about these accusations [made by the Inspector General of Police] . . . They (the police) have also never asked any detailed questions to show the relationship between myself and the unfounded allegations." *Id.* Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.140, at para. 27: "Throughout the period of detention I was not asked at all about the allegations of trying to get explosive material and weapons." *Id.* *See also* Interviews with Raja Petra Bin Raja Kamarudin, Gobalkrishnan a/l Nagappan, Badaruddin Bin Ismail (June 2, 2002).

144. Aff. of Abdul Ghani bin Haroon, *supra* n.140, at para 35(15),(16); Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 11 (c), (d), (h), (i), and (j); Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 43, 45, 46; Aff. of Mohamad Ezam bin Mohd Nor, *supra* n.140, at paras. 18-29; 33-39; Aff. of Lokman Noor Bin Adam, *supra* n.140, at para. 31; Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at para. 17; Aff. of Chua Tian Chang, *supra* n.140, at para. 19(h), (m), and (n); and Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.140, at para. 20.

145. Aff. of Abdul Ghani bin Haroon, *supra* n.140, at para. 35(13)-(14).

ing the detainees of connection to the CIA, and in the case of Hishamuddin Bin Rais, of being “Al Gore’s stooge.”<sup>146</sup>

In addition, interrogating officers asked the detainees about their relationships to and knowledge of a particular set of individuals — among them, Wan Azizah, Anwar Ibrahim and Chandra Muzaffar.<sup>147</sup> During the course of the interrogations, the police officers explicitly described former Deputy Prime Minister Anwar Ibrahim’s alleged sexual proclivities, and promised to provide photographic and other documentation of this alleged activity.<sup>148</sup> A consistent theme in all the interrogations was the lewd, disturbing interest evidenced by the interrogators in respect of completely unrelated sexual matters. A number of the detainees were accused of involvement in extra-marital affairs,<sup>149</sup> and were asked questions of a sexually graphic nature.<sup>150</sup>

The prurient nature of the questioning to which the detainees were subjected cannot be dismissed as an unfortunate function of ill-disciplined, unprofessional police conduct. These pervasive themes of the interrogations suggest a coordinated effort on the part of the authorities. More gravely, the nature of the interrogations confirms that the arrests and detentions were unsupported by reasonable suspicion, or any suspicion at all, on the part of the police officers of involvement or likely involvement in conduct prejudicial to Malaysia’s security, essential services, or economic life. The interrogations, instead, amounted to exercises in information gathering, in which the police had no expectation of eliciting information relating to security threats, but rather, sought to learn about the structure of the

146. Aff. of Hishamuddin Bin Rais, *supra* n.140, at 6, para. 15.

147. Aff. of Abdul Ghani bin Haroon, *supra* n.140, at para. 35.17, 35.18, 35.19, 35.20, and 35.21; Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 11(b), (e); Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 50; Aff. of Mohamad Ezam bin Mohd Nor, *supra* n.140, at 11, para. 30; Aff. of Saari bin Sungib, *supra* n.140, at 16, para. 31; Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at para. 19; Aff. of Chua Tian Chang, *supra* n.140, at para. 19(b), (f), and (q); Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.139, at paras. 21 and 22.

148. Aff. of Abdul Ghani bin Haroon, *supra* n.140, at para. 35.17.3; Aff. of Mohamad Ezam bin Mohd Nor, *supra* n.140, at 15, para. 40; Aff. of Chua Tian Chang, *supra* n.140, at para. 19(b); Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 50; and Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.140, at para. 23.

149. Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 11(b); Aff. of Lokman Noor Bin Adam, *supra* n.140, at para. 32; Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at para. 21; and Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.140, at para. 23.

150. Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at paras. 15, 22.

political opposition, its support, and leadership. The character of the interrogations further negates any conclusion that the Minister could be genuinely satisfied that those who were detained subsequent to the end of the initial sixty-day period, by an order issued pursuant to Section 8, posed a threat to the national security of Malaysia, its essential services, or the economic life thereof. None of the questions asked during the interrogations was aimed at soliciting information that might support such a conclusion. Without this information, there can be no *bona fide* claim that the Minister was, in fact, satisfied that their continued detention was necessary. Instead, the process reinforces the perception that the ISA is consistently employed to persecute legitimate political opposition.

The detainees appealed the denial of their *habeas* petitions and a ruling, in respect of five of the ten, was issued by the Federal Court on September 6, 2002.<sup>151</sup> Relying upon the appellants' affidavits — their disclosure of the nature of the questioning they endured during the initial sixty-day detention — the Federal Court concluded that the initial arrests and detentions were *mala fides* and unlawful. Unable to exercise review of the Minister's decision, given the express judicial ouster in this regard, the Court did not make the corollary finding: that the initial unlawfulness tainted the subsequent Ministerial detention.<sup>152</sup> The detainees thus remain in detention, but the judgment, nonetheless, stands as a significant exposure of police abuse of the ISA and substantially erodes claims to the ISA's necessity.

Not surprisingly, the decision has provoked the government's ire. Suggesting that the abuse is not a matter of isolated police misconduct but represents part of a systematic campaign originating from within the highest levels, the Malaysian government has responded to the Federal Court's ruling by threatening to amend the law. The threatened amendments include the proposal that police no longer be required to defend detentions in court, that no negative inferences may be drawn from their

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151. Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals, 2002-4 M.L.J. 449.

152. *Id.* The Court, in fact treated the Minister's order as a separate matter: "[A]s the appellants have now been detained by order of the Minister under S.8 of the Act, the issue of whether or not to grant the writ of habeas corpus for their release from current detention does not concern us. That is a matter of a different exercise." Judgment of Justice Steve Shim Lip Kiong, Chief Judge Sabah & Sarawak.

decision not to do so, and a second proposal that detainees held under the ISA be prohibited from divulging any details of their interrogations to the courts.<sup>153</sup> Should these proposed amendments be realized, *habeas corpus* applications, already strictly curtailed, will be all but impossible.

It should also be noted that a number of the detainees were informed at the very beginning of their detention periods that they would be detained for the full sixty days.<sup>154</sup> This practice is at odds with the authorized procedure whereby continued detention under Section 73 is subject to the approval of more senior police authorities,<sup>155</sup> a procedure evidently designed to ensure that detention is continued only if necessary. In making clear at the outset that they had no intention of adhering to the legal provisions, the police officers demonstrated that the purpose of the arrests and detentions was not the legitimate one of attempting to ascertain whether, in fact, the detainee posed a security threat and thereafter conditioning continued detention on the necessity of ascertaining further information. In other words, detention for the full sixty days was the result, even if the police were satisfied after five days that the individual was not about to act or likely to act in any of the prohibited ways, underscoring the extent to which the police officers eschewed reasonable suspicion, required by both international and domestic provisions, as justification at every stage of the detention.

#### 4. Recommendations

1. First and foremost, no amendment to the ISA along the lines currently proposed by the government should be passed. If such

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153. See REPORT BY THE OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS, MALAYSIA: "THE BOA CONSTRICTOR": SILENCING HUMAN RIGHTS DEFENDERS 12 2003. See also Jonathan Kent, *Malaysia to Tighten Security Laws*, BBC, Nov. 12, 2002, at <http://www.suaram.org/isa/news20021112.htm>; Suaram Press Statement, Proposed Amendments of ISA Perpetuate Further Injustices (Oct. 8, 2002), available at [http://www.suaram.org/press\\_release/pr20021008.htm](http://www.suaram.org/press_release/pr20021008.htm). The proposed amendments appear to be direct responses to the Federal Court judgment's criticism in *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals*, *supra* n.55, of the respondent's conduct: "A thorough perusal of the affidavits filed by the respondents find them to contain nothing more than bare denials in response to the allegations contained in the affidavits affirmed by the respective appellants." Judgment of Justice Steve Shim Lip Kiong, Chief Judge Sabah & Sarawak.

154. Interview with Gobalakrishnan a/l Nagappan, Badaruddin Bin Ismail, ISA detainees (June 3, 2002).

155. See ISA, *supra* n.5, Sec. 73(3).

an amendment is passed, applications for judicial review, already rarely successful, will be all but impossible.

2. Review at staggered intervals of the detention must be undertaken to establish the continued necessity of detention. Review procedures should be conducted by judicial authorities, such as magistrates, independent of the police.

3. In keeping with the Body of Principles, due record shall be made of the reasons for the arrest of the individual, the time of the arrest, and the taking of the arrested person to a place of custody, the identity of the law enforcement officials concerned, and precise information concerning the place of custody. These records must be communicated to the detained person or his counsel.

4. A system of inspection and monitoring of periods of interrogation must be established, which would include videotaping interrogations.

5. Access to legal counsel must be provided from the moment of detention and detainees must be entitled to request the presence of counsel during interrogation.

### *C. Access To Legal Counsel*

#### 1. Introduction

ISA detainees are routinely denied access to legal counsel. During their first sixty days of detention, this involves an absolute denial of any form of contact with legal counsel, serving only to enhance the vulnerability of the detainees and increase the likelihood of their exposure to forms of physical and psychological abuse. Individuals detained pursuant to a Ministerial order issued under Section 8, and transferred to detention camps, are generally permitted some access to legal counsel, but even this is severely restricted, and fails to meet internationally recognized standards.

This section examines Malaysia's commitments under international and domestic law to provide persons detained with effective legal counsel. Against these standards, it assesses the extent to which current practice falls far short of these undertakings and compromises the Malaysian government's ability to protect the rights of detainees, first by examining the extent to which denial of legal assistance facilitates the mistreatment and manipulation of the detainees by police authorities during inter-

rogation; secondly, by examining the inability of legal counsel, given the polices' refusal to provide consultation time, to mount successful legal challenges on behalf of their clients and so ensure that those wrongly detained are offered the earliest possible release. Both these problems assume that legal counsel are willing to provide their services to ISA detainees but the final part of this section examines the extent to which that willingness is eroded by interference and intimidation directed at the individual lawyers specifically and the legal profession more generally.

## 2. Malaysia's Human Rights Obligations

### a. International Obligations

The right of those arrested to legal assistance is so fundamental that it finds expression in all the regional human rights instruments.<sup>156</sup> It also finds expression in Article 14 of the ICCPR, guaranteeing to everyone charged with a criminal offence the right to "have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."<sup>157</sup>

The Human Rights Committee, established under the ICCPR, has in considering the various individual petitions brought before it, given substantive content to the right of legal assistance — emphasizing time and again that the right to legal assistance is to avail the detainee from the moment of her arrest.<sup>158</sup> In the context of special anti-terrorist laws enacted in

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156. See African Charter, *supra* n.95, art. 7. Article 7 states: "Every individual shall have the right to have his cause heard. This comprises: . . . (g) the right to defence, including the right to be defended by counsel of his choice." *Id.* See also American Convention, *supra* n.117, art.8. Article 8 states: ". . . During the [criminal] proceedings, every person is entitled, with full equality to the following minimum guarantees . . . (h) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel." *Id.*; ECHR, *supra* n.95, art. 6. Article 6 states: "Everyone charged with a criminal offence has the following minimum rights: . . . (e) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." *Id.*

157. ICCPR, *supra* n.87, art. 14(3)(b).

158. See Senegal, A/48/40, vol. I, para. 104 (1993): "The right of access to legal counsel begins from the moment an individual is deprived of his freedom." *Id.* See also Venezuela, A/48/40, vol. I, at 61, para. 310 (1993): "[A]n accused person . . . should have access to his lawyers from the time of arrest." *Id.*; Georgia, A/52/40, vol. I, at 40, para. 254 (1997): "All persons who are arrested must immediately have access to counsel . . ." *Id.*; Algeria, A/53/40, vol. I, at 52, para. 360 (1998): "The State party must ensure [that] . . . all persons arrested . . . have immediate access to a lawyer." *Id.*



France, the Committee has expressed particular concern that the accused is denied the right to contact a lawyer during the initial seventy-two hours of detention in police custody.<sup>159</sup> While the Committee is evidently troubled by the prejudice to the quality of defense that results from this lack of access,<sup>160</sup> it also fears the mistreatment of the detainee that may occur and has noted with alarm the circumstances in which interrogation has proceeded without the presence of defense counsel.<sup>161</sup>

The Committee against Torture, established under the CAT,<sup>162</sup> has underscored the importance of access to counsel in protecting against abuse.<sup>163</sup> In respective petitions, it noted that the “likelihood of commission of acts of torture or other cruel, inhuman or degrading treatment would be limited if suspects had easy access to a lawyer”<sup>164</sup> and that “[a] major obstacle in efforts to prevent torture is the difficulty experienced by accused persons in gaining access to a lawyer of their choice.”<sup>165</sup>

The right of legal assistance and the important protections it provides is not removed by a formalistic insistence that the right only avails those charged with a criminal offence — in other words, only those who have not had the misfortune of being detained under preventive detention laws that do not provide for criminal charges. The protection is far more substantive and robust, as evidenced by Principles 17 and 18 of the Body of Princi-

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159. See France, A/52/40 vol. I, para. 410 (1997).

160. See Japan A/49/40, vol. I, para. 110 (1994).

161. See *id.*: “It is of concern that the guarantees contained in articles 9, 10 and 14 are not fully complied with, in that . . . most of the time interrogation does not take place in the presence of the detainee’s counsel.” *Id.*

162. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, June 26, 1987, art.17 1465 U.N.T.S. 85 [hereinafter CAT].

163. The prohibition on torture forms part of international customary law. While Malaysia has not ratified CAT and is not theoretically subject to the Committee against Torture’s jurisdiction, the Committee’s pronouncements nonetheless represent authoritative statements on the evolving norms applicable to the prohibition on torture.

164. Poland, A/52/44, at 18, para. 110 (1997).

165. Ukraine, A/52/44, at 23, para. 138 (1997). See also United Kingdom of Great Britain and Northern Ireland, A/51/44, at 12, para. 61 (1996). Paragraph 61 provides:

[T]hat maintenance of emergency legislation in Northern Ireland and of separate detention or holding centers will inevitably continue to create conditions leading to the breach of the Convention. This is particularly so because at present the practice of permitting legal counsel to consult with their clients at their interrogations is not yet permitted.

*Id.*

ples.<sup>166</sup> These Principles guarantee to all persons under any form of detention, the right to have the assistance of legal counsel and to be provided with reasonable facilities for exercising it. So central is this right that it may not be suspended or restricted “save in exceptional circumstances to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.”<sup>167</sup>

Like the Body of Principles, the United Nations Basic Principles on the Role of Lawyers (“Basic Principles on Lawyers”)<sup>168</sup> and the Standard Minimum Rules for the Treatment of Prisoners<sup>169</sup> both emphasize that the right to legal assistance obtains, irrespective of the issuing of a criminal charge.<sup>170</sup> This consis-

166. Body of Principles, *supra* n.120, at Principles 17-18. Principle 17 reads:

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

*Id.* Principle 18 reads:

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

*Id.*

167. *Id.* at Principle 18(3).

168. Approved by the General Assembly in 1990. U.N. Doc. A/CONF.144/28/Rev.1 (1990).

169. *See supra* n.124.

170. Article 7 of the Basic Principles on Lawyers, *supra* n.168, provides:

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

tency in expression of all these contemporary pronouncements on the rights of those arrested and detained, and the general support these documents command, indicate that this right has, in fact, been elevated to an emerging norm of customary international law. The Basic Principles on Lawyers stipulates that the right of access to legal counsel must be provided not "later than forty-eight hours from the time of arrest or detention,"<sup>171</sup> and like the Body of Principles and the Standard Minimum Rules requires that consultations take place in full confidentiality, admittedly "within sight, but not within hearing, of law enforcement officials."<sup>172</sup>

The right of effective legal assistance presupposes an availability and willingness on the part of legal professionals to perform this role and the role of the state in facilitating an environment in which lawyers are willing and able to provide effective legal assistance is recognized in international law. In particular, the Basic Principles on Lawyers enumerates a number of guarantees for the functioning of lawyers, requiring that governments ensure that lawyers "are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference,"<sup>173</sup> are able to "consult with their clients freely,"<sup>174</sup> and shall not "suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."<sup>175</sup> Where lawyers in discharging their duties are subject to threat, "they shall be adequately safeguarded

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*Id.* Article 93, within Part II, Section C, entitled "Prisoners Under Arrest or Awaiting Trial" of the Standard Minimum Rules, *supra* n.124, provides: "For the purposes of defence, an untried prisoner shall be allowed . . . to receive visits from his legal advisor with a view to his defence and to prepare and hand him confidential instructions . . ."

*Id.* Article 95 of Part II, Section E, entitled: "Persons Arrested or Detained Without Charge" provides:

Without prejudice to the provisions of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C.

*Id.*

171. Basic Principles, *supra* n.168, art. 7.

172. Basic Principles, *supra* n.168, art. 8; *see also* Body of Principles, *supra* n.121, at Principle 18(5); Standard Minimum Rules, *supra* n.124, art. 93.

173. Basic Principles, *supra* n.168, art. 16(a).

174. *Id.* art. 16(b).

175. *Id.* art. 16(c).

by authorities.”<sup>176</sup> They shall also be assured access to all appropriate information within sufficient time to enable them to provide “effective legal assistance to their clients,”<sup>177</sup> and consultations shall be confidential.<sup>178</sup> The Basic Principles on Lawyers goes beyond protection to individual lawyers in the discharge of their professional duties, and expressly recognizes their right to freedom of expression, belief, association, and assembly. No prejudice shall result from their participation in public discussions on matters like the administration of justice or the promotion and protection of human rights, or their involvement in local, national, or international organizations.<sup>179</sup> They shall also be entitled “to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.”<sup>180</sup>

#### b. Domestic Obligations

One of the fundamental liberties inscribed in the Malaysian Constitution is the right of persons arrested to be “allowed to consult and be defended by a legal practitioner of his choice.”<sup>181</sup> As was set out in the earlier discussion on the right to be informed as soon as may be of the grounds for arrest, also granted under Article 5(3), the protections established under Article 5 are not withdrawn from the ISA detainee unless the ISA’s provisions are expressly inconsistent with these protections. The ISA, however, contains no provision that denies those arrested and detained access to legal counsel and is accordingly not inconsistent with Article 5(3).<sup>182</sup> On the contrary, the ISA remains subject to the Article 5(3) right of access to legal counsel.

Unfortunately, legal precedent on this issue has been far from clear. The Malaysian High Court in the case of *Ramli bin Salleh v. Inspector Yahya Bin Hashim*<sup>183</sup> and the Federal Court in

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176. *Id.* art. 17.

177. *Id.* art. 21.

178. *Id.* art. 22.

179. *Id.* art. 23.

180. *Id.* art. 24.

181. MALAY. CONST., art. 5(3).

182. This argument was submitted by the appellants in *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals*, Outline of Arguments for the Appellants, *supra* n.129, at 60-66.

183. [1973] 1 M.L.J. 54.

the case of *Assa Singh v. Menteri Besar, Johore*<sup>184</sup> demonstrated a willingness to read the provisions of Article 5(2) and (3) into Statutes that were silent on the issue “with the result that the applicant must be informed as soon as may be of the ground of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice . . .”<sup>185</sup> However, the Federal Court in the cases of *Ooi Ah Phua v. Officer in Charge of Criminal Investigation, Kedah/Perlis*<sup>186</sup> and *Hashim bin Saud v. Yahaya bin Hashim*,<sup>187</sup> indicated a reluctance to give unqualified expression to the right of access to legal counsel, observing that the right could be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. This reticence culminated in the judgment in *Theresa Lim Chin Chin v. Inspector General of Police*, where the presiding judge in the Federal Court held that “the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of Article 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article.”<sup>188</sup>

However, as evidenced by the recent judgment in *Mohamad Ezam Bin Nor & Others v. The Chief of Police*, the Federal Court has essentially reversed itself and police will no longer be able to count on judicial tolerance for their denial of access to legal counsel. Writing for the entire bench, Judge Siti Norma Yaakob found that denial of legal assistance during the initial sixty-day detention period “is conduct unreasonable and a clear violation of Article 5(3) . . . Responding to the Respondent’s argument that under the ISA, the police has absolute powers during the entire period of the sixty day detention to refuse access under the guise that the investigations were ongoing . . . I find no justification to support the Respondent’s argument.”<sup>189</sup>

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184. [1969] 2 M.L.J. 30.

185. [1973] 1 M.L.J. 54.

186. [1975] 2 M.L.J. 198.

187. [1977] 2 M.L.J. 116.

188. [1998] 1 M.L.J. 293.

189. *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals*, 2002-4 M.L.J. 449.

### 3. Problems

#### a. Inability to Mount Legal Challenge

In practice, the authorities prohibit any of form of communication between detainees and legal counsel during the first sixty days of detention. During the mission, members of the delegation observed the habeas corpus proceedings brought on behalf of Sejahratul Dursina<sup>190</sup> before the Shah Alam High Court on June 4, 2002, and were sharply reminded of the injustice of this prohibition. Her lawyers explained to the Presiding Justice that Chomel had by then been “kept incommunicado for 47 days” and they urged that they be granted access so that they might “know what is happening to her.”<sup>191</sup> Chomel’s lawyers further argued that without access to her they were unable to consult with their client.<sup>192</sup>

Certainly, the practice of refusing access to legal counsel during the first sixty days of detention is hardly new, and in fact appears to have been standard procedure since the inception of the ISA. Interviews with detainees from the 1960s and 1970s confirm that they, too, were denied any form of legal assistance during their first sixty days of detention,<sup>193</sup> and those detained in 1987, as part of Operation Lalang, report similar experiences.<sup>194</sup> However, the practice today works more seriously to prejudice the circumstances of the detainee than it did those detained in previous decades. The 1988 amendment to the ISA effectively bars the judiciary from exercising any form of judicial review of the Minister’s orders of detention under Section 8. Accordingly, the only chance of successful review is that exercised in respect of the first sixty days of detention, authorized under Section 73. Yet if lawyers are prohibited from consulting with their clients, as they always are, it is enormously difficult to make application for such review within those first sixty days and ac-

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190. A.k.a. Chomel Mohamad. See *KMM-linked Woman ISA Detainee Released*, MALAYSIKINI, June 13, 2002; *Wife of Terror Suspect says Arrest was Pressure Tactic*, MALAYSIKINI, June 15, 2002.

191. Delegation’s Notes from Trial (June 4, 2002).

192. *Id.*

193. See Interviews with Ban Ahkam (detained 1968, released 1978); Lim Yoon Pang (detained 1963, released 1967); Koh Swee Yong (detained in 1976, released in 1977); and Chong Ton Sin (detained in 1968 for 28 days) (June 3, 2002).

194. See Interview with Dr. Nasir Hashim (detained in 1987 for 15 months) (June 3, 2003).

cordingly be offered the chance of effective remedy — in these circumstances, immediate release. Opportunity to make application for review and attain effective remedy is effectively foreclosed once detainees are transferred under two-year detention orders to the detention camps.<sup>195</sup>

Once detainees are transferred to detention camps under Ministerial orders of detention, they are allowed to consult with their lawyers, and it is at this stage that the lawyers “learn a lot about what happened under the sixty days detention — for instance that their questioning was irrelevant, that they were asked about their sexual preferences, etc., but not about any connection to terrorist attacks.”<sup>196</sup> But even here access is unjustifiably restricted. A number of the KeADILan detainees recount that when they met with their lawyers, camp officers were stationed such that they could hear “the entire conversation between myself and my lawyers. My request for a private and confidential meeting with my lawyers to discuss my case was rejected.”<sup>197</sup> This physical proximity of police officers during lawyer-client consultations in the detention camps militates against full disclosure and accordingly, prejudices the detainee in the preparation of his legal defense. Accordingly, a number of the affidavits of the KeADILan detainees expressly state that they are submitted “without prejudice to my rights to raise other matters if required and when given the opportunity to do so.”<sup>198</sup>

#### b. Facilitation of Police Abuse

Legal counsel is essential to mounting challenges to wrongful detention, but access to legal counsel is additionally important in serving as a constraint on police impunity for physical and psychological abuse of detainees. A later section of this Report documents the full extent of abuse to which detainees are subject. It is important here, however, to note that the severity of the abuse and extremity of the conditions experienced by the detainees noticeably diminish once they are transferred to the

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195. Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals, Judgment of Abdul Malek Ahmad, FCJ, *supra* n.55.

196. See Interview with Malik Imtiaz Sarwar, lawyer (June 11, 2002).

197. See Aff. of Lokman Noor, *supra* n.140, at para. 39. See also Aff. of Mohamad Ezam bin Mohd Nor, *supra* n.140, at para. 48; Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at para. 34; Aff. of Badrulamin Bin Bahran, *supra* n.140, at para. 70.

198. See Affs. *supra* n.140.

detention camps, where they are also permitted access to legal counsel.<sup>199</sup> The lawyer's ability to report the circumstances of the detainee's abuse, not only to the courts, but also to the public at large, serves as an important safeguard for the detainee and a substantial disincentive to the would-be abuser. Lawyers have, thus far, been unable to perform this important role during the period of initial custody.

The absence of counsel during the first sixty-day period, during which intensive and prolonged interrogation takes place, has meant that detainees are not only more vulnerable to physical and psychological abuse, but also to the likelihood that their personal statements and testimony will be manipulated. After hours of questioning and threats made by their interrogators, unable to consult legal counsel, many detainees sign what amount to fabricated admissions of guilt, believing these to be their best chances of early release. Lokman Noor's experience in submitting a personal statement is indicative:

Some of the information was given by the Interrogating Officer, like abuses of the leaders and so on, which was used as my own personal statements. Some were written by myself particularly the facts that were within my knowledge. Then, I only wanted to be released. My state of mind at that time was tense, anxious, disturbed and confused. They repeated their questions, shouting and pressing me until I gave the answers they wanted.<sup>200</sup>

Evidence that interrogating officers tamper with the personal statements of the detainees also appears from statements made by Mohamad Ezam bin Mohd Nor: "He [the investigating officer] informed me that his superiors ordered that he obtain a testimony from me; if not, I would be seen as not co-operating and would be detained for a further two years. I told him that I did not want to make any testimony and I would not sign or be responsible for any statement. The investigating officer told me that he still had to put my testimony in the statement."<sup>201</sup> Clearly, abuse of detainees and manipulation of their testimonies would cease, or at least be drastically reduced, were the Ma-

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199. See Interview with Malik Imtiaz Sarwar, lawyer (June 11, 2002).

200. See Aff. of Lokman Noor, *supra* n.140, at para. 35. See also Aff. of Raja Petra, *supra* n.140, at para. 18.

201. Aff. of Mohamad Ezam bin Mohd Nor, *supra* n.140, at para. 46.



Malaysian government to act in compliance of both its international and domestic obligations and grant those detained under Section 73 of the ISA the opportunity to consult with legal practitioners of their choice.

### c. Harassment of Legal Counsel

The Malaysian system acts to constrain effective legal assistance by limiting contact between individuals detained under the ISA and legal counsel willing to act on their behalf. It also does so, less visibly and therefore perhaps more perniciously, by subjecting lawyers prepared to act in this capacity to undue interference and harassment.<sup>202</sup> Cheah Kah Peng, lawyer for KeADILan detainee Tian Chua, reported following Chua to the police station after his arrest: "I asked to consult with Tian Chua and was refused. [The police] began pushing Tian Chua around and they arrested me as well."<sup>203</sup> Both Sankaran Nair and Pawancheek Marican, lawyers for former Deputy Prime Minister Anwar Ibrahim, have been targets of harassment. Each has had his office broken into and materials removed.<sup>204</sup> For lawyer, Sivarasa Rasiah, the experience of interference has been less overt: "I don't get any threatening phone calls or anything like that — but we're watched. There is surveillance, the Special Branch is there. . . My home phones are tapped from time to time."<sup>205</sup> Malik Imtiaz Sarwar, another prominent defender of ISA detainees corroborated the experience of constant surveillance, and explained that lawyers who undertake this type of practice are subject to the surveillance of the Special Branch, but also "frequent visits from officials of the Tax Department.

While this type of interference is not always physically intimidating, particularly as defense lawyers have become accustomed to almost continuous surveillance, it does, nonetheless, have a chilling effect on the numbers of lawyers willing to take such cases and thereby be subject to heightened scrutiny. All this stands in stark contrast to the Basic Principles on Lawyers' requirement that Malaysia guarantee that lawyers "are able to per-

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202. For a detailed study on the chilling effect of intimidation of defense lawyers in the context of emergency laws, see Martin Flaherty, *Human Rights Violations Against Defense lawyers: the Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87 (1994).

203. Interviews with Cheah Kah Peng and Gooi Hock Seng, lawyers (June 8, 2002).

204. *Id.* see also Interview with Pawancheek Marican (June 11, 2002).

205. Interview with Sivarasa Rasiah, lawyer (June 11, 2002).

form all of their professional functions without intimidation, hindrance, harassment or improper interference.”<sup>206</sup>

The Malaysian Bar Council, too, has been subject to government pressures that appear designed to result in a more government-compliant professional association. Article 46(A) of the Legal Profession Act<sup>207</sup> provides for disqualification from the Malaysian Bar Council of any member who is “a member of either House of Parliament, or of a State Legislative Assembly, or of any local authority,”<sup>208</sup> or if she holds “office in any trade union or political party”<sup>209</sup> or “any other organization, body or group of persons whatsoever, whether or not it is established under any law, whether it is in Malaysia or outside Malaysia, which has objectives or carries on activities which can be construed as being political in nature, character or effect, or which is declared by the Attorney-General by order published in the *GAZETTE*, to be an organization, body or group of persons which has such objectives or carries on such activities.”<sup>210</sup>

While this law appears facially neutral in application, it nevertheless expressly conflicts with the Basic Principles of Lawyers that guarantee lawyers’ freedom of expression, belief, association, and assembly.<sup>211</sup> Also, contrary to its appearance of facial neutrality, the law is likely to disproportionately prejudice those who engage in opposition politics, or groups that oppose government policies and are so deemed “political” by the Attorney-General. Currently, Sivarasa Rasiah, a lawyer and political officer for the Parti Rakyat Malaysia, is challenging the constitutionality of Article 46 of the Legal Profession Act.<sup>212</sup> Given the political climate in Malaysia, it is lawyers like Sivarasa, who engage in opposition politics or are outspoken in their opposition to government policies, who are also those most likely to provide defense to those detained under the ISA.

In the past year, the Minister responsible for legal development, Dr. Rais Yatim, has introduced a draft Bill for a Malaysian

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206. Basic Principles on Lawyers, *supra* n.168.

207. Legal Profession Act 1976 (Act 166).

208. *Id.* art. 46(A) (b).

209. *Id.* art. 46(A) (c) (i)-(ii).

210. *Id.* art. 46(A) (c) (iii).

211. Basic Principles on Lawyers, *supra* n.169, art. 23.

212. *See* Interview with members of the Malaysian Bar Council’s Human Rights Committee (June 10, 2002).

Academy of Law, proposing compulsory membership in the Academy for all members of the legal profession — lawyers, academics, members of the Attorney-General's Office, and judges.<sup>213</sup> The Bar Council has expressed strong reservations, observing that the Bill is likely to violate Article 10 of the Malaysian Constitution, guaranteeing the right of association.<sup>214</sup> Practitioners further perceive the Bill as a measure intended to facilitate undue regulation of the profession. Members of the Human Rights Committee of the Malaysian Bar Council explained during interviews with the delegation that "the Bill purports to be aimed at improved communication and accountability standards, but under the new law there would be no Bar elections and it allows the Minister to directly regulate the activities of the Bar and would also allow for removal of any lawyer at the discretion of the Minister."<sup>215</sup> The Bill has recently been withdrawn from Parliament and is unlikely to be enacted any time soon.<sup>216</sup> Nonetheless, this government-initiated attempt to increase regulation of the legal profession serves to underscore the extent to which Malaysian lawyers find their right to freedom of association under substantial threat, and the even greater levels of interference lawyers handling politically sensitive cases, like ISA detentions, are likely to encounter.

In spite of this interference, the Malaysian Bar Council, or at the very least a significant number of its members, continues to evidence a spirit of independence that is praiseworthy.<sup>217</sup> The Bar Council has an active and energetic Human Rights Committee, and as members of this Committee made plain during their discussion with the delegation, a number of lawyers, who voluntarily respond to public interest demand. When large numbers of arrests and detentions were made during the period of Reformasi, over twenty-five lawyers responded to a request from the Bar Council to render assistance in the preparation of de-

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213. *Id.*

214. Statement of the Minister in the Prime Minister's Office, Datuk Seri Dr. Rais Yatam, available at <http://www.bheuu.gov.my/jph/main.shtml>.

215. See Interview with members of the Malaysian Bar Council's Human Rights Committee (June 10, 2002).

216. See Statement of the Minister in the Prime Minister's Office, *supra* n.214.

217. See, e.g., Memorandum from the Malaysian Bar Council on the Repeal of Laws Relating to Detention Without Trial, *supra* n.12.

fense.<sup>218</sup>

#### 4. Recommendations

The Malaysian system routinely denies ISA detainees access to counsel. So deprived, ISA detainees are unable to challenge the lawfulness of their arrests and detentions — difficult even in the best of circumstance — and face greater likelihood of abuse at the hands of police officials. When detainees are finally granted access to counsel, generally after the first sixty-day period when any possibility of real remedy has expired, access is often unnecessarily circumscribed. Defense counsel, themselves, face intimidation and harassment, suffer prejudice if they choose to hold office in any political party or other types of civic association and recently, like all other members of the legal profession, have faced the prospect of compulsory membership in a government-initiated and regulated association, so enhancing the likelihood that their activities would be closely monitored.

The delegation recommends:

1. Access to counsel should be provided from the very moment of detention, as provided in the U.N. Basic Principles on Lawyers. Detainees should be entitled to the presence of counsel during detention. Detainees should also be offered other reasonable opportunity to consult with legal counsel during both the sixty-day detention period, and in the detention camps. Opportunity for legal consultation free of interception, censorship, and in full confidentiality, must be guaranteed.
2. The Malaysian government should thoroughly and expeditiously investigate and halt all instances of persecution and surveillance of ISA defense lawyers pursuing their legitimate work.
3. Lawyers must be guaranteed the right to participate in lawful political activities without suffering prejudice. In particular, the provisions of the Legal Profession Act disqualifying individuals who hold office in any trade union, or political party, or any other organization deemed political in nature by the Attorney-General, should be repealed.
4. The Malaysian Bar Association should be guaranteed the independent exercise of its functions free of external interference.

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218. *See* Interview with members of the Malaysian Bar Council's Human Rights Committee, *supra* n.215.

The Malaysian Academy of Law Bill mandating compulsory membership for all legal professionals should be abandoned.

5. Efforts should be made to educate law enforcement personnel of the international and constitutional provisions that allow ISA detainees access to counsel. Educational efforts should also be undertaken in respect of the essential service provided by defense counsel and their right to conduct their professional activities free of intimidation.

#### D. *Absence of Effective Forms of Review*

##### 1. Introduction

Perhaps the most authoritarian of the ISA's provisions is the 1988 amendment, which precludes judicial review of any decision made by the Minister or Yang di-Pertuan Agong in the exercise of his discretionary powers afforded under the Act. In effect, the ISA detainee is denied any effective remedy for unlawful or invalid arrest and detention, because while review of the exercise of discretionary powers afforded police under the ISA remains theoretically possible, denial of access to legal counsel makes legal challenge during the first sixty-day period of detention almost impossible, and thereafter, ineffective.<sup>219</sup> Limited opportunities for redress are rarely seized by an often unjustifiably compliant judiciary, albeit one that has suffered severe attacks on its independence — the subject of a comprehensive International Bar Association (“IBA”) investigation and report.<sup>220</sup> In those rare instances in which judges have undertaken review of executive action under the ISA, their actions have often met with punitive or retaliatory measures. The Federal Constitution and the ISA mandates an alternative form of review in the establishment of an Advisory Board, but as documented later in the

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219. The recent judgment of Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeal, 2002-4 M.L.J. 449, illustrates the ongoing nature of this problem. Although the Federal Court held that the initial arrests and detentions effected under the discretionary powers afforded police by the ISA were unlawful and *ultra vires*, the detainees were granted no remedy. The Court reasoned that “as the appellants have now been detained by order of the Minister under S.8 of the Act, the issue of whether or not to grant the writ of habeas corpus for their release from current detention does not concern us. That is a matter of a different exercise.” See Judgment of Steve L.K. Shim, CJSS.

220. JUSTICE IN JEOPARDY: MALAYSIA 2000, REPORT OF A MISSION ON BEHALF OF THE INTERNATIONAL BAR ASSOCIATION & OTHERS, available at <http://www.ibanet.org> [hereinafter JUSTICE IN JEOPARDY].

Report, this type of review exists in form only, offering no prospect of effective remedy.

It is these features — together securing the absence of any effective form of review, of remedy or redress for the detainee — that provide the focus of the next section of the Report. The section begins by enumerating the applicable international and domestic standards. These provide the framework within which the ISA's provisions — its express ouster of judicial review and authorization of non-disclosure of any information deemed sensitive; attacks on the independence of the judiciary and its consequent conservatism and finally the (non) workings of the Advisory Board — might be assessed.

## 2. Malaysia's Human Rights Obligation

### a. International Obligations

The UDHR enshrines the right of everyone "in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."<sup>221</sup> Importantly, the right is not limited to circumstances in which an individual has been formally charged with a criminal offence. The ICCPR elaborates on this right, requiring that the tribunal not only be independent and impartial, but that it also be "competent" and "established by law."<sup>222</sup> It requires, in addition, that those persons deprived of their liberty by arrest or detention "be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order release if the detention is not lawful."<sup>223</sup>

Even in circumstances making derogation from these rights permissible — among other things, the existence of a "public emergency which threatens the life of the [N]ation" — certain threshold standards continue to apply. In particular, the Body of Principles<sup>224</sup> sets forth certain core guidelines for the protection of all prisoners and detainees, applicable even during times

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221. UDHR, *supra* n.79, art. 10.

222. ICCPR, *supra* n.87, art. 14(1). Article 14(1) states: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." *Id.*

223. *Id.* art. 9(4).

224. Body of Principles, *supra* n.120.

of public emergency. Although the Body of Principles does not constitute a treaty, it has received the approval of the General Assembly and reflects considered global consensus that evidences emergent customary international law.

Among other things, the Body of Principles provides that “the authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”<sup>225</sup> The Principles further state 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,”<sup>226</sup> and that “a judicial or other authority shall be empowered to review as appropriate the continuance of detention.”<sup>227</sup> Moreover, detained persons or their counsel “shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.”<sup>228</sup> In requiring that recourse be had to a “judicial or other authority,” the Body of Principles refers to a “judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.”<sup>229</sup>

The U.N. Basic Principles on the Independence of the Judiciary (“U.N. Judiciary Principles”),<sup>230</sup> another document reflecting the emergence of customary international norms, also provides for the effectiveness of judicial review by setting forth certain core principles to safeguard the integrity and autonomy of courts throughout the world. Among other things, the U.N. Judiciary Principles assert that “[t]he independence of the judiciary shall be guaranteed by the States and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>231</sup> They further provide that the

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225. *Id.* at Principle 9.

226. *Id.* at Principle 11(1).

227. *Id.* at Principle 11(3).

228. *Id.* at Principle 32(1).

229. *Id.* at Use of Terms.

230. Basic Principles on the Independence of the Judiciary, G.A. Res. 40/32, 7th Cong., at 59, U.N. Doc A/CONF. 121/22/Rev.1 (1985).

231. *Id.* at Principle 1.

judiciary shall decide matters “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason.”<sup>232</sup> In addition, the Principles declare that the method for selecting judges should be free of “improper motives,”<sup>233</sup> and that judges should be suspended or removed only for actions that make them unable to discharge their duties.<sup>234</sup>

### b. Domestic Obligations

Among the fundamental liberties enshrined by the Malaysian Federal Constitution, is the right to judicial review in cases of alleged unlawful detention. Specifically, Article 5(2) provides that “[w]here complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.”<sup>235</sup> As has been explained in a previous section of this Report, Article 5 is among those fundamental rights from which derogation is permitted, but only in circumstances where laws designed to inhibit action prejudicial to public order are expressly inconsistent with such rights.<sup>236</sup> In respect of the ISA, the 1988 amendment prohibiting judicial review of “any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act”<sup>237</sup> stands in direct opposition to the right afforded in Article 5 of the Federal Constitution. However, no provisions of the ISA expressly deny or limit judicial review of discretionary powers exercised by police officers in accordance with the Act.

## 3. Problems

### a. ISA Textual Constraints

ISA prescriptions restricted the exercise of review powers

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232. *Id.* at Principle 2.

233. *Id.* at Principle 10.

234. *Id.* at Principle 18.

235. MALAY. CONST., art. 5(2).

236. *Id.* art. 149(1).

237. ISA, *supra* n.5, art. 8B(1). Judicial review of these executive decisions is excluded, save for questions on compliance relating to certain narrow procedural requirements.



even prior to the 1988 amendment ousting judicial review. In particular, Article 16 provides that “[n]othing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.”<sup>238</sup> This expansively-framed provision entitles any public servant at his or her unlimited discretion to withhold large quantities of information from the court. Indeed, this grant of non-disclosure extends to the most significant information — the very facts that purportedly support the necessity of the individual’s arrest and detention. Without such information, the court is manifestly unable to engage in judicial review. In dismissing the relevance of an objective determination of whether the suspicion necessary to effect ISA arrests and detentions had been formed, the Federal Court in *Theresa Lim Chin Chin* made such a reading plain:

In this case, whether the objective or subjective test is applicable, it is clear that the [C]ourt will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and material in their possession upon which they based their decision<sup>239</sup>

The authorization of non-disclosure strays far from contemporary practice in a number of jurisdictions, attempting more seriously to balance threats to national security against protection of individuals’ fundamental freedoms. South Africa, for example, insists that security-sensitive information be made available to the courts for examination, even while other individuals and bodies may justly be refused such information.<sup>240</sup> In this man-

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238. ISA, *supra* n.5, art. 16. Article 151 of the Constitution, entitled “Restrictions on preventive detention” contains an analogous provision: “This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.” MALAY. CONST., art. 151.

239. *Theresa Lim Chin Chin v. Inspector-General of Police*, [1998] 1 M.L.J. 293.

240. Under Section 41 of the South African Promotion of Access to Information Act No. 2 of 2000, a public body may refuse a request for information if its disclosure:

- (a) could reasonably be expected to cause prejudice to –
  - (i) the defence of the Republic;
  - (ii) the security of the Republic; . . .

*Id.* However, Section 80, entitled “Disclosure of records to, and non-disclosure by, court,” provides:

ner, not only do the individual's rights and liberties go uncompromised and national security interests are accommodated, but the Court's powers of review are preserved and its role as the most important and independent check on government is powerfully reaffirmed.

The 1988 amendment<sup>241</sup> to the ISA substantially narrowed the space within which those seeking to challenge the legality of ISA arrests and detention could operate. While certain procedural requirements may nonetheless be invoked as the basis for judicial review, these are so limited as to be almost negligible.<sup>242</sup> A

(1) Despite this Act and any other law, any court having an application, or an appeal against a decision on that application, may examine any record of a public or private body to whom this Act applies, and no such record may be withheld from the court on any grounds.

(2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1) –

(a) any record of a public or private body which, on request to access, may or must be refused; . . .

*Id.*

241. *See* ISA, *supra* n.5, art. 8B. Article 8B provides:

(1) There shall be no judicial review in any court of, and no court shall exercise any jurisdiction in respect of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.

*Id.*

242. Section 8A of the ISA makes the following procedural defects ineligible for review:

No detention order shall be invalid or inoperative by reason –

(a) that the person to whom it relates –

(i) was immediately after the making of the detention order detained in any place other than a place of detention referred to in [S]ection 8(3);

(ii) continued to be detained immediately after the making of the detention order in a place in which he was detained under section 73 before his removal to a place of detention referred to in [S]ection 8(3), notwithstanding that the maximum period of such detention under [S]ection 73(3) had expired; or

(iii) was during the duration of the detention order on journey in police custody or any other custody to a place of detention referred to in [S]ection 8(3); or

(b) that the detention order was served on him at any place other than the place of detention referred to in [S]ection 8(3), or that there was any defect relating to its service upon him.

*Id.*

much more significant basis for judicial review is the exercise of discretionary powers afforded police under the ISA, as there is no express ouster in this regard. And yet, the Federal Court has read the ouster in respect of Section 8 detentions — those authorized by the Minister and the Yang di-Pertuan Agong — to apply equally with respect to Section 73 detentions, those effected by police officers, essentially upholding an absolute prohibition on the powers of judicial review. In *Theresa Lim Chin Chin*, the Federal Court reasoned:

[W]e cannot see how the police power of arrest and detention under [S]ection 73 could be separated from the ministerial power to issue the order of detention under [S]ection 8. We are of the opinion that there is only one preventive detention and that is based on the order to be made by the Minister under [S]ection 8.<sup>243</sup>

Although this reasoning is not expressly mandated by the textual provisions of the ISA, it nonetheless keeps faith with the intent motivating the amendment. Together, the textual prescriptions of the ISA act to severely impair the right of individuals deprived of their liberty by arrest and detention “to take proceedings before a court, in order that the court may decide without delay on the unlawfulness”<sup>244</sup> of the detention. The limited opportunities for review that remain are now threatened by proposed amendments that have arisen in response to the Federal Court’s ruling in *Mohamad Ezam Bin Mohd Nor & Others v. Ketua Polis Negara*,<sup>245</sup> holding that the five challenged arrests and detentions were unlawful and *ultra vires*. The threatened amendments include the proposal that police no longer be required to defend detentions in court, that no negative inferences may be drawn from their decision not to do so, and a second proposal that detainees be prohibited from divulging any details of their interrogations before the court.<sup>246</sup> Should these proposed amendments be enacted, review of police powers will be rendered meaningless, leaving detainees without the possibility of any form of review.

In the following section, the generally deferential nature of

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243. *Theresa Lim Chin Chin v. Inspector-General of Police*, [1998] 1 M.L.J. 293.

244. ICCPR, *supra* n.87, art. 9(4).

245. *See Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals*, 2002-4 M.L.J. 449.

246. *See Interview with Gopalakrishnan a/l Nagappan*, *supra* n.154.

the judiciary and government-initiated measures designed to ensure the judiciary's compliance are discussed in light of their propensity to further narrow judicial review.

### b. Judicial Independence

With rare exceptions,<sup>247</sup> where adjudication of ISA matters is concerned, judges act with extreme deference to the executive. This approach stands in stark contrast to the canonical interpretive principle that legislative intrusions in respect of individuals' liberty be construed in *favorem libertas* — that inroads made upon established principles of justice be strictly construed. As one of the lawyers who met with the delegation observed:

the lack of judicial independence in this country is due to a lack of understanding of the proper role of the judiciary. Judges in this country see themselves as nothing more than an arm of the executive branch. They see their job as upholding the judgment of the executive.<sup>248</sup>

In those rare instance in which courts have acted to protect individual liberties, as in *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application*,<sup>249</sup> where the High Court ruled that the detainee was entitled to be present in court at the hearing of the *habeas corpus* application, such rulings have been quickly reversed on appeal.<sup>250</sup>

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247. *See*, for instance, the judgment of Judge Hishamuddin Mohd in *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application*, 2001-2 M.L.J. 689, ordering the release of two of the KeADILan-10, and his courageous obiter dictum:

With the greatest of humility, perhaps it is high time for Parliament to consider whether the ISA, which was originally to counter Communist terrorism in the early years of independence, is really relevant to the present-day situation of this nation of ours. Or, if at all to be retained, at least whether its provisions need to be thoroughly reviewed to prevent or minimize the abuses which I have highlighted in this judgment.

*Id.*

248. Interview with lawyer, Malik Imtiaz Sarwar, *supra* n.196.

249. 2001-6 M.L.J. 203. *See also* MALIK IMTIAZ SARWAR & CHRISTOPHER LEONG, *THE TRIALS AND TRIBULATIONS OF HUMPTY-DUMPTY: FUNDAMENTAL LIBERTIES AND NATIONAL SECURITY, ARE THE COURTS STRIKING THE RIGHT BALANCE?* 11 (2002).

250. *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application* [2001] 4 MLJ 11 where the Federal Court held that the detainee was not entitled to be present at the hearing of his application, reasoning in unduly formalistic terms that "no oral evidence is required in the habeas corpus proceeding and the issue of the detainee being prejudiced would not arise. He had the benefit of counsel . . ." *Id.* *See also* SARWAR & LEONG, *supra* n.250, at 13. This article observes that:

[T]here is no point to being represented by counsel where said counsel have

Even the recent landmark judgment of *Mohamad Ezam Bin Mohd Nor & Others v. Ketua Polis Negara* includes a disconcerting deferential element: although the Federal Court held that the detentions of the appellants were unlawful and believed that they should be released accordingly, the Court stopped short of ordering release, reasoning that their subsequent detention pursuant to a Ministerial order rendered their release from current detention a matter that “does not concern us.”<sup>251</sup> Yet, this reluctance to alter the status of individuals detained by Ministerial order is in no way mandated by the judicial ouster contained in Section 8B of the ISA; instead, it reflects an unnecessary judicial timidity.

The executive-mindedness of the judiciary arises from a number of factors. Firstly, the Malaysian judiciary is unnecessarily shielded from public criticism, even assuming that some degree of insulation is necessary to ensure an independent and respected judiciary. The judiciary’s increased resort to contempt of court proceedings against lawyers deemed to have acted inappropriately can only have a chilling effect on counsels’ willingness to critique the judiciary and judgments rendered, as well as impair their ability to provide effective legal counsel.<sup>252</sup> Other attempts to stifle criticism of the judiciary include the September 2000 court ruling prohibiting the Malaysian Bar Council from discussing the conduct of judges, in particular the alleged misconduct of then Chief Justice Eusoff Chin, at a planned Extraordinary General Meeting.<sup>253</sup>

Conversely, the courts are particularly vulnerable to pressures from the government. As several lawyers who met with the

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no clue as to what happened or is happening to their clients as they cannot get instructions. As surprising as it may seem, this is usually the consequence of not getting access, and will amount to deprivation of the right to be heard.

*Id.*

251. See *Mohamad Ezam Bin Mohd Nor & Others v. Ketua Polis Negara*, Judgment of Steve L.K. Shim, CJSJ, 2002-4 M.L.J. 449.

252. See *Att’y Gen., Malaysia v. Manjeet Singh Dhillon*, 1991-1 M.L.J. 167; *MBf Capital Bhd & Anor. v. Tommy Thomas & Another*, 1999-1 M.L.J. 139; *Zainur bin Zakaria v. Public Prosecutor*, 2000-4 M.L.J. 134, where the court held, obiter: “We observe that lately there has been an increase in contempt offences being committed by advocates and solicitors. As such we feel the time is now ripe for imposition of custodial sentences in contempt offences.” *Id.* All three cases are discussed in *JUSTICE IN JEOPARDY: MALAYSIA 2000*, *supra* n.222.

253. REPORT BY THE OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS, *supra* n.154, at 23.

delegation remarked, the judiciary has, in fact, never fully recovered from the assault it sustained in 1988.<sup>254</sup> At the time, the Constitution was amended to make the jurisdiction and powers of the Court subject to federal law rather than the Constitution, making it possible for Parliament to limit or abolish judicial review by a simple majority vote rather than the two-thirds required for constitutional amendment.<sup>255</sup> That same year also witnessed the suspension, on the eve of a crucial court decision on the legal status of UMNO, of the Lord President of the Federal Court, Tun Salleh Abbas, and his subsequent dismissal on grounds of “misbehaviour in the form of bias against the government.”<sup>256</sup> Five of the remaining Supreme Court judges were also suspended, and two later dismissed.<sup>257</sup> Tun Salleh Abbas, meeting with the delegation, stated that the crisis had been precipitated by a breakdown in the relationship between the judiciary and the executive: “the government thought any decision we [the judiciary] made against them was interference with the executive power.”<sup>258</sup> He explained that one of the factors leading to his dismissal was a letter he had written to the Prime Minister expressing the judiciary’s unhappiness at the Prime Minister’s public criticism of individual judges.<sup>259</sup>

Recent assaults on the independence of the judiciary have included the transferal of individual judges who issued rulings unfavorable to the executive. Shah Alam High Court Judge, Hishamudin Mohd, who ordered the release of KeADILan detainees, N. Gobalakrishnan and Abdul Ghani Haroon, found himself transferred to the commercial law division of the Kuala Lumpur High Court,<sup>260</sup> thus limiting his ability to issue any further decisions favorable to ISA detainees. It also remains fairly commonplace for members of the executive to sharply criticize

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254. See Interview with Ngeow Yin Ngee, lawyer (June 2, 2002); Interview with Sivara Rasiyah, lawyer (June 11, 2002); Interview with Karpal Singh, lawyer (June, 11 2002); Interview with former Lord President of the Federal Court, Tun Salleh Abbas (June 13, 2002).

255. AMNESTY INTERNATIONAL, *supra* n.31, at 10.

256. *Id.* at 11.

257. *Id.*

258. Interview with Tun Salleh Abbas, former Lord President of the Federal Court (June 13, 2002).

259. *Id.*

260. Former Chief Justice, Tun Salleh Abbas, confirmed this fact in his Interview (June 13, 2002).

the judiciary for any adverse decisions — Prime Minister Mahathir recently stated that “judges who do not agree with laws passed by Parliament should excuse themselves when hearing such cases.”

Consequently, the judiciary must operate in a destabilizing context, vulnerable to various pressures brought to bear by government. The environment has made for a particularly fragile judiciary that has been denied the freedom to decide matters “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason.”<sup>261</sup> It has also bred an unduly deferential and compliant judicial character, ensuring that courts very rarely act to secure the rights of detainees to challenge the lawfulness of their detention or the conditions to which they are subject.

### c. Advisory Board Review

Through the Advisory Board the ISA offers what appears to be an alternative form of review,<sup>262</sup> but Malaysian lawyers have called the process a “mockery” and “rubber-stamp.”<sup>263</sup> The Advi-

261. Basic Principles on the Independence of the Judiciary, *supra* n.230, at Principle 2.

262. See ISA, *supra* n.5, Sec. 11(1). Section 11(1) provides:

A copy of every order made by the Minister under [S]ection 8(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations against the order to an Advisory board.

*Id.* The establishment of an Advisory Board is mandated by the Federal Constitution. Article 151 provides:

...  
(b) no citizen shall continue to be detained under [laws or ordinances promulgated under Section 149] unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members who shall be appointed by the Yang di-Pertuan Agong.

MALAY. CONST., art. 151.

263. See Interview with Cheah Kah Peng & Gooi Hock Seng, lawyers (June 8, 2002). See also Interview with Malik Imtiaz Sarwar, lawyer (June 10, 2002).

sory Board's mode of establishment and operation compromise any claim to independence. The Board is, moreover, only empowered to make recommendatory findings and 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 his detention. Although provision is made in the ISA for representations by the detainee before an Advisory Board,<sup>264</sup> a number of the ISA detainees refuse to participate in the Advisory Board review process at all, believing that the process does not qualify as suitably competent, impartial, and independent review.<sup>265</sup>

For one thing, while the Constitution requires that the Chairman of the Advisory Board have attained the level of judge, or be so qualified, no criteria guide the appointment of the two other members of the Advisory Board.<sup>266</sup> All three appointments are made by the Yang di-Pertuan Agong.<sup>267</sup> The Yang di-Pertuan Agong is also empowered to devise the rules by which representations are brought before the Advisory Board and those regulating the procedure of the Board.<sup>268</sup> Taken together, these factors fundamentally impair the Board's independence.

Perhaps most importantly, the Advisory Board lacks the power to issue binding orders. Rather, it merely issues non-binding recommendations to the Yang di-Pertuan Agong, who in turn subsequently gives the Minister such directions pertaining to the order as he thinks fit.<sup>269</sup> The merely advisory nature of the Board's conclusions negates any assessment of the Board's review proceedings as competent, as required under interna-

264. ISA, *supra* n.5, Sec. 11(1).

265. Interview with Wong Luke Khuan and Keng Sun Tao, ex-ISA detainees (June 4, 2002). Both recalled experiences in which the only evidence placed before the Board was that supplied by the Security Branch.

266. MALAY. CONST., art. 151(2).

267. *Id.* art. 151(2).

268. ISA, *supra* n.5, art. 11(3). Article 11(3) states: "The Yang di-Pertuan Agong may make rules as to the manner in which representations may be made under this section and for regulating the procedure of the Advisory Boards." *Id.*

269. *See* ISA, *supra* n.5, art. 12(2). Article 12(2) states:

Upon considering the recommendations of th Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to [S]ection 13, be final, and shall not be called into question in any court.

*Id.*



tional law. This was starkly illustrated most recently in December 2002, when the Advisory Board, in the wake of the Federal Court's decision in *Mohamad Ezam Bin Mohd Nor & Others v. Ketua Polis Negara*,<sup>270</sup> recommended that the five appellants be immediately released, taking into account that they had already served two years detention under their initial detention orders. To date, neither the Yang di-Pertuan Agong nor the Minister have responded to these recommendations, far less acted upon them.<sup>271</sup>

#### 4. Recommendations

In many legal systems the grant of extensive powers for the purposes of maintaining public order is offset by the prospect of judicial review, which can constitute a significant safeguard against the abuse of these powers. This is not true of Malaysia. Textual prescriptions of the ISA make judicial review an infrequent occurrence and the government's proposed amendments look set to make review all but impossible. It is this situation — an executive intent on making review of ISA arrest and detentions increasingly meaningless and a judiciary, with rare, courageous exceptions, disinclined to read the provisions to ameliorative effect — that make ISA detainees particularly vulnerable to abuse.

The delegation believes that recommendations made in JUSTICE IN JEOPARDY<sup>272</sup> — an International Bar Association report published in 2000, investigating threats to the independence of Malaysia's judiciary — should be adopted forthwith. In addition, the delegation recommends that:

1. Information which authorities deem prejudicial to national interest, if publicly disclosed, should be presented before the courts *in camera*. Judges must determine whether such disclosure would indeed prejudice the national interest and order its public submission before the courts in circumstances in which they find that disclosure would not be contrary to national interest. In any event, judges must have the benefit of scrutinizing the information, in normal proceedings or *in camera*, in order to allow for judicial review.

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270. See *supra* n.190.

271. See Aliran Media Statement, Scrap the ISA Advisory Board, Jan. 15, 2003.

272. JUSTICE IN JEOPARDY: Malaysia 2000, *supra* n.220.

2. The right of judicial review should be restored in respect of decisions made by, or acts of the Minister or Yang di-Pertuan Agong under the ISA. Section 8B, introduced by a 1988 amendment, should be repealed.
3. Judges should abide by the precedent established in *Mohamad Ezam Bin Mohd Nor & Others v. Ketua Polis Negara* that arrest and detention under Section 73 of the ISA is separate from subsequent detention under Section 8, review of which is not prohibited by the Section 8 judicial ouster.
4. The proposed amendments to the ISA, prescribing that police be freed from the requirement of defending detentions before courts; that no negative inference should be drawn from this non-appearance; and that the ISA detainees should be prohibited from divulging details of their interrogations to the courts, must be entirely abandoned.
5. Members of the government should refrain from speaking out publicly against members of the judiciary. Conversely, members of the public at large and lawyers especially should be guaranteed the right to provide constructive criticism of the judiciary.
6. Removal or transfer between divisions of judges, particularly in the wake of their having authored controversial decisions, must be subject to the review of an independent body, unless such removals or transfers are publicly explained.
7. The Malaysian government should not only desist from actively compromising the independence of the judiciary, but should also take greater steps to ensure its independence, as mandated under domestic and international law. Such measures might include greater educational efforts directed at the public generally and civil servants in particular. The Malaysian government should also encourage scholarly exchange between Malaysian judges and those from other jurisdictions, sponsoring delegations both to and from other jurisdictions.
8. Laws regulating the composition and procedure of the Advisory Boards must be repealed. All members of the Advisory Boards shall be, or have been, or be qualified to be, judges of the Federal Court, the Court of Appeal or High Court. Their findings on representations submitted to them shall be made public and shall be binding on both the Yang di-Pertuan Agong and the Minister.

## E. *Abuse of Detainees*

### 1. Introduction

Amnesty International missions to Malaysia during 1978, and ten years later in 1988, recorded “[a]n almost uniform pattern in the ill-treatment of ISA detainees, primarily during the 60-day interrogation.”<sup>273</sup> This pattern continues today, with individual detainees, in part depending on their public profiles, experiencing differing degrees of physical abuse. The controversy surrounding Anwar Ibrahim’s physical mistreatment during his time under ISA detention may have acted to curtail such manifest abuse. Nevertheless, the dire conditions of detention, the psychological abuse inflicted during interrogation, and the denial of access to detainees’ families remain standard procedure, and ensure that the experience of detention under the ISA is almost intolerable.

This section details Malaysia’s international and domestic commitments to safeguarding the well-being of detainees and protection against torture, cruel, unusual and degrading treatment and punishment. It examines how current practice fails to conform to these standards: first, in the conditions of detention detainees must endure; second, in the physical and psychological abuse to which they are subject during interrogation; and third, in the denial of contact with family during the first sixty days of detention. This section also documents the extent to which conditions in the detention camps, although not as extreme as those experienced during the first sixty days, nonetheless fall far short of international standards. Finally, it assesses the role played by SUHAKAM, the government-sponsored Human Rights Commission, in monitoring the conditions to which detainees are subject.

## 2. Malaysia’s Human Rights Commitments

### a. International Human Rights Norms

Of the increasing number of human rights standards given international recognition, few command as much undisputed consensus as does the prohibition on torture, cruel, inhuman, or degrading treatment or punishment. Article 5 of the UNDHR enumerates this proscription clearly, as does Article 7 of the

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273. AMNESTY INTERNATIONAL REPORT, *supra* n.31.

ICCPR. The ICCPR elevates this right to the status of a non-derogable norm, prohibiting any derogation from its provisions, even as it acknowledges that in times of public emergency, States Parties may take measures derogating from their ICCPR obligations "to the extent strictly required by the exigencies of the situation."<sup>274</sup> The reiteration and amplification of this prohibition in international instruments such as the CAT, the Standard Minimum Rules for the Treatment of Prisoners, and the Body of Principles, sustain the conclusion that the norm is at the very core of international customary law and binding on all States, irrespective of individual ratification.<sup>275</sup>

The prohibition on torture and other cruel, inhuman or degrading treatment or punishment encompasses both the intentional infliction of physical pain and mental distress.<sup>276</sup> With ap-

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274. ICCPR, *supra* n.87, art. 4. See also ICCPR General Comment 7, 16th Sess., A/37/40 94, para.1 (1982) (stating: "The Committee recalls that even in situations of public emergency such as are envisaged by article 4(1) this provision is non-derogable under [A]rticle 4(2)."). See also ICCPR General Comment 20, Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, 44th Sess., A/47/40 193, para. 3 (1992) (stating: "The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force.").

275. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 189-90 (1995) (stating:

It is now accepted that respect for a number of the rights protected by the Covenant has become an international obligation by customary law, for all [S]tates, and such obligations are *ergo omnes*, obligations to all [S]tates. At a minimum, 'a [S]tate violates international law, if, as a matter of [S]tate policy it practices, encourages or condones' any of the following: genocide, slavery or slave trade; murder or causing the disappearance of a person; torture or cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; or any consistent pattern of gross violations of other human rights.

*Id.* See also RESTATEMENT, *supra* n.81, Sec. 702.

276. See CAT, *supra* n.162, art. 1. Article 1 states:

[T]he term 'torture' means any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

*Id.* See also ICCPR, General Comment 20, *supra* n.275, para. 5. Paragraph 5 states that: "the prohibition in [A]rticle 7 [referring to the ICCPR] relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."

preciation for the particularly vulnerable position of persons placed in detention, the Body of Principles recommends that “the term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”<sup>277</sup> In keeping with its exhortation that the widest possible protection against these abuses be extended, the Body of Principles also urges extreme caution in regard to situations that may prove conducive to the perpetration of this type of abuse, insisting that it is prohibited to “take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against another person.”<sup>278</sup> A circumstance-sensitive approach is also adopted by the U.N. Human Rights Committee, urging that assessments of non-compliance be based not so much on identifying specifically prohibited forms of treatment or punishment, but on examining the individual circumstances of the detainee — “[e]ven such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this [A]rticle [7].”<sup>279</sup>

The Body of Principles elaborates on the type of conditions that should prevail during detention. These include allowing detainees the opportunity to be visited by and to correspond with, their families;<sup>280</sup> to be kept, if possible, in places of deten-

277. Body of Principles, *supra* n.120, at Principle 6.

278. *Id.* at Principle 21(1). *See also* Principle 21(2): “No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.” *Id.*

279. ICCPR, General Comment 7, *supra* n.274. *See also* ICCPR, General Comment 20, *supra* n.274: “The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by [A]rticle 7.” *Id.*

280. Body of Principles, *supra* n.120, at Principle 19. *See also* Standard Minimum Rules, *supra* n.124, art. 92. Article 92 states:

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

*Id.*

tion reasonably near their usual place of residence;<sup>281</sup> to be afforded proper medical care;<sup>282</sup> and to obtain reasonable quantities of educational, cultural, and informational material, subject to reasonable restrictions.<sup>283</sup> In order to protect against abuse and non-compliance with relevant laws, Principle 29 requires that qualified and experienced individuals who were appointed by and report to a “competent authority distinct from the authority directly in charge of the administration of the place of detention,” visit places of detention regularly.<sup>284</sup> During these visits, detainees shall have the right to “communicate freely and in full confidentiality” with such persons.<sup>285</sup> They, or their counsel, shall also have the right to issue complaints regarding treatment, particularly in circumstances of torture or other cruel, inhuman or degrading treatment to the responsible administrative authorities and “when necessary, to appropriate authorities vested with reviewing or remedial powers.”<sup>286</sup>

#### b. Domestic Obligations

It is surprising, even acknowledging the limited number of fundamental rights enumerated in Malaysia’s Constitution, that it contains no guarantee against torture or other cruel, inhuman, or degrading treatment or punishment. This failure is itself arguably a violation of the customary law standards just described. Further, this omission has disturbingly been employed by the Malaysian Federal Court, in order to distinguish Malaysia from those countries that have constitutions inscribing such a right, and accordingly, to imply that treatment deemed abusive in these jurisdictions would weigh less heavily within the Malaysian constitutional system.<sup>287</sup> Nonetheless, the Court does observe that “one would not expect Parliament to countenance torture or any punishment that is inhuman or degrading.”<sup>288</sup>

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281. *Id.* at Principle 20.

282. *Id.* at Principle 24.

283. *Id.* at Principle 28.

284. *Id.* at Principle 29(1).

285. *Id.* at Principle 29(2).

286. *Id.* at Principle 33(1). Principle 33(1) states: “In circumstances where neither the detainee, nor his counsel, can exercise this right, a member of the detainee’s family or other individual with knowledge of the case may exercise the right.”).

287. *Public Prosecutor v. Lau Kee Hoo*, 1983-1 M.L.J. 157.

288. *Id.*

### 3. Problems

#### a. Detention Conditions

Statements of the KeADILan ten, confirmed by the delegation's interviews with their wives and families,<sup>289</sup> unfailingly attest to the deplorable conditions of their first sixty-days of detention. All were transported, in a manner designed to disorientate them, to inhabitable cells where each was kept in solitary confinement with no human contact, save for contact with the police officers, who interrogated them.<sup>290</sup> Cells were characteristically filthy with grossly inadequate ablution facilities and almost no ventilation.<sup>291</sup> Beds consisted of slats of wood or slabs of concrete, and no pillows or other bedding were provided, at least initially.<sup>292</sup> Detainees were denied prayer mats, religious reading material, such as the Koran, and other more general reading material.<sup>293</sup> They were also denied the opportunity of exercise and were often deprived of clothing, footwear, and proper nutrition.<sup>294</sup> Lights in the cells were always switched on, and detainees were denied access to any means of calculating the passage of time<sup>295</sup> — measures apparently designed to ensure their disorientation.

Conditions often improved as the period of detention wore on, but amelioration coupled with threats of return to conditions that previously prevailed<sup>296</sup> amounted to coercion and manipulation of the detainees. This appears to be a regular feature of ISA detentions, employed not only to ensure compliance or compel incrimination, but in the case of certain categories of ISA detainees, like “deviant” *Shi'ite* Muslims, to “turn-around,” or

289. See Interviews with wives and supporters of the KeADILan-10 (June 10, 2002).

290. Aff. of Abdul Ghani bin Haroon, *supra* n.140, at paras. 17 - 27; Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 17, 18, 19; Aff. of Lokman Noor, *supra* n.140, at paras. 8, 9 & 10; Aff. of Hishamuddin Bin Rais, *supra* n.140, at paras. 6,7,8; Aff. of Mohamad Ezam Bin Mohd Nor, *supra* n.140, at paras. 11, 12, 13; Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.140, at paras. 9, 10; Aff. of Tian Chua, *supra* n.140, at paras. 9-14; Aff. of Saari Bin Sungib, *supra* n.140, at paras. 8-12; Affidavir of Badaruddin Bin Ismail, *supra* n.140, at paras. 4-7.

291. *Id.*

292. *Id.*

293. *Id.*

294. Aff. of Badrulamin Bin Bahron, at para. 25.

295. Aff. of Lokman Noor, at para 9.

296. Aff. of Badrulamin Bin Bahron, at para. 20.

more euphemistically to “re-educate,” these individuals.<sup>297</sup>

Adding to the severity of the treatment to which detainees are subject, is the restricted access to their families, and the knowledge that their families, too, are vulnerable to police harassment.<sup>298</sup> When access is permitted, visits take place under observation,<sup>299</sup> and are generally preceded by instructions not to discuss the conditions of detention with family members.<sup>300</sup> Often, they are permitted to see their families only at the very end of the sixty-day period, and in some instances, not at all. This works particular hardship in conditions where the detainee may fear that no one knows where he is. As he faces the prospect of indefinite detention without trial, he is denied any knowledge of campaigning efforts undertaken on his behalf, causing particular mental stress. Testimony to the hardship experienced is the deterioration in health, particularly high blood pressure and weight loss, many detainees suffer in detention.<sup>301</sup>

The detainees’ experience of detention during the first sixty days is one of solitary confinement, involving disorientation and deprivation of the use of natural senses and of awareness of place and passage of time. Denial of access to family is also customary. These conditions warrant the gravest concern, violating, as they do, the prohibition on torture, cruel, and inhuman and degrading treatment.

### b. Interrogation Methods

In the earlier years, ISA detainees were routinely subjected

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297. AMNESTY INTERNATIONAL REPORT, *supra* n.31, at 23.

298. Aff. of Saari Bin Sungib, *supra* n.140, at para. 22: “I was instructed to discuss only family matters and to advise my wife and children to stay away from political programmes and activities.” *Id.* In her discussions with the delegation, Aliza Jaffar, wife of Saari Bin Sungib, recounted her own arrest for having participated in a demonstration outside the Kamunting camp, and disclosed that she thought that she was continuously followed by Special Branch officers. Interviews with wives and supporters of KeADILan-10 (June 10, 2002).

299. Aff. of Badrulamin Bin Bahron, *supra* n.140, at paras. 35-36; Aff. of Lokman Noor, *supra* n.140, at para. 18. In the case of Lokman Noor, three to four police officers were always present. *Id.* at para 20.

300. Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 13; Aff. of Saari Bin Sungib, *supra* n.140, at para. 22: “I was made to understand by the Investigating Officer that future family visits depended on me obeying the warnings that he had given.” *Id.*

301. Aff. of Raja Petra Bin Raja Kamarudin, *supra* n.140, at para. 12; Aff. of Lokman Noor, *supra* n.140, at para. 16; and Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 32.



to torture during interrogation, or the interrogation was conducted in such a manner that it was itself torture. Wong Luke Kwan, detained between 1957 and 1963, recalls being “interrogated for six days straight, from October 1 to October 6, non-stop,” all the while being deprived of sleep.<sup>302</sup> Koh Swee Yong, detained in 1976, recounts being beaten with a rubber hose, “about one inch in diameter” during his interrogation — “they would ask me questions and when they weren’t satisfied with the answer, they would beat me.”<sup>303</sup> Hon Yew Pen, detained from 1971 to 1979, recalls twenty-four hour periods of interrogation, during which the air-conditioner was adjusted to unbearably cold temperatures, and being beaten at regular intervals. During the beatings, interrogators would “wear plastic rings and would punch your back, not your face. They would put an iron pail on your head and whack it with a stick.”<sup>304</sup> Physical abuse of ISA detainees during these years was so intolerable, that at least one detainee committed suicide.<sup>305</sup>

The intensity of abuse appears to have diminished in recent years, in part because of the international and domestic outcry surrounding the mistreatment of Anwar Ibrahim, and the disrepute earned by the Malaysian criminal justice system. Nonetheless, physical abuse, intended to degrade and intimidate detainees continues to be inflicted during interrogation. One KeADILan detainee, N. Gobalakrishnan, recounted that during his detention and interrogation, “Chief Inspector Davadasin assaulted me. He hit and kicked me.”<sup>306</sup> Lokman Noor was forced to undress and parade before the police officers, showing “both my biceps in the style of a ‘bodybuilder’ . . . Sergeant Major Yusof after that then slapped and kicked me in the right side of my back.”<sup>307</sup> Threats of severe physical harm also continue to be part of standard operating procedure and Amnesty International’s 1978 assessment remains valid: “All are exposed to the threat of ill-treatment or torture. The whole interrogation process seeks to induce in the prisoner severe mental and physical

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302. Interview with Wong Luke Kwan, ex-ISA detainee (June 4, 2002).

303. Interview with Koh Swee Yong, ex-ISA detainee (June 3, 2002).

304. Interview with Hon Yew Pen, ex-ISA detainee (June 4, 2002).

305. Interview with Chan Beng Sam, ex-ISA detainee (1969-1977) (June 4, 2002).

306. Interview with Gobalakrishnan a/l Nagappan, *supra* n.154 (noting that Gobal-krishnan was an ex-ISA and KeADILan detainee).

307. Aff. of Lokman Noor Bin Adam, *supra* n.140.

stress.”<sup>308</sup> Hishamuddin Rais starkly recounts this type of threat in his affidavit, describing an Interrogating Officer who stood up during an interrogation and “pointed his hand at me (in the style as if he was holding a gun in his hand)”<sup>309</sup> and being shown walls with scratches and boot prints, as police officers described “the techniques they used until blood was splattered on the interrogation room walls. They threatened me by saying that they would push detainees forcefully to the wall and beat them until their blood sprayed onto the walls.”<sup>310</sup>

Also unchanged over the years and vividly recalled by generations of detainees is the pathology of the interrogation process: a chilling interplay of “good” versus “bad” interrogators. Its routine use suggests a procedure designed to maximize the vulnerability of the detainees and exploit this frailty.<sup>311</sup> Together, these conditions compel an assessment that although mistreatment of detainees may seldom rise to the level of torture, the standard is consistently one of cruel, inhuman, and degrading treatment.

In respect of standards of treatment, the delegation believes it necessary to articulate another point of concern: although we made various attempts, we ultimately met with very few family members of detainees alleged to be Islamic militants,<sup>312</sup> and can report little as to their conditions of detention. Generally, in contrast to the KeADILan detainees, these detainees and their families do not maintain high-profile status within civil society, and cannot avail themselves of the same organizing and support networks. Supporters of the KeADILan detainees have made approaches to the families of the “KMM” detainees, but family members have refused to talk to them as the Special Branch has instructed them not to do so.<sup>313</sup> This enhanced vulnerability — their absence of profile within established activist circles — makes these detainees that much more liable to physical abuse.

308. AMNESTY INTERNATIONAL, *supra* n.31, at 85.

309. Aff. of Hishamudin Rais, *supra* n.140, at para. 23.1.

310. Aff. of Hishamudin Rais, *supra* n.140, at para. 23.10.

311. Interview with Nasir Hashim, ex-ISA detainee (June 3, 2002); Interview with Raja Petra, KeADILan ISA detainee (June 3, 2002).

312. We did meet with Kelantan Chief Minister, Dato' Nik Aziz (June 6, 2002), father of alleged KMM member, Nik Adli Nik Abdul Aziz.

313. Interview with Bahirah Tajul Aris, wife of KeADILan ISA detainee, Mohamad Ezam Bin Mohd Nor (June 10, 2002).

c. Conditions in the Detention Camp

Conditions in the Kamunting Detention Camp, where individuals are transferred once detained pursuant to the Minister's Section 8 order, are markedly better than those they experience under police lock-up during the first sixty-day detention period. They nonetheless fail to conform to international human rights standards. Although the KeADILan detainees are permitted to meet with their families once a week for forty-five minutes, the detention camp, Kamunting, is a three to five hour journey from Kuala Lumpur, making access unduly onerous for the families and detainees.<sup>314</sup> Recently, arbitrary restrictions have been set on the kind and number of family members they may meet with.<sup>315</sup>

The KeADILan detainees have been subject to particularly restrictive conditions. In Kamunting, the six detainees have been separated into three groups of two and not permitted to interact with other ISA detainees, as is customary for other ISA detainees.<sup>316</sup> Very little stimulation is provided and gifts from families are often arbitrarily denied: all books given them about Anwar Ibrahim were refused.<sup>317</sup> Wives of the detainees report that sanitary conditions in the detention camp leave much to be desired.<sup>318</sup> Recently, drinking and bathing water in the camp was contaminated with dead birds and maggots.<sup>319</sup> In times of illness and when they embarked on a hunger strike, the detainees have received less than adequate medical attention, and were often denied treatment at hospitals.<sup>320</sup> Family members of the detainees have requested access to their medical reports, but have not been granted permission.<sup>321</sup>

These unduly restrictive and burdensome conditions are more offensive for the fact that the detention is ostensibly not punitive in design, but merely preventive. However, the hardship

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314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* The detainees have no access to televisions or to newspapers.

318. Interviews with Bahirah Tajul Aris, wife of Mohamad Ezam Bin Md Nor; Aliza Jaffar, wife of Saari Bin Sungib; Zumrah Husni, wife of Dr. Badrulamin Bin Bahron (June 10, 2002).

319. Interview with Bahirah Tajul Aris, wife of KeADILan ISA detainee, Mohamad Ezam Bin Mohd Nor (June 10, 2002).

320. *Id.*

321. *Id.*

and discomfort experienced by the detainees often pales alongside the psychological suffering inflicted by denying them knowledge of when, or even if, they will be released, and their belief that detention may stretch on for years. As Dr. Nasir Hashim reported to the delegation, it was during this period, and with the realization of these facts, that some of the detainees “really went mad.”<sup>322</sup>

#### d. Absence of Remedy

A number of the KeADILan detainees attest to visits from representatives of SUHAKAM, the Malaysian Human Rights Commission, during their initial sixty day detention. These visits are to be welcomed and have the potential to serve as significant safeguards against possible ill-treatment of detainees.<sup>323</sup> At present, however, the potential is unrealized and SUHAKAM’s efficacy is substantially compromised, given that these interviews often take place in the presence of the very police officers who conduct the interrogations.<sup>324</sup> In the case of Badrulamin Bin Bahron,<sup>325</sup> Badaruddin Bin Ismail,<sup>326</sup> and Lokman Noor,<sup>327</sup> the Deputy Director of the Special Branch and head of the operation responsible for the arrest and detention of the ten, was present at their meetings with SUHAKAM.

All detainees were prepared for the meetings in a manner designed to mislead the SUHAKAM commissioners as to the true conditions of their detention.<sup>328</sup> More ominously, detainees were instructed as to what they should say to SUHAKAM and informed that their early release was to be conditioned on satisfactory performance in the interviews.<sup>329</sup> In the case of

322. Interview with Dr Nasir Hashim, ex-ISA detainee (June 3, 2002).

323. As Aliran President, P. Ramakrishnan, explained to the delegation: “SUHAKAM has the power to walk into any detention center unannounced and examine the conditions and talk to detainees without an officer present.” Interview (June 8, 2002).

324. See Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 37; Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 14; Aff. of Lokman Noor, *supra* n.140, at para. 21; and Aff. of Saari bin Sungib, *supra* n.140, at para. 24.

325. Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 37.

326. Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 14.

327. Aff. of Lokman Noor, *supra* n.140, at para. 21.

328. Aff. of Tian Chua, *supra* n.140, at para. 28 and Aff. of Saari bin Sungib, *supra* n.140, at para. 24.

329. Aff. of Abdul Ghani Bin Haroon, *supra* n.140, at para. 51; Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 37: “I was advise [sic] to use the opportunity to

Hishamuddin Bin Mohd Rais, a senior police officer informed him that “we are looking at all aspects of the meeting. If you give a good impression, then I will give a good report — positive views about you to the higher authorities for your early release.”<sup>330</sup> Badrulamin was advised “to use the opportunity in the meeting to ‘please’ Dato Razak [Deputy Director of the Special Branch].”<sup>331</sup> Although SUHAKAM representatives would have been ignorant of these instructions, the circumstances of their visits — the presence of the police officers, the fact that the meetings were held outside of the detainees’ cells — should have placed them on notice that conditions of detention were deliberately obscured from them. SUHAKAM’s meeting with Badaruddin Bin Ismail lasted only ten minutes, during which he was asked a series of perfunctory questions: whether he had been physically assaulted, a question which defied an honest answer given the presence of the Deputy Director of the Special Branch; whether the food was adequate; and whether he had access to medical treatment.<sup>332</sup>

Now that the affidavits of the KeADILan ten have been made public and SUHAKAM is privy to the instructions that preceded their visits, it is hoped that they will be more insistent that meetings take place without the presence of Security Branch officers, that their questioning is more comprehensive, and that they provide detainees the opportunity to articulate their complaints. Only then will SUHAKAM’s potential to act as a significant safeguard against abuse of ISA detainees be more fully realized.<sup>333</sup> The delegation’s interviews with SUHAKAM commissioners suggest that while their official position is one which calls

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‘please’ Dato’ Razak.” *Id.* Aff. of Chua Tian Chang, *supra* n.140, at para. 28: “I was instructed by my Interrogators that there were certain things that I was not allowed to inform to[sic] SUHAKAM.” *Id.*; Aff. of Saari bin Sungib, *supra* n.140, at para. 24.

330. Aff. of Hishamuddin Bin Md Rais, *supra* n.140, at para. 28. *See also* Aff. of Lokman Noor, *supra* n.140, at para. 21: “I was advised that the SUHAKAM visit was a test for me. If I made no complaints, Dato Razak [Deputy Director of the Special Branch] would decide whether or not to release me.” *Id.*

331. Aff. of Badrulamin Bin Bahron, *supra* n.140, at para. 37.

332. Aff. of Badaruddin Bin Ismail, *supra* n.140, at para. 15.

333. Former SUHAKAM commissioner, Tan Sri Anuar Zainal Abidin, explained to members of the delegation that the government had in fact responded positively to a number of the Commission’s recommendations, observing that the government had established a committee to review SUHAKAM’s report and that it had acted to improve conditions in Police and Immigration detention facilities, in response to SUHAKAM’s complaints. Interview (June 13, 2002).

for the repeal of the ISA,<sup>334</sup> there is surprising equivocation on the part of the Commission as to how to ameliorate the ISA in the short term, and a disturbing deference shown the Executive. Although Deputy Chairman of SUHAKAM, Tan Sri Dato'Harun Hashim, argued that the Commission was not "fully satisfied that there is a real security threat to justify the ISA," he nonetheless insisted that SUHAKAM would not question the grounds of ISA arrests as "that's security and not our area."<sup>335</sup> The Deputy Chairman also indicated a disturbing equivalence towards the ISA when he informed the delegation that although SUHAKAM had submitted recommendations to the government, urging repeal of the ISA, "especially after 9/11 with the U.S.A. making more atrocious laws than the ISA, we'll allow the government to take time to get rid of it."<sup>336</sup>

SUHAKAM's ability to meaningfully check abuses committed against ISA detainees is further compromised by the vulnerable positions of SUHAKAM commissioners themselves. The terms of their appointment effectively constrain the independence of this body. Recently, when the original two-year terms of appointment for the commissioners expired, three of the commissioners failed to be reappointed. Each of these commis-

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334. See Interview with Tan Sri Anuar Zainal Abidin, Former SUHAKAM Commissioner (June 13, 2002); Interview with Zainah Anwar, Suhakam Commissioner and Executive Director of Sisters in Islam (June 12, 2002); Interview with Tan Sri Dato'Harun Hashim, Deputy Chairman of SUHAKAM (June 10, 2002).

335. Interview with Tan Sri Dato'Harun Hashim, Deputy President of SUHAKAM (June 10, 2002).

336. *Id.* In the weeks prior to publication of the Crowley Report, SUHAKAM released its own report on conditions of detention under the ISA. The report is to be welcomed and its eighteen recommendations are similar to many made in this Report. These include recommendations that individuals should not be detained under the ISA unless genuine reasons exist for believing that such individuals are a threat to national security; that officers responsible for mistreatment of detainees be subjected to disciplinary procedures; that family members be granted access visits soon after detention; that detainees be produced before magistrates within twenty-four hours of detention; and that they be permitted access to counsel from the time preceding their appearance before magistrates.

However, the report was limited to exposition of detention conditions and failed to address the more substantive point — whether, in fact, the ISA is a justifiable law. The report also gave unwarranted emphasis to the testimony of Special Branch Social Intelligence Assistant Director, Anuar Bashah Mohd Sohore, who insisted that interrogations were carried out without the use of physical force — directly contradicting consistent testimony of many generations of ISA detainees. See Claudia Theophilus, *First 60-Day Under ISA not 'Brainwashing Session'*, MALAYSIAKINI, Mar. 6, 2003; Media Statement by DAP National Chairman Lim Kit Siang in Petaling Jaya, Mar. 7, 2003.

sioners had initiated inquiries critical of the government's conduct — in respect of police mistreatment during the Kesas Highway demonstration and in respect of the situation of indigenous people in Sarawak.<sup>337</sup> Zainah Anwar, a current SUHAKAM commissioner, explained that the period of appointment should be extended to safeguard independence and expressed disquiet over the non-renewals: "Certain commissioners have not been renewed on SUHAKAM and that certainly is troubling . . . [those] who were not renewed were the most proactive."<sup>338</sup> The recent appointment of the former Malaysian Attorney-General to chair the Commission — a man who, in the past, explicitly endorsed the ISA — has also raised suspicions that the appointment process is deliberately used to impede the independence of SUHAKAM.<sup>339</sup>

Sadly, no meaningful alternatives present themselves to SUHAKAM's compromised function as a reviewing or remedial power. The ISA does provide that Ministerial detention orders shall be reviewed not less often than once every six months by the Advisory Board, providing for representations from detainees as to their conditions of detention.<sup>340</sup> However, the ineffectiveness of the Advisory Board as a safeguard against abuse of ISA powers, as documented in the previous section of this Report, means ISA detainees almost never utilize these proceedings. The courts, at least theoretically, present themselves as an alternative. But, again, as documented in the previous section of the report, Malaysian courts have seldom exercised review in respect of ISA detentions. This reluctance is compounded in the context of alleged ill-treatment by an unwillingness on the part of the courts to recognize that police officers might perpetrate torture or cruel, inhuman or degrading treatment, and to hold them accountable for these violations. In a recent case, in which the appellant alleged that he had been tortured while in police detention and forced to incriminate himself in order to avoid more torture, the judge dismissed the allegations as "too far fetched and implausible to be believed . . . It would indeed be

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337. Interview with Yap Swee San and Cynthia Gabriel, executive members of Suaram (June 2, 2002).

338. Interview with Zainah Anwar, Head of Sisters in Islam and SUHAKAM Commissioner (June 12, 2002).

339. See Interview with P. Ramakrishnan, Aliran Director (June 8, 2002).

340. See ISA, *supra* n.5, Sec. 13(1).

stretching the imagination to even consider the appellant's version, less [sic] to accept it as believable . . . Such transgression by the police in our country is unheard of."<sup>341</sup>

#### 4. Recommendations and Conclusions

The first sixty-day period of detention, sealed almost completely from outside view, places ISA detainees in positions in which they are most vulnerable to torture, cruel, inhuman and degrading treatment. Solitary confinement, deprivation of their natural senses and disorientation as regards to place and passage of time, and customary denial of access to family, make the experience particularly severe. In addition, detainees are also subject to grave psychological abuse and threats of physical abuse during periods of interrogation. Once transferred to the detention camp, under two-year detention orders, detainees experience improved conditions. Yet, the prospect of indefinite detention, of not knowing when or if they will be released, of years of similarly impoverished routine, works unimaginable psychological hardship. This vulnerability is compounded by the absence of effective reviewing or remedial power. SUHAKAM, the advisory boards, and the courts of Malaysia all evidence a disturbing deference to the Executive and a reluctance, despite all evidence to the contrary, to recognize the abuse perpetrated by police against detainees during detention.

The delegation recommends:

1. That detainees should not be kept in solitary confinement. During the first sixty days of detention, detainees should be permitted to interact with people other than their interrogating officers, and during the two-year detention periods all ISA detainees should be permitted to interact with one another. In particular, all ISA detainees should be permitted regular contact with their families from the very first days of their detention.
2. The Malaysian government should make every effort to ensure that family members of ISA detainees are not subject to harassment by police officers and are not further traumatized.
3. Detainees should be entitled to request the presence of their counsel during police questioning. Questioning of detainees by police should be videotaped and these videotapes should be available on demand to the courts.

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341. Mohd Masri bin Radhuan v. PP Perbicaraan Jenayah, 2002-111 M.L.J. 1.



4. Educational efforts should be directed at police, particularly members of the Special Branch, as to what type of treatment constitutes torture, cruel, inhuman and degrading treatment.

5. All allegations of torture, and cruel, inhuman and degrading treatment should be thoroughly and expeditiously investigated, and be subject to criminal prosecutions. The Malaysian government should make every effort to upgrade detention facilities — in police lock-up and in the Kamunting detention camp — to ensure that conditions in these facilities are consistent with international standards.

6. SUHAKAM meetings with ISA detainees should not be attended by members of the police and detainees should be offered the opportunity to fully articulate their concerns during these meetings. SUHAKAM visits should be conducted regularly during the sixty-day detention period, and should include visits to the places of actual detention. Reports on these meetings and the condition of the detainee should be expeditiously published and made available to family and members of the general public.

#### *CONCLUSIONS: PROSPECTS FOR CHANGE*

It is our hope that this report contributes to the work of the many Malaysian NGOs campaigning for repeal of the ISA. However, neither domestic nor international developments bode particularly well for repeal at this current moment. Recent proposed amendments to the ISA indicate that the government is set to tighten, rather than relax, the ISA's stranglehold;<sup>342</sup> and increased fears of terrorist attacks have substantially reversed the impetus for reform among the broader public, suggesting that these proposed amendments are likely to be met with general deference. Furthermore, the international community, and the United States in particular, has so softened its criticisms of repressive laws, justified as anti-terrorism measures, that it seems disingenuous to attempt to distinguish silence from explicit endorsement. Recent high-profile enactments like the U.S. PATRIOT Act increasingly make comparative reference more likely to support, rather than malign, use of the ISA.

In the next year, Malaysian Prime Minister, Mahathir

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342. See n.153 and accompanying text.

Mohamad, is scheduled to step down,<sup>343</sup> and is set to be replaced by Abdullah Ahmad Badawi, currently Deputy Prime Minister and Minister of Home Affairs, responsible for effecting ISA arrests and detentions. It is possible that Mahathir's departure may bode well for ISA repeal and ancillary reform: he, in particular, has shown a propensity to employ the ISA and the threat thereof to shore up his personal political position.<sup>344</sup> Abdullah might initiate ISA reform, so winning favor at home and abroad and signaling a new post-Mahathir era. Yet, this hoped-for scenario is sadly unlikely. If anything, a post-Mahathir era may compel the government to rely even more heavily on the ISA, in an attempt to quell the tumult that may follow the departure of this charismatic leader, popularly perceived as having almost single-handedly engineered Malaysia's impressive economic growth and secured relative peace and security.

Another factor limiting the possibility of immediate reform is the absence of a genuine, deeply-rooted, and wide-ranging human rights culture, and the concomitant generally permissive reception afforded human rights infringements in Malaysia. This is principally a function of State effort. Even senior officials in SUHAKAM, the National Human Rights Commission, evidence a disturbing relativity regarding human rights, arguing in respect of the ISA that "especially after 9/11 with the U.S.A. making more atrocious laws than the ISA, we'll allow the government to take time to get rid of it."<sup>345</sup>

Opposition parties also contribute to this permissive environment. Although many of these parties have struggled and continue to struggle for recognition of human rights and civil liberties,<sup>346</sup> some of the most significant ones have a less than stellar record. In particular, PAS' attempts to introduce *Hudud*

343. Mahathir announced his impending resignation on June 22, 2002. *See Mahathir Reverses Resignation*, BBC, June 22, 2002.

344. *See* the ISA arrests known as "Operation Lalang," described *supra* in this Report and the arrests surrounding Anwar Ibrahim's suspension and dismissal, described *supra* in this Report.

345. Interview with Tan Sri Dato' Harun Hashim, Deputy President of SUHAKAM (June 10, 2002).

346. *See* Interview with Lim Kit Siang, leader of the Opposition Democratic Action Party ("DAP") (June 12, 2002). Lim Kit Siang has been arrested and detained twice under the ISA — in 1969 and in 1987. He was also arrested briefly under the Malaysian Sedition Act, during the delegation's visit to Malaysia, for having distributed a pamphlet "that dealt with the Islamic State issue and [why] we are worried about the threat." *See also* Interview with Wan Azizah, Head of KeADILan (June 12, 2002).

law in the States of Kelantan and Terengganu — laws prejudicing women and religious minorities particularly<sup>347</sup> — evidence a political party that can hardly be said to take seriously human rights for all. Sadly, the imperatives of coalition-building among the opposition, and the ethically centered nature of politics, which often generates indifference towards issues principally affecting other ethnic groups, has made for muted criticism from other parties and an appearance of disregard for human rights.

It is Malaysian civil society — committed NGOs and other civic associations — that serve as the most genuine inculcators of human rights culture and promise the best hope for change. But they are not without their own challenges. Few resources, restrictive legislation that hampers their operations, a generally unsympathetic mainstream press, and heightened personal risk mean that their focus is often necessarily ad-hoc and short-term. In the context of the ISA, this has resulted in coalitions formed over the years that “have been basically reactive, coming in the wake of the ISA’s sporadic enforcement with only low-level activism in between.”<sup>348</sup> This appears to be true of the most recent bouts of concerted campaigning undertaken in response to the arrests and detentions of the KeADILan ten.

The lesser emphasis afforded the recent arrests and detentions of the alleged Islamic militants may reflect a fear on the part of activists post-September 11 to appear to support terrorism, albeit indirectly. More simply, it might be a consequence of the fact that individuals targeted by these arrests and detentions, and their families, are more difficult to contact. They often reside in rural areas and are not part of activist circles. However, the difference in emphasis also signals that the ethnic/religious split that characterizes the more formal political arena, infuses civil society. Activists from secular NGOs who would tradition-

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347. See text accompanying n.67. Further illustration of PAS’ intolerance was evidenced last year when several PAS division members submitted resolutions to the National Islamic Affairs Committee, chaired by Mahathir, calling for punitive action to be taken against several individuals — columnists Farish Noor and Akbar Ali; intellectual, Kassam Ahmad; academic, Patricia Martinez; lawyer, Malik Imtiaz Sarwar and Sisters in Islam executive director, Zainah Anwar — for having allegedly insulted Islam, the Prophet, the Qu’ran, and the *ulama* (religious leaders). See *PAS ‘Muktamar’ Expected to Target Writers*, NEW STRAITS TIMES, May 29, 2002.

348. See MEREDITH L. WEISS, *The Malaysian Human Rights Movement in Social Movements in Malaysia: From Moral Communities to NGO’s* (Meredith L. Weiss & Saliha Hassan eds., 2003).

ally organize and campaign may believe that the issue of these most recent detentions will be taken up by Islamic NGOs and by PAS, from whose supporters many of the recent detainees are believed to be drawn.

As arrests and detentions of these individuals increase, as they look set to, it is hoped that Islamic NGOs and the more secularly-orientated groupings seize the opportunity for extraordinary collaboration, allowing more powerful pressure to be leveled against the government. A possible challenge for this collaboration is that among the large numbers arrested, some individuals may raise genuine security concerns — those allegedly connected, for instance, to the *Jemaah Islamiyah* network. Unlike the KeADILan arrests, in these circumstances, security concerns may not so clearly serve as mere pretexts. However, an anti-ISA collaboration of the type envisaged attains much clearer focus and sharper definition, by insisting not only that genuine reasons be given for ISA arrests, but by demanding explanations from the government as to why, even in cases of valid security concern, the ISA's detention without trial provisions are justified.

Optimal outcomes for this collaboration would go beyond more powerful mobilization; collaboration could also encourage supporters of the diverse groups to trust one another, promote multi-racial understanding at various levels, and provide the foundation for collaboration on other issues.<sup>349</sup> If ISA repeal and reform is, not to happen immediately, then, efforts directed at these goals may, nevertheless, help fuse collaborative campaigns and engender co-operation that lives on beyond realization of repeal and allows for a robust, multi-faceted human rights culture to take root.

Despite the impassioned rhetoric directed against “Western” human rights activists, and the intolerance shown toward foreign intervention in Malaysia, principally by the government, international human rights scholars and activists can help promote this outcome by ensuring that ISA abuses are widely reported abroad and that campaigns and collaboration for its repeal receive due publicity and encouragement.

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349. *Id.*

ANNEX  
ISA-RELATED INTERVIEWS CONDUCTED IN MALAYSIA

Sunday, June 2, 2002: Kuala Lumpur

- |         |                                                                                                                              |
|---------|------------------------------------------------------------------------------------------------------------------------------|
| TIME    | INTERVIEW                                                                                                                    |
| 10 A.M. | Ms. Cynthia Gabriel, Suaram Executive Director<br>Mr. Yap Swee Seng, Suaram<br>Mr. Steven Gan, Editor-in-Chief, Malaysiakini |
| 7 P.M.  | Ms. Aegile Fernandez, Tenanganita<br>Ms. Florida Sundaraswamy                                                                |

Monday, June 3, 2002: Kuala Lumpur

- |           |                                                                                                                                                                                                                   |
|-----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10 A.M.   | Mr. Koh Swee Yong, ex-ISA detainee & Parti Rakyat Malaysia treasurer<br>Mr. Chong Tong Sin, ex-ISA detainee & Publisher<br>Mr. Ban Akham, ex-ISA detainee<br>Mr. Lim Yoon Pang, ex-ISA detainee                   |
| 11 A.M.   | Mr. Ngeow Yin Ngee, Lawyer                                                                                                                                                                                        |
| 2 P.M.    | Mr. YB Ramli Ibrahim, KeADILan MP for Kota Bharu                                                                                                                                                                  |
| 3 P.M.    | Mr. G. Rajasekaran, Secretary-General of the Malaysian Trade Union Congress                                                                                                                                       |
| 3 P.M.    | Mr. Raja Petra Kamarudin, ex-ISA detainee and Director, Free Anwar Campaign<br>Mr. N. Gobalakrishnan, ex-ISA detainee and KeADILan leader<br>Mr. Badaruddin Ismail, ex-ISA detainee and Suaram Secretariat member |
| 8:30 P.M. | Professor P. Ramasamy, Universiti Kebangsaan Malaysia                                                                                                                                                             |
| 8 P.M.    | Dr. Nasir Hashim, ex-ISA detainee, Chairperson of Socialist Party of Malaysia                                                                                                                                     |

Tuesday, June 4, 2002: Kuala Lumpur

- |        |                                                                                                                                                                                                                                                                                                                                              |
|--------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 9 A.M. | Delegation observed habeas corpus application of Sejahtul Dursina a.k.a. Chomel Mohamed.                                                                                                                                                                                                                                                     |
| 2 P.M. | Mr. Hon Yen Peng, ex-ISA detainee<br>Mr. Low Ming Leon, ex-ISA detainee<br>Mr. Chan Beng Sam, ex-ISA detainee<br>Mr. Wong Luke Kuan, ex-ISA detainee<br>Ms. Loh Siew Lin, ex-ISA detainee<br>Mr. Tey Boon Chua, ex-ISA detainee<br>Mr. Lim Bok Eng, ex-ISA detainee<br>Mr. Keng San Tau, ex-ISA detainee<br>Mr. Loh Foot Yu, ex-ISA detainee |

Wednesday, June 5, 2002: Terengganu

- |         |                                                                                  |
|---------|----------------------------------------------------------------------------------|
| 11 A.M. | Mr. YB Abdul Rahman Yusof, KeADILan MP for Kemaman, Terengganu                   |
| 2 P.M.  | Mr. Abdul Hadi Bin Awang, Chief Minister of Terengganu & Acting President of PAS |

Thursday, June 6, 2002: Kelantan

- 2 P.M. Nik Aziz, PAS Spiritual Leader & Chief Minister of Kelantan  
 5 P.M. Haji Saupi Haji Daud, KeADILan MP for Tanah Merah  
 Mohammad Mustafa, KeADILan MP for Peringat and chair of  
 KeADILan in Kelantan

Saturday, June 8, 2002: Penang

- 10 A.M. Mr. P. Ramakrishnan, President of Aliran  
 11 A.M. Dato' Dr. Toh Kin Woon, State Assemblyman of Parti Gerakan  
 Rakyat Malaysia  
 3 P.M. Mr. Cheah Kah Peng, Lawyer  
 Mr. Gooi Hock Seng, Lawyer

Sunday, June 9, 2002: Penang

- 12 P.M. Professor Johan Saravanamuttu, Universiti Sains Malaysia  
 Professor Maznah Mohamad, Universiti Sains Malaysia  
 4 P.M. Dr. Kumar Devaraj, Central Committee Member of PSM

Monday, June 10, 2002: Kuala Lumpur

- 10 A.M. Dato Sri' Harun Hashim, SUHAKAM Vice Chairperson  
 10 A.M. Mr. Syed Sharir, National Union of Transport Equipment and Al-  
 lied Industries'Workers  
 11 A.M. Mr. Leonard Teoh, Lawyer  
 2 P.M. Mr. Malik Imtiaz Sarwar, Lawyer  
 5 P.M. Meeting with members of the Malaysian Bar Council's Human  
 Rights Committee  
 Mr. Christopher Leong  
 Mr. Malik Imtiaz Sarwar  
 Mr. Abdul Rashid Ismail  
 Ms. Harsharan Kaur  
 8 P.M. Meeting with wives and supporters of KeADILan Deatainees  
 Ms. Bahirah Tajul Aris, wife of ISA detainee Mohamed Ezam Nor  
 Ms. Aliza Jaffar, wife of ISA detainee Saari Sungib  
 Ms. Zumrah Husni, wife of ISA detainee Badarulamin  
 Ms. Noor Farahin  
 Ms. Animah Annette Ferrar  
 Mr. Khairul Anuar (nickname Jonah)  
 8:30 P.M. Mr. Jonson Chong, Lawyer

Tuesday, June 11, 2002: Kuala Lumpur

- 11 A.M. Meeting at the American Embassy  
 Mr. Bob Reiss, U.S. Embassy Official  
 Mr. Gary Grey, U.S. Embassy Official  
 1 P.M. Mr. Karpal Singh, Lawyer/ISA Detainee  
 2 P.M. Dr. Chandra Muzaffar, President, International Movement for a  
 Just World and ex-ISA detainee  
 2:30 P.M. Mr. Pawancheek B. Marican, Lawyer  
 Mr. Christopher Fernando, Lawyer

- 3 P.M. Mr Zaid Kamaruddin, Jamaah Islah Malaysia  
Dr. Hj Mohamed Hatta bin Hj Shaharom, Jamaah Islah Malaysia
- 4 P.M. Mr. Sankaran N. Nair, Lawyer
- 5 P.M. Mr. Sivarasa Rasiah, Lawyer
- Wednesday, June 12, 2002: Kuala Lumpur
- 9 A.M. Ms. Wan Azizah Wan Ismail, President, KeADILan
- 11:30 A.M Mr Said Zahari, commentator and ex-ISA detainee
- 1 P.M. Mr Lim Kit Siang, President, Democratic Action Party
- 3 P.M. Ms Zainah Anwar, SUHAKAM Commissioner & Executive Director of Sisters in Islam
- 4 P.M. Dr. Syed Husin Ali, President, Parti Rakyat Malaysia
- 5 P.M. Mr Zainul Zakaria, Lawyer
- 7 P.M. Meeting with Student Activists  
Mr. Hasnul Hisham  
Mr. Hasmi Hashim  
Mr. Amin Shah B. Iskandar  
Mr. Farid Hatta  
Mr. Rafzan Ramli  
Ms. Shazeera Tariq al Ayubie
- Thursday, June 13, 2002: Kuala Lumpur
- 11 A.M. Tan Sri Anuar Zainal Abidin, ex-SUHAKAM Commissioner
- 1 P.M. Dato Sri' Tun Salleh Abas, Former Lord President of the Federal Court (Interview took place in Terengganu)
- 3 P.M. Dr Kua Kia Soong, Suaram Director and ex-ISA detainee
- 4 P.M. Dato Dr. S Sothi Rachagan, Regional Director Consumers International
- Friday, June 14, 2002: Kuala Lumpur
- 10 A.M. Ms. Mehrun Siraj, Ex-Suhakam Commissioner
- 10 A.M. Mr Mohamad Azmin Ali, Vice President of KeADILan
- 11:30 A.M. Meeting with Executive Members of the Sahabat Wanita Selangor (Support Group for Working Women) & the Women's Development Collectives (WDC)  
Ms. Maria Chin, Executive Director of the WDC & anti-ISA campaigner  
Ms. Chee Heng Leng, ex-ISA detainee