

**1. Has your Commission received complaints from individuals or groups claiming torture? If so, how many complaints and please describe some of the most important cases and the role of your Commission in resolving the complaints.**

Apart from carrying out one of our primary functions of making inquiries to complaints regarding human rights violations, CIWG has also made several visits to detention camps as well as organising Human Rights Awareness Workshops for law enforcement officers in 2004. CIWG has also organised dialogues and forums relating to violence against women and on land issues.

**1. ACTIONS TAKEN TOWARDS COMPLAINTS RECEIVED**

**a) Analysis on complaints received**

In 2004, there are \_\_\_\_ complaints received compared to that received in 2003. The changes in the number of complaints are illustrated in Table 1 below. The figure shown in the table also includes \_\_\_\_ memorandums that has been treated as complaints. The increase in awareness towards human rights issues has been identified as one of the main factor towards the escalation in the number of complaints received by CIWG. The high level of awareness relating to human rights issues was due to SUHAKAM's constant efforts to instill awareness in the public through various activities such as workshops, forums, seminars as well as dialogues. These activities are organized to promote consciousness towards human rights issues to the society. For the year 2004, complaints received by SUHAKAM mainly dealt with the issues of violation of human rights by law enforcement officers , on land matters as well as allegation of abuse of power by government agencies.

Table 1 : Classifications of complaints received<sup>1</sup>

**b) Jurisdiction**

A complaint received by SUHAKAM will initially be checked to see if it involves any issue pertaining to violation of human rights. Further action will only be taken if a complaint falls within the ambit of human rights violations. Complaints that do not involve any issue on violation of human rights shall either be forwarded to relevant government agencies or to be classified as NFA (No Further Action). Through this process, a number of complaints have been categorized as not falling within SUHAKAM's jurisdiction. This is especially so if a complaint is on:

- i. allegations of inefficiency of administration, approval of a matter involving the government, claims relating to work accidents against Pertubuhan Keselamatan Sosial (PERKESO)
- ii. criminal cases that already been referred to the police or any other investigation agencies.

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<sup>1</sup> See Annexure 10

- iii. ongoing court cases or any other decision of the court. No action could be taken by virtue of section 12 (2) of the Human Rights Commission Act 1999 which limits the power of SUHAKAM to investigate cases of this nature.

**c) Actions taken**

Actions taken by CIWG involves:

- getting explanations by way of visiting, writing or calling up the parties alleged to have violated human rights.  
(Note: This method is the most used by SUHAKAM)
- Dialogues  
In 2004, CIWG had organized a series of dialogues with several enforcement agencies and related bodies in relation to complaints received. These include:
  - i. Closed dialogues with the authorities where there is a death in custody.
  - ii. Closed dialogues concerning allegations of violation of human rights to workers in the supermarket sector.
  - iii. Closed dialogues concerning the issue of illegal immigrants and refugees in this country.
- Visits to detention camps  
Visits to detention camps are in line with the power vested under section 4 (2) (d) of the Human Rights Commission Act 1999. Detention camps visited include police lock ups, jails as well as Immigration detention depot.
- Press statements issued on these actions and activities
- Workshops / Forums

Actions taken in holistically especially in cases that involve the law enforcement officers and on any complaint related to land matters. Among the actions taken are as follows:

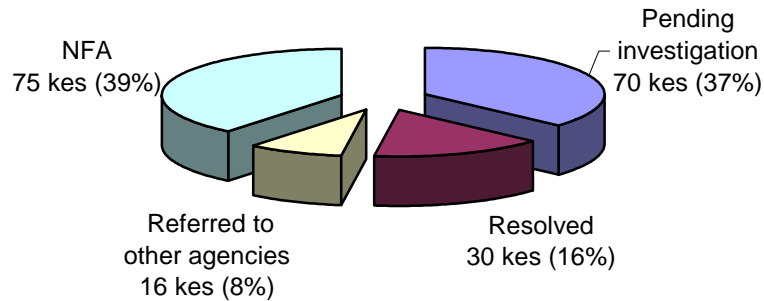
**i. Complaints against law enforcement officers**

In overcoming the complaints received against law enforcement officers, CIWG have organized workshops with the relevant government agencies in order to highlight cases against them. Besides drawing the attention of the relevant government agencies, these workshops acted as platforms to educate the law enforcement officers so that they could be more aware towards human rights issues while performing their duties. A total of four workshops have been organized for these law enforcement officers in Peninsula Malaysia for the year of 2003. In 2004, the emphasis shall be in Sabah and Sarawak.

A public inquiry has also been made towards an allegation of violation of human rights by police concerning a land matter in Sabah.

## Chart 2 : Resolution of Complaints

(NB: THIS IS NOT THE ACTUAL FIGURES)



### e) Example of cases

These are among the cases that have been successfully resolved as a result of action taken by SUHAKAM.

#### Case 1 –

Article 5 Federal Constitution

Article 3 and 5 Universal Declaration of Human Rights

A memorandum concerning a death in custody of a detainee named Francis Udayapan a/l Govindasamy who was detained at the Brickfields Police lock up. According to the police report, the victim, aged 24 was arrested for his participation in a robbery case. Regarding his cause of death, the police report stated that it was due to his attempt to run away when the police interrogated him but this reason was questioned and not accepted by complainant as well as the family of the victim. The family and the lawyer of the victim claimed that the police were not trying to clear the confusion and had not entertained the complaint and dissatisfaction of the family and the lawyer. The victim's family believed that the he was shot by the police deliberately before being tossed into the Klang River and not as what had been reported by the police.

#### Actions Taken

SUHAKAM had contacted the police and they have since responded to the queries.

Based on the information, the victim was arrested on 14<sup>th</sup> April 2004 by a group of police officers from Crime Prevention Unit, IPD Brickfields. The police had also confiscated a suspected stolen motorcycle from the victim. On 15<sup>th</sup> April 2004, the court allowed the victim to be remanded for 6 days for further investigation starting from 15<sup>th</sup> April 2004 to 20<sup>th</sup> April 2004. On 16<sup>th</sup> April 2004, the victim was taken out from the lock up for interrogation at Level 1, Crime Prevention Unit's office, IPD Brickfields by two policemen. While guarding the victim alone, the victim told a policeman that he was feeling sick and was brought to a toilet behind the said office. When his handcuffs were released, the victim pushed the police away and escaped by jumping to the 1<sup>st</sup> floor corridor. The victim ran towards the Klang River and jumped into the river. The

policemen who were guarding him tried to chase but failed. At the same time, several other policemen joined in the chase. The police tried to help the drowning victim up by throwing him a rope, but he did not grab it.

The police also informed SUHAKAM that the investigation of the victim's sudden death was complete, and they were waiting for the autopsy/ post mortem report to be later forwarded to the Deputy Public Prosecutor. On 23<sup>rd</sup> May 2004, a body believed to be Francis Udayapan was found in a river in Puchong. The DNA results did not match the DNA profiles of the victims's parents in subsequent testing.

CIWG decided that a letter should be sent to the Attorney General (AG) proposing an inquest to be conducted in order to determine the cause of death. The AG's Chambers responded positively to the proposal. The Inspector General of Police (IGP) has also been contacted. It was suggested that the parents of the deceased be given access to the autopsy report and that they be given permission to undergo free DNA test for the purpose of identification of the recovered body.

On 20<sup>th</sup> July 2004, the AG informed that an inquest would be made for the purpose of clarifying the victim's cause of death. Furthermore, the family of the victim was also allowed to undergo a free DNA test for the above said purpose.

## 2. VISITS TO DETENTION CENTRES

For the year under review, CIWG had made \_\_\_\_ visits to detention centres around the country. Most of the visits were made on SUHAKAM's initiative while several others were made due to complaints received. These visits were made by virtue of Section 4 (2) (d) of the Human Rights Commission Act 1999. Detention centres that have been visited are as in Table 3.

**Table 3: Visited detention centres.**

NO.	DATE	PLACES
1.	09 Mac 2004	Kamunting Detention Camp, Taiping, Perak
2.	15 Mac 2004	Princess Anne Home, Kota Kinabalu, Sabah
3.	17 Mac 2004	Henry Gurney School, Keningau, Sabah
4.	18 Mac 2004	Henry Gurney School (Women), Kepayan, Sabah
5.	18 Mac 2004	Police lock-up, District Police Headquarters, Karamuning, Sabah
6.	18 Mac 2004	Police lock-up, Central Police Station, Kota Kinabalu, Sabah
7.	18 Mac 2004	Kepayan Prison, Kota Kinabalu, Sabah
8.	19 Mac 2004	Immigration Detention Depot, Menggatal, Sabah
9.	21 Apr 2004	Sri Aman Prison, Sarawak
10.	22 Apr 2004	Kuching Prison, Sarawak
11.	20 May 2004	Immigration Detention Depot, Simuja,

		Sarawak
12.	21 May 2004	Police lock-up, Central Police Station, Kuching, Sarawak
13.	21 May 2004	Police lock-up, Satok Police Station, Kuching, Sarawak.
14.	09 Jun 2004	Kamunting Detention Camp, Taiping, Perak.
15.	16 Jun 2004	Immigration Detention Depot, Semenyih, Selangor.
16.	04 July 2004	Kamunting Detention Camp, Taiping, Perak
17.	15 July 2004	Police Remand Centre, Kuala Lumpur.
18.	15 July 2004	Police lock-up, Bukit Aman, Kuala Lumpur.
19.	05 Aug 2004	Muar Rehabilitation Centre, Muar, Johor.
20.	06 Aug 2004	Simpang Renggam Rehabilitation Centre, Simpang Renggam, Johor.
21.	25 Aug 2004	Police Detention Centre, Kuala Lumpur.

Generally, there is no major change noted as to the condition of the detention camps visited as compared to previous years. The issue of overcrowding is still a problem for the prisons and Immigration depots visited.

Nevertheless, 2004 witnessed a change of administration of all Immigration depots with the Prisons Department taking over control from the Royal Malaysian Police. With this change, all matters including security of the detention depots is now under the jurisdiction of the Prisons Department whereas the Immigration Department will only be involved in matters relating to the documentation of the detainees before they are sent back to their country of origin or third countries. These steps are taken as an attempt to synchronize the administration and operation of all detention depots, prisons as well as correctional centers all over the country. This process, however was done gradually as there are problems such as shortage of officers as well as logistics issues such as the repair and renovation of these detention depots before they are completed.

**2. Has your Commission conducted research on the issue of torture? If so, please provide the results of this research.**

Refer to annexure 7

**3. Has your Commission undertaken awareness and education campaigns relating to torture? If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.**

NIL.

- 4. Has your Commission monitored the conditions in and visited centres of detention to assess the conditions in which detainees are kept and the treatment they receive? If so, please provide details of any findings.**

Refer to annexure 7

- 5. Has your Commission intervened in court proceedings on the issue of torture? If so, please provide details of the cases, the role of the Commission and the outcome of the cases. Please provide copies of any submissions and court decisions.**

NO.

- 6. Has your Commission addressed the issue of torture in its annual reports? If so, please provide a copy of the relevant sections.**

Refer to Annexure 5 & 6

- 7. If your government has ratified the International Covenant on Civil and Political Rights, Convention Against Torture and/or Convention on the Rights of the Child, has your Commission been approached by the government to contribute to the periodic reports to the relevant Committees, or has your Commission provided a shadow report to the relevant Committees? If so, please provide copies of the sections relevant to the issue of torture.**

NIL.

- 8. Does your Commission have regional offices and are these offices involved in torture issues? If so, in what way?**

NO.

- 9. Has your Commission identified laws/policies/practices in your country that impact on torture?**

Refer to annexure 7

- 10. Has your Commission proposed legislation relating to torture, or helped develop a national policy?**

Refer to annexure 7

## **PART II**

### **1. Do the police and other disciplinary forces in your country currently follow set minimum standards of interrogations?**

**Please provide any information about complaints received by individuals or groups about the methods of interrogations used by disciplinary forces in your country?**

#### **Internal Security Act 1960**

The government continued to justify detention without trial under the ISA as a means to counter the threat of "terrorism". It also put before parliament additional "anti-terrorism" measures, including amendments to the Anti-Money Laundering Act, which were passed in November, and amendments to the Criminal Procedure Code giving public prosecutors additional investigative powers in "terrorism"-related cases. In November the Penal Code was amended to impose criminal penalties, including imprisonment of up to 30 years, on lawyers, accountants and others aiding or facilitating "terrorist" activities. There were concerns about the broad definition of "terrorist" acts in the amendments, and about the extension of capital punishment to "terrorist" acts resulting in deaths.

#### **Anwar Ibrahim**

On 20 September 1998, following his arrest under the Penal Code (s377B), Anwar Ibrahim was taken to Bukit Aman police headquarters. Later that night Anwar Ibrahim was served documents informing him he was detained under the ISA, and remained in incommunicado detention.

On 24 September Malaysia's most senior police officer, Inspector-General of Police (IGP) Abdul Rahim Noor, stated publicly that Anwar Ibrahim was 'safe and sound', and would soon be tried in court. On 29 September Anwar Ibrahim was brought to court after being held incommunicado for nine days. He showed visible signs of ill-treatment, including a swollen eye and a bruised arm. He complained that a few hours after his arrest, when he was handcuffed and blindfolded in his cell an unidentified police officer 'beat him severely, causing serious injuries'. Anwar Ibrahim was denied access to a doctor until the fifth day of his detention.

On 5 January the Attorney General announced that an internal police inquiry had submitted a report to him on 19 November finding that the injuries sustained by Anwar Ibrahim were inflicted by the Royal Malaysia Police, but had failed to identify the perpetrator. On 7 January IGP Abdul Rahim Noor, announced his resignation, assuming responsibility for the injuries suffered by Anwar Ibrahim while in police custody.

On 27 January Prime Minister (and then Home Minister) Mahathir announced a Royal Commission of Inquiry to identify the assailant and to recommend appropriate action against any perpetrator. The Commission began proceedings on 22 February. Anwar Ibrahim testified that when he was sitting blindfolded and handcuffed he heard a person enter his cell:

"He stood up and within seconds of doing so, he felt a very strong punch on the left side of his forehead...He fell forwards...He was forcibly pulled up...and a series of

blows were rained on him, all around the neck, face and head...he distinctly remembers seven hard blows..."<sup>2</sup>

Dr Halim Manzar, a forensic consultant, explained to the Commission why the injuries could not have been self-inflicted, as earlier suggested to journalists as a possibility by Prime Minister Mahathir.

" There were many injuries at potentially lethal places. This is a blunt trauma, the extent of the injuries is very severe and the positions of the injuries spread all over."

Abdul Rahim Noor admitted to the Commission that he had 'lost his cool' and that he, acting alone and under no direction or prompting, had assaulted Anwar Ibrahim. On 6 April the Commission issued its Report, recommending that charges of attempting to cause grievous hurt to Anwar Ibrahim (Penal Code s511 and s325) be brought against Abdul Rahim Noor, and concluding:

"We hope that our report will bring home the realisation that any Institution can only survive with its credibility and integrity intact if all its members are totally committed to the provisions enacted for its proper governance".

Abdul Rahim Noor pleaded not guilty to these charges and stood trial in September 1999.

### **Dr Munawar Anees**

Dr Munawar Anees, aged 51, is a microbiologist who was born in Pakistan. A married man with two children, he is an internationally recognised Muslim writer and intellectual who has founded several journals on Islamic studies. He moved to Malaysia in 1988, and became a friend of Anwar Ibrahim, writing occasional academic and policy speeches for him.

On 14 September 1998, he was arrested under ISA, and reportedly subjected to severe physical and psychological pressure during incommunicado detention to confess to sexual acts with Anwar Ibrahim. On 19 September he was convicted of 'unnatural offences' under s377D of the Penal Code, after he pleaded guilty to having 'allowed himself to be sodomized' by Anwar Ibrahim. He later appealed his conviction and sentence, claiming that his confession had been coerced. He described his arrest and incommunicado interrogation in a sworn statement which detailed aggressive, disorientating and prolonged interrogation, threats of indefinite detention and, degrading treatment including being stripped, and being ordered to mimic homosexual acts.

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<sup>2</sup>Report of the Royal Commission of Inquiry

## **Sukma Darmawan**

Sukma Darmawan is a 37-year-old Indonesian businessman with Malaysian citizenship. He was adopted by Anwar Ibrahim's father, a friend of Sukma's own father, when he came to Malaysia to study in 1977. Sukma Darmawan was arrested 'for investigation' under the Criminal Procedure Code on 6 September 1998. Police at first refused to reveal the grounds for his arrest<sup>3</sup>, and he was held incommunicado for 15 days, denied access to his family and to lawyers of his choice.

Sukma Damarwan was convicted on 19 September after he pleaded guilty of 'having allowed himself to be sodomized by Anwar' (Penal Code s377D). After his conviction, Sukma Darmawan was transferred from Kajang Jail back to Bukit Aman federal police headquarters where he was detained and denied access to lawyers appointed by his family. In a handwritten letter authenticated by family members, a copy of which was received by Amnesty International in late October 1998, Sukma Darmawan alleged that during pre-trial detention he was subjected to severe psychological and physical pressure during prolonged interrogation by police in order to make him confess and to implicate others, including being stripped naked in a cold room, humiliated, struck, and threatened with indefinite detention under the ISA.

In December 1998 Sukma Darmawan, in support of his appeal, lodged an affidavit to this effect, stating also that police had threatened to place bullets in his car and charge him with possession unless he implicated Anwar Ibrahim. In May 1999 the High Court dismissed Sukma Darmawan's appeal against his conviction and sentence, stating that there was no miscarriage of justice because he had admitted the facts, and had understood the consequences of his guilty plea. Sukma Darmawan appealed the ruling.

In April 1999 Sukma Darmawan was charged with three new offences: two involving sexual offences, and one of fabricating false evidence (perjury) during a judicial proceeding<sup>4</sup>, by lodging a statutory declaration in which he stated that he had been threatened by police into making a confession.

In his subsequent joint trial with Anwar Ibrahim beginning on 7 June 1999 arguments were put forward over the admissibility as evidence of Sukma Darmawan's September 1998 confession, which he said had been coerced. During questioning in court Sukma testified that during prolonged periods of interrogation (8 hours a day over 10 days after arrest) police had threatened to place bullets in his car and charge him with possession, while promising him a light sentence if he accused Anwar Ibrahim of sodomy. He stated that police humiliated him by making him stand naked and by groping his genitals and pinching his nipples while taunting him with debasing words. He said he was given no food on the first day of detention and, though he suffers from asthma was placed wearing only underwear in a small, damp and cold cell. At one stage he was taken for a DNA test, given a painful anal examination by a doctor, and photographed naked from all angles by police. He also claimed he was prevented from retaining a lawyer of his own choice. He eventually confessed:

"I was frightened and sad. I was no longer strong. I could no longer take the continuous yells and threats...When I said I would obey them, they removed my

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<sup>3</sup> NST 7/9/98.

<sup>4</sup> Section 193 of the Penal Code, carrying a sentence of up to seven years jail and a fine.

handcuffs, returned my clothes and became polite...They wanted me to admit I had sex with Anwar."

Police denied all allegations, testifying that they did not threaten him to confess, did not raise their voices, and that Sukma gave his confession voluntarily and calmly. On 26 July the Judge ruled that the prosecution had proved beyond reasonable doubt that Sukma's confession had been made voluntarily in that there had been no inducement, threat or promise by police. The joint trial had not been completed by mid-August 1999.

### **Opposition activists**

In June the Minister of Home Affairs chose not to renew the two-year ISA detention orders of six reformasi (reform) activists, most of them leading members of the opposition Parti Keadilan Nasional (PKN), National Justice Party. They were detained in 2001 for allegedly planning to overthrow the government by "militant" means, including by organizing mass demonstrations. No evidence to support the allegations was made public. The detainees – **Saari Sungib, Tian Chua, Hishamuddin Rais, Mohamad Ezam Mohamad Nor, Badrul Amin Baharom and Lokman Noor Adam** – who were all prisoners of conscience, were released without ISA orders restricting their freedom of expression or movement. However, most of them continued to face criminal proceedings related to charges filed previously under other restrictive laws.

The Malaysian government continued to use arbitrary regulatory decrees, broadly worded legislation, and lengthy, expensive court proceedings to punish its critics and control free speech. In preparation for the upcoming general elections, the Information Ministry announced in July that Malaysian opposition parties would not be allowed to appear on state-run television stations. At the same time, the Entrepreneur Development Minister, who controls taxi licenses, told Parliament that taxi drivers who criticize the government, play tape-recordings of anti-government speeches, or display pictures of opposition leaders in their vehicles could have their licenses revoked. In September Deputy Chief Minister **Datuk Seri Mohamad Shariff Omar** stated that mosque officials who allowed opposition parties to hold anti-government "ceramah" (political forums) in their mosques would be removed. Certain mosque officials who criticized the government in their sermons reportedly were removed.

### **Alleged Islamist activists**

Following the attacks on 11 September 2001, the authorities have defended the ISA as a tool in the "War against Terror". At least 80 suspected Islamists are reported to be detained in Kamunting Detention Camp, most accused of links to Jemaah Islamiah, a regional network allegedly linked to Al-Qa'ida. Attempts, though periodic habeas corpus petitions, to allow judicial scrutiny of the authorities' grounds for their detention have been mostly ineffective.

Scores of people were reportedly arrested under the ISA for alleged involvement in domestic or regional Islamist "extremist" groups including Kumpulan Mujahidin Malaysia (KMM), Malaysia Mujahidin Group, and a Southeast Asian network Jemaah Islamiah (JI) reportedly linked to the 2002 Bali bombings and al-Qa'ida. A total of at least 90 alleged members of these groups had reportedly been issued ISA detention orders since 2000.

Attempts by ISA detainees to challenge the lawfulness and alleged reasons for their arrest continued to prove ineffective. In July, **Ahmad Yani Ismail and Abdul Samad Shukri Mohamad**, arrested

in 2001 for alleged membership of JI, filed habeas corpus applications before the Kuala Lumpur High Court on the grounds that their arrest and detention had been illegal and conducted in bad faith.

Hopes for their release were undermined in August by a ruling of the Federal Court (Malaysia's highest court) in a similar ISA habeas corpus petition. The Federal Court, on the basis that the courts should not review the decisions of the executive in matters of national security, upheld an appeal by the Attorney General against a High Court order in 2002 to release ISA detainee **Nasharuddin Nasir**. The High Court had found that the police had failed to provide any evidence to support claims that he was a member of the KMM. On his release Nasharuddin Nasir was immediately rearrested under the ISA. Nasharuddin Nasir has been in detention ever since his arrest in 2002 and is now suffering from health problems. Since March 2004, he has reported serious pain in his hip causing him great difficulty standing up and walking normally. His requests to the authorities to allow him to visit a hip specialist, have reportedly been repeatedly denied. In May 2004, his lawyers wrote to the Malaysian authorities calling on them to grant Nasharuddin access to a specialist who could conduct appropriate medical check-ups, including X-Rays.

### **Other ISA detainees**

On 11 June 2004, eight detainees arrested at the same time as **Nasharuddin Nasir, Azmi Khan Mahmood, Jaafar Saldin, Mat Sah Satray, Mazlan Ishak, Shakom Shahid, Shamsuddin bin Sulaiman, Syed Ali Syed Abdullah and Yusrin Haiti** were sent with him to a Police Remand Centre in Kuala Lumpur, where they were interrogated in relation to their alleged links with Islamist "militant" organizations. The detainees were not told of the reasons for the transfer nor the place where they would be transferred. They were reportedly interrogated by Special Branch police officers who tried to make them confess that they were members of Jemaah Islamiyah (JI).

The next day, the Deputy Home Minister announced that the eight men and two other detainees arrested with them, **F. Muchlis Abdul Halim Ferry and Agungdiyadi Ahmad Bnyamin**, were given two year detention orders.

Expressing concern at the continued detention without trial of **Nasharuddin Nasir, Syed Alid Syed Abdullah, Shamsuddin bin Sulaiman, Mat Sah Satray, Shakom Shahid, Yusrin Haiti, Mazlan Ishak, F. Muchlis Abdul Halim Ferry, Agungdiyadi Ahmad Bnyamin, Azmi Khan Mhamood, Jaaffar Saldin** and of at least 70 other ISA detainees at Kamunting Detention Centre.

Urging him to charge them and all other ISA detainees with a recognizable criminal offence and to respect the right to a fair trial, or else release them.

### **Hunger strike**

The 16 detainees began a hunger strike on 1 March to protest the government's renewal - despite the reported recommendation for release by the ISA Advisory Board - of their 2001 two-year executive detention orders. The detainees stated that they felt they had no alternative course of action. They claimed that authorities had misled them into believing that - if they and their families accepted their

detention without public complaint, including by not seeking judicial redress through habeas corpus petitions - their original detention orders would not be renewed.<sup>5</sup>

The detainees were arrested under the ISA in mid-2001 on suspicion of belonging to a local 'militant' Islamist group, Kumpulan Mujahadin Malaysia (KMM). Twelve of the arrests took place before the 11 September 2001 Al Qa'ida attacks in the USA, and most of those detained were members of the country's main opposition party, the Islamic Party of Malaysia (PAS). One of those arrested, **Nik Adli bin Nik Abdul Aziz**, is the son of the chief minister of PAS-controlled Kelantan state. Government officials alleged that KMM, some of whose members had undergone religious and military training in Afghanistan, aimed to create an Islamic state in Malaysia through the use of force. No evidence to substantiate these accusations has been made public.

As the health of the hunger strikers is reported to be deteriorating, Amnesty International urges the authorities to ensure that all the detainees receive appropriate medical care and be given regular access to independent doctors. The organisation welcomed last week's inspection visit by Malaysia's national Human Rights Commission (SUHAKAM), which found that at least four detainees, had been taken to hospital for treatment before being returned to detention. Home Ministry officials also visited the camp to confer with the hunger strikers.

### **Asylum-seekers and Refugees: at risk of arrest, detention, imprisonment and refoulement**

In July 2004, Malaysian Home Minister Azmi Khalid announced plans to expel more than one million 'illegal immigrants', many of whom are undocumented migrant workers, from the country by the end of 2005. In August, Deputy Prime Minister Najib Razak stated that the government would seek to prosecute all arrested undocumented migrants under the Immigration Act prior to deportation.<sup>6</sup> Those convicted under the Act are liable to imprisonment and caning.<sup>7</sup>

### **Risk of mass expulsion without access to fair procedures**

In any case of mass expulsions there is a risk that the expulsion will be tainted with discrimination and arbitrariness, and will therefore be inherently unlawful. The collective nature makes it virtually impossible for the state to provide the necessary procedural guarantees and to ascertain whether among those expelled are some who are legally entitled to be in the country. Practice shows that, even in instances where a mass expulsion is purportedly aimed at undocumented migrants, legal residents or nationals, or both, can be caught up in such expulsions.

In 2002, reports indicated that Malaysian nationals may have been deported along with undocumented migrants. A 13-year-old girl, who was deported in August 2002, was originally thought to be from the Philippines. Further investigation showed she was a Malaysian citizen. She was reportedly raped in an immigration detention centre in Sabah state by three policemen.<sup>8</sup>

In 2003, the United Nations High Commissioner for Refugees (UNHCR) registered 15,000 new asylum-seekers in Malaysia. Most were from Chin and northern Rakhine States in Myanmar and

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<sup>5</sup>Mar 14, 2004

<sup>6</sup> "Government acts to stem rising tide of illegal workers", The Star, 11 August 2004

<sup>7</sup> Immigration Act 1959/63 (2002 Amendment) Section 56

<sup>8</sup> See Amnesty International 2003 annual report

from the Indonesian province of Nanggroe Aceh Darussalam (NAD), commonly known as Aceh.<sup>9</sup> As Malaysia is not a party to the 1951 UN Convention Relating to the Status of Refugees nor to its 1967 Protocol, the Malaysian government has refused over the years to offer protection, including legal status, to refugees on its territory, instead designating all undocumented foreign nationals as 'illegal immigrants'.

In a significant step forward, the Malaysian government announced in October 2004 its willingness to provide official identity documents to Rohingyas to allow them to work in Malaysia and to protect them from becoming caught up in the deportation process. Mohamed Nazri Abdul Aziz, Minister in the Prime Minister's Department, confirmed that identity documents will be provided to Rohingyas until the Government of Myanmar confirms their citizenship and stops 'persecuting' them. Procedures establishing how Rohingyas can obtain identity cards have yet to be announced and implemented.<sup>10</sup> UNHCR estimates that there are about 10,000 Rohingyas currently living in Malaysia.<sup>11</sup>

The Malaysian government still denies legal protection to other groups of refugees, such as the Acehnese and the Chins.<sup>12</sup> Its position is strongly influenced by a desire to maintain a cordial relationship with neighbouring countries. Amnesty International reminds the Government of Malaysia that the grant of asylum has been explicitly recognized as a peaceful and humanitarian act, and should not be considered unfriendly by any other state.<sup>13</sup>

Thousands of Acehnese have escaped counter-insurgency operations or have migrated to neighbouring Malaysia for economic reasons over the years. Following the declaration of a military emergency on 19 May 2003 in NAD, the numbers of Acehnese fleeing in fear of violence and other human rights violations, including extrajudicial executions, torture and arbitrary detention are believed to have increased.<sup>14</sup> UNHCR considers that the high-level of generalized violence in NAD places all Acehnese in Malaysia at potential risk of human rights violations if forced to return. Nevertheless, several hundred Acehnese are believed to have been returned since May 2003. In most cases, there is no information on their fate. However, Amnesty International is aware of recent cases where Acehnese were subjected to arbitrary detention on their return to NAD. An unconfirmed report indicates that an individual who returned was unlawfully killed.<sup>15</sup>

### **Threat of refoulement**

In July 2004, approximately 60 asylum-seekers were arrested in Selayang, Selangor state. The majority of them were subsequently sent to Semenyih immigration detention centre, where a significant number of undocumented migrants are currently held prior to deportation. At least 20 of them have now reportedly 'voluntarily' repatriated to their home country.

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<sup>9</sup> UNHCR Global report 2003, "East Asia and the Pacific", p. 370

<sup>10</sup> "Daily says Malaysian minister confirms refugee status of Burma's Rohingyas", Malaysiakini, 2 November 2004.

<sup>11</sup> UNHCR "Rohingyas flock to UNHCR in Kuala Lumpur following Malaysia government pledge", 9 November 2004.

<sup>12</sup> Christian Chins are suffering human rights violations in Myanmar, including religious persecution.

<sup>13</sup> See *inter alia* UNHCR Executive Committee Conclusion No. 94 (LIII), 2002 on the civilian and humanitarian character of asylum.

<sup>14</sup> Precise numbers are unknown.

<sup>15</sup> See "New military operations, old patterns of human rights abuses in Aceh [Nanggroe Aceh Darussalam]", AI Index: ASA 21/033/2004, Amnesty International, October 2004

Extended detention of undocumented immigrants continued to spark protests by detainees. On July 27, detainees at the Lenggeng detention center demonstrated against a three-day water cut and numerous health issues, and almost two hundred detainees escaped. On September 19, more than four hundred Indonesian detainees at the Langkap detention center protested their lengthy detention.

According to Menteri Besar Tan Sri Mohamad Isa Abdul Samad, 1,998 undocumented immigrants were detained and deported from January to August 20. On September 3 Foreign Minister Datuk Seri Syed Hamid Albar stated, "We do not recognize the status of refugees. . . . [W]e only allow foreigners to stay on a temporary basis after which they have to go back." Although Malaysia is not a party to the 1951 Convention Relating to the Status of Refugees, it is bound both by the Universal Declaration of Human Rights which provides refugees the right to seek and enjoy asylum from persecution and by customary international law which prohibits governments from returning refugees to countries where their life or freedom would be threatened.

**The Immigration Act: risk of ill-treatment and lack of fair trial**

The Malaysian government's warning that they might prosecute - prior to deportation - suspected undocumented migrants who have not left during the "amnesty" period, implies a massive use of the 1959/63 Immigration Act (as amended).

Under this legislation, those who breach immigration laws in Malaysia face fines of up to 10,000 Malaysia Ringgit per offence, jail sentences of up to five years, or both, as well as whipping of up to six strokes with a rattan cane. In Malaysia, caning is used as a supplementary punishment for at least 40 crimes including in the Immigration Act, even though it constitutes a cruel, inhuman or degrading punishment and contravenes international human rights standards<sup>16</sup> Under the Immigration Act, the police and immigration authorities are provided with wide powers to arrest, detain and eventually deport undocumented migrants.

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<sup>16</sup> Defendants who are older than 50 years of age are exempted from this form of punishment.

## **The right to a fair trial**

Many defendants currently charged under the Immigration Act do not fully enjoy their right to a fair trial. Many defendants reportedly do not have access to a lawyer; are not fully informed of their rights under Malaysian law; do not have access to the outside world and are not fully aware of the charges they face. Amnesty International is gravely concerned by these reports which indicate that the right to a fair trial, including the right to be presumed innocent, the right to inform family of arrest or detention and place of confinement<sup>17</sup> and the right to legal counsel, is not fully respected. The right to a fair trial as recognized in the UDHR is part of customary international law and legally binding on all states.

## **Caning amounts to a cruel, inhuman or degrading punishment**

Up to 18,000 'illegal immigrants' are reported to have been caned in Malaysian prisons within the last two years, and another 16,900 are awaiting this punishment.<sup>18</sup> Following the 2002 mass deportation of undocumented migrants, Professor Mohammed Hamdan Adnan, in his capacity of Commissioner at the Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia, Suhakam), visited Semenyih detention centre and met detainees who had recently been caned.<sup>19</sup> He concluded that the government should reconsider caning as a penalty for undocumented migrants because it amounts to cruel and inhumane treatment.

The UN Human Rights Committee considers whipping and other forms of corporal punishment to constitute cruel, inhuman or degrading punishment and contrary to international human rights law.<sup>20</sup> The UN Committee against Torture has also called for the abolition of judicial corporal punishment<sup>21</sup> and the UN Special Rapporteur on Torture has stated that 'corporal punishment' is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>22</sup>

## **Inhuman or degrading detention conditions prior to and during deportation**

### **Detention conditions in police lock-ups**

The conditions of detention in police lock-ups and immigration detention centres frequently may not comply with the UN Standard Minimum Rules for the Treatment of Prisoners, which sets minimum standards in the area of hygiene, clothing, bedding, food, medical services, and discipline.

Concerns in police lock-ups include overcrowding: lack of bedding and clothes for detainees; lack of access to safe water and poor hygiene and sanitation. In 2002, Suhakam recommended that the Lock-Up Rules 1953 be reviewed and brought up-to date in compliance with the UN Standard Minimum Rules for the Treatment of Prisoners.<sup>23</sup> Amnesty International urges the government of Malaysia to follow Suhakam's recommendations and abide by international standards.

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<sup>17</sup> Rule 92 of the Standards Minimum Rules for the Treatment of Prisoners.

<sup>18</sup> "Malaysia faces rising problems of illegal immigrants", Channel News Asia, 17 August 2004.

<sup>19</sup> "Suhakam: Whipping of illegal immigrants violates human rights", Malaysiakini, 28 January 2003.

<sup>20</sup> *George Osbourne v Jamaica* (communication number 759/1997) UN Doc. A/55/40, pp. 133-139.

<sup>21</sup> UN Doc. A/52/44, p. 250.

<sup>22</sup> UN Doc. E/CN.4/1997/7, p. 6.

<sup>23</sup> "Rights of remand prisoners", Suhakam, 2002.

## Conditions in immigration detention centres

Problems with conditions in immigration detention centres include:

**Overcrowding:** Severe overcrowding has been reported in some immigration detention centres. Suhakam recognizes overcrowding as a major problem, which results in detainees having to sleep on bare floors with insufficient blankets and lack of proper clothing.<sup>24</sup> In 2003, during a visit to the immigration detention centre of Belantek in Sik, Kedah state, Suhakam Commissioners observed that although the centre's capacity was for 400 people, on the day of their visit there were 652 detainees housed in the centre. This constituted an actual inmate rate of one and a half times the centre's capacity.<sup>25</sup>

**Poor hygiene and sanitation:** At the immigration detention centre in Macap Umboo, Malacca, Suhakam described the building which was housing 260 men together as "in a deplorable state and unhygienic due to an overflowing septic tank."<sup>26</sup> Detainees held in immigration detention centres are often not provided with basic provisions such as toothpaste, soap or washing powder. Reports indicate that women are not always provided with sanitary napkins.<sup>27</sup>

**Health issues:** Poor conditions in immigration detention centres are reported to contribute to ill-health of detainees. Although there is some medical attention provided, this is believed not to be adequate. Suhakam reported that during a visit at Macap Umboo immigration detention centre, the health of the detainees and personnel were at risk due to a recent outbreak of meningitis.<sup>28</sup> More recently, reports indicated that at Semenyih immigration depot, there were signs of beri beri and diseases arising from malnutrition, and that due to overcrowding, there was an outbreak of chicken pox placing detainees at risk of developing pneumonia.

**Inadequate nutrition:** Detainees reportedly had limited access to clean water, adequate milk for children and adequate nutrition in Semenyih detention centre.

**Verbal and physical abuses:** Verbal abuse and threats to migrants or refugees by camp guards are commonly reported by detainees. Physical abuse, such as beatings, is reported to occur on some occasions.

Such conditions are contrary to provisions in the UN Standard Minimum Rules for the Treatment of Prisoners. Suhakam recommended that in order to improve the conditions of detainees in immigration centres, the authorities should transfer the daily running of detention centres to the Prison Department. The main immigration centres of Semenyih, Lenggeng, Macap Umboo, Langkap and Pekan Nanas are now all reported to be under the Prisons Department. Although Suhakam and others were optimistic that conditions would improve as a result, deterioration of

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<sup>24</sup> Annual report 2002, Suhakam, p. 39.

<sup>25</sup> "Prisons department should take over management of more immigration depots", Suhakam, 22 September 2003.

<sup>26</sup> Ibid.

<sup>27</sup> Irene Fernandez, "The 'truth' about detention camps", Tenaganita, 14 September 2004.

<sup>28</sup> "Prisons department should take over management of more immigration depots", Suhakam, 22 September 2003.

detention conditions are reported to have been among the reasons for a hunger-strike by detainees in Semenyih in early September 2004.<sup>29</sup>

## **Children**

In 2002, reports indicated that the process of mass deportations of undocumented migrants led to the deaths of children, due to dehydration and disease in detention centres in the state of Sabah.<sup>30</sup> Amnesty International is gravely concerned by these reports and urges the Malaysian government to ensure that such incidents will not occur again and that child will be provided with adequate medical care and nutrition while in Malaysia.

On 17 July 2004, seven Acehnese refugees, including three children, were reportedly detained in the Jalan Hang Tuah police station in Kuala Lumpur. Reports indicate that the three children were detained for five days along with 20 adults, some of whom were believed to be drug-addicts. The children were reported to have been given food which was stale, and had no option but to drink unsafe tap water. Due to lack of proper food, clean water and lack of sleep, they became ill. However, it was alleged that requests for medicine by the family was rejected.<sup>31</sup>

As a state party to the Convention on the Rights of the Child (CRC), Malaysia has a duty to ensure that detention of children is used only as a measure of last resort and for the shortest appropriate period of time. Malaysia should also take all appropriate measures to ensure that children who are detained are treated in accordance with the needs of people of their age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. Like adults, all children who are detained in police lock-ups or immigration detention centres, have the right to be examined by a doctor and, when necessary to receive medical treatment free of charge.<sup>32</sup> Torture and other cruel, inhuman or degrading treatment of children, as of adults, is absolutely prohibited.

## **Conditions during deportation operations**

Amnesty International is aware that in 2002 overcrowding and poor sanitary conditions during the process of deportation may have led to illnesses and deaths of undocumented migrants both in the country and outside.<sup>33</sup> The organization urges the Malaysian government to take appropriate measures to ensure that these violations will not take place again. In particular Amnesty International urges the Malaysian government to take measures to ensure that during deportation operations all deportees are provided regularly with adequate and safe food and water, have ready access to sanitation facilities and are treated with respect for their human dignity.

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<sup>29</sup> The hunger strike ended on the third day following promises by Malaysian authorities to improve access to medical care and basic conditions of the detention centre. "Semenyih inmates end hunger-strikes after three days", Malaysiakini, 8 September 2004. Conditions are reported to have since improved partly due to less overcrowding, renovation of toilets and increase access to water supplies.

<sup>30</sup> "Philippines asks Malaysia for moratorium on deportations", Agence France Presse, 31 August 2004.

<sup>31</sup> "Five harrowing days in lock-up for refugees", Malaysiakini, 23 July 2004.

<sup>32</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 24.

<sup>33</sup> It is reported that in 2002, tens of Indonesians died in the city of Nunukan, at the border with the Malaysian state of Sabah, after being deported from Malaysia and while waiting to be transported to their home town in Indonesia. The deaths were reportedly due to inadequate nutrition and lack of medical care in temporary Indonesian shelters.

**2. Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to the rule of customary international law prohibiting torture?**

**Malaysia's Adherence to Customary International Law**

Unfortunately, Malaysia has recently demonstrated an intransigent refusal to adhere either to its international obligations arising from the Convention on the Privileges and Immunities of the United Nations<sup>34</sup> or to a binding decision of the International Court of Justice.

The latter decision involved Dato' Param Cumaraswamy, appointed in 1994 as the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. Four private defamation suits were filed in Malaysia, against Mr. Cumaraswamy based on a 1995 magazine article containing references to an interview with him. In January of 1997 the Secretary General of the United Nations determined that the words spoken by Mr. Cumaraswamy that formed the basis of the four defamation suits were protected by privilege pursuant to the provisions of the aforesaid Convention and called on the Malaysian government to advise the Malaysian courts accordingly. Although Prime Minister Mahathir stated in March that he had accepted the court's decision, in October the Malaysian High Court denied Cumaraswamy's motion to dismiss and assessed him costs, stating that the world court's decision was not a final and binding authority<sup>35</sup>. According to the Malaysian court, Cumaraswamy is not absolutely immune, and whether he is entitled to any immunity should be decided at trial.

After extensive negotiations failed to resolve the differences between the government of Malaysia and the United Nations on the issue of Mr. Cumaraswamy's immunity, the matter was referred for opinion to the International Court of Justice. An April 1999 decision of the International Court of Justice both confirmed the 1997 decision of the Secretary General that Mr. Cumaraswamy's statements were protected by immunity and determined that Malaysia is bound by the decision of the International Court of Justice. Two statements of interest contained in the summary of the majority judgment are:

"...Mr. Cumaraswamy, in speaking the words quoted in the article in International Commercial Litigation, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22(b)<sup>36</sup>, of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind."<sup>37</sup>

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<sup>34</sup> The Convention on the Privileges and Immunities of the United Nations was ratified by Malaysia in 1957 without reservation

<sup>35</sup>The Secretary General's opinion was, "scant probative value and no binding force upon the court."

<sup>36</sup> The Convention on the Privileges and Immunities of the United Nations, Article VI, s.22: Experts...shall be accorded: (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

<sup>37</sup> Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Summary of the Advisory Opinion of 29 April 1999 of the International Court of Justice at 7, at <[http://www.ecjij.org/icjwww/ipresscom/iPress1999/ipresscom9916bis\\_inuma\\_19990429.htm](http://www.ecjij.org/icjwww/ipresscom/iPress1999/ipresscom9916bis_inuma_19990429.htm)>

“...according to Article VIII, Section 30,<sup>38</sup> of the General Convention, the opinion given by the Court [the International Court of Justice] shall be accepted as decisive by the parties to the dispute.”<sup>39</sup>

In reliance on this decision of the International Court of Justice another application was brought to set aside one of the defamation suits on the grounds of Mr. Cumaraswamy's immunity. This application was refused on October 28/99 by the Senior Assistant Registrar of the High Court Wan Shaharuddin bin Wan Ladin with these words:

“...that the issue whether the Courts in Malaysia should follow the Advisory Opinion of the ICJ, [the International Court of Justice] I find that the said Convention is not a final and binding authority.”<sup>40</sup>[emphasis added]

Other targets have included Zainur Zakaria, an attorney for Anwar who had filed an affidavit accusing the prosecution of attempting to tamper with evidence, and Tommy Thomas, an attorney who had publicly criticized the judiciary and who was the target of several libel suits for comments attributed to him in the same 1995 article that led to the suits against Cumaraswamy. In separate proceedings in November and December 1998, respectively, Zakaria and Thomas were convicted of contempt of court under a loosely worded law that gives a presiding judge broad discretion to sanction attorneys and other parties for statements they make in connection with pending cases. At the time of this writing, although their cases were on appeal, both were still facing jail time.

### **Conclusion on the Use of International Law in Malaysia**

At best, the rights and freedoms in the UDHR are now part of international customary law and therefore binding on Malaysia and its courts. At the very least, the UDHR, and other international instruments to which Malaysia is not a party, provide general principles of international law to guide the interpretation and application of Malaysia's national law and permissible limitations on rights and freedoms within Malaysia. As a member of the Commonwealth, Malaysia has committed through the Harare Declaration to principles that require adherence to the broad principles of the rule of law. The Latimer House Guidelines for the Commonwealth to which Malaysia has also committed, further confirm that: “freedom of expression is a universal human right... (and) is the primary freedom, an essential precondition to the exercise of other freedoms.”

### **3. Does your constitution or national law allow for any derogation from the prohibition on torture and other forms of ill-treatment? If so, please provide the relevant sections?**

The Malaysian Constitution is in a sense unique because it was born during a state of Emergency on 31<sup>st</sup> August 1957, a consequence of the communist insurgency that lasted from 1948 to 1960. The British ruled Malaya from 1948 - 1957 under an emergency proclamation issued on 13 July 1948. This proclamation continued through independence and was ended only on 29 July 1960.

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<sup>38</sup> Section 30: All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice...The opinion given by the Court shall be accepted as decisive by the parties.

<sup>39</sup> Supra note 124 at 8

<sup>40</sup> Insas Berhad & Magapolitan Nominees Sdn Bhd. v. Param Cumaraswamy (29 October 1999) Grounds for Judgment, Unofficial English Translation[unreported]

Consequently the usual constitutional guarantees in respect of fundamental liberties that one would normally expect in a constitution of an independent nation came to be subject to the overhanging dark cloud of special emergency powers and powers against subversion. Since independence, these special powers have in fact become tighter and wider in scope arising from a series of constitutional amendments. These have had the effect of curtailing fundamental liberties and human rights according to international standards.

### **Article 150 - Emergency (Overlapping Emergencies)**

In fact for the major part of its post-independence period, the nation has existed under a continuous state of Emergency except for the period 1960 to 1964. More curiously, the nation now exists under four overlapping Proclamations of Emergency.

The first of the currently subsisting proclamation was made on 3 September 1964 due to the confrontation with Indonesia; the second on 14 September 1966 in the state of Sarawak to deal with the political crisis that arose from the efforts of the federal government to replace the Chief Minister of Sarawak; the third on 15 May 1969 due to racial riots; and the fourth on 8

November 1977 in the state of Kelantan, again to deal with a political crisis caused by the effort of the party in power at the federal level to impose on the state a Chief Minister of its own choice.

Article 150(2) of the Constitution brought about by an amendment in 1981 confers upon the Yang di Pertuan Agong:

“the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued...and such Proclamation or Proclamations are in operation”.

Two or more proclamations may therefore validly overlap. It is necessary for Parliament to specifically annul a Proclamation of Emergency and till then the state of Emergency would subsist and the laws promulgated under it would continue to apply.

In the first Report by the Human Rights Commission of Malaysia (“SUHAKAM”) to Parliament, the Commission expressed its serious concern that none of these four proclamations have been revoked resulting in a “perpetual state of emergency” which “enables the Government to promulgate emergency regulations even though both Houses of Parliament are sitting and the events that occasioned the states of emergency had come to pass”.<sup>41</sup>

The emergency regulations which are still invoked and applied are the Emergency (Essential Powers) Ordinance 1969; the Essential (Security Cases) Regulations 1975 (ESCAR) and the Emergency (Essential Powers) Act 1979. These undoubtedly constitute a blot on our system of parliamentary democracy.

### **Article 149 - Special Powers Against Subversion**

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<sup>41</sup> Annual Report 2000 of the Human Rights Commission of Malaysia (“SUHAKAM”), p.14

The Article 149 Special Powers Against Subversion permit the violation of fundamental rights contained in Articles 5 (relating to personal liberty), 9 (relating to prohibition of banishment and freedom of movement), 10 (relating to freedom of speech, assembly and association) and 13 (relating to rights of property).

These powers which curtail fundamental liberties are triggered by the simple expedient of a magical incantation in the form of a “recital” in an Act of Parliament that “action has been taken or threatened by any substantial body of persons, whether within or outside the federation” to cause fear of subversion.<sup>42</sup>

“Subversion” has been defined in Article 149 (1) to refer to the following: causing people to fear organized violence; exciting disaffection against the government; promoting feelings of ill-will between classes of the population in such a way as is likely to cause violence; procuring alteration, otherwise than by lawful means of anything by law established; prejudicing the maintenance of any supply or service to the public; or causing prejudice to public order or national security.

It is evident that this definition of subversion “is of such a broad, catch - all nature that even vigorous criticism of official policies, industrial action like strikes and call to taxpayers to withhold payment could conceivably fall within the parameters of subversion. Only the good sense of those in power is a safeguard against overzealous use of the law’s omnipotence”.<sup>43</sup>

It is Article 149 which is the parent of preventive detention laws such as the Internal Security Act 1960 (ISA) and the Dangerous Drugs (Special Preventive Measures) Act 1985. The other law which provides for preventive detention is The Emergency (Public Order and Prevention of Crime) Ordinance 1969. This paper will deal specifically with the ISA.

### **The Internal Security Act 1960**

Under this law the Minister of Home Affairs may detain a person for a period not exceeding two years (and renewable for two year periods indefinitely) on the suspicion or belief that the detention of that person is necessary in the interest of public order or security. Further no grounds need be given by the Minister for the initial order or the extension.<sup>44</sup> It is significant to note that in law this is an executive detention order and not a detention pursuant to a judicial decision.

This is underscored by the highest judiciary in the land which pronounced “the ISA is a peculiar law, and is peculiar to our country” and further that the “judges in the matter of preventive detention relating to the security of the Federation are the executive”.

This judicial abdication was pronounced in the hallmark case of *Theresa Lim Chin Chin & Ors v Inspector General of Police* (1988) 1 MLJ 293. The appellants were detained in a police crack-down code-named “Operation Lallang” and were among the 106 citizens including the leader of the

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<sup>42</sup> Article 149, Federal Constitution

<sup>43</sup> Prof. Dr, Shad Saleem Faruqi ; “Special Powers Legislation And The Courts” : Paper Presented at the 11<sup>th</sup> Malaysian Law Conference, 2001.

<sup>44</sup> The Federal Court recently held in *Gurcharan Singh v Minister of Home Affairs* (unreported) that no grounds are required for the initial two year detention and subsequent renewals.

Opposition, Members of Parliament, civil-society advocates, academicians, social workers and religious leaders who were put away by executive action in one of the largest and widest ISA swoops in independent Malaysia, marking one of the darkest episodes in the chapter of human rights abuses in the country.

This case gave life to the ghost of *Liversidge v Anderson* (1942) A.C 206 and affirmed that it is not the function of the court to review the discretionary executive decision and the grounds upon which they came to the belief that it was necessary or desirable to hold a person in detention for national security.

In fact the court extended the haunt of the ghost from the Ministerial detention order under section<sup>45</sup> to the initial police power of arrest and detention under section 73<sup>46</sup>. It held that both the initial police arrest and detention “pending enquiries” and the final ministerial detention could not be separated. Its reasons may be summarized by referring to this passage in the judgment:

“Looking at the provision relating to preventive detention, we cannot see how the police power of arrest and detention under s.73 could be separated from the ministerial power to issue an order of detention under s.8. We are of opinion that there is only one preventive detention and that is based on the order to be made by the Minister under s.8. However, the Minister will not be in a position to make that order, unless information and evidence are brought before him, and, for this purpose, the police is entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain a person, in respect of whom the police have reason to believe that there exists grounds which would justify the detention of such person under s.8. There can be no running away from the fact that the police power under s.73 is a step towards the ministerial power of issuing an order of detention under s.8, which the Attorney - General referred to as the initial stage in the process leading to preventive detention.”

#### **4. Set out any legislation, rules or practices of courts in admitting or rejecting any statement that is made by an accused as a result of torture or any other form of ill-treatment.**

Section 113<sup>47</sup> is primarily aimed to govern the admissibility provision with regard to the statements of an accused person, whether made in the course of police investigation or not. The section clearly states that any statement made by any person charged with an offence shall be admissible in evidence at his trial subject to compliance with various conditions. Two of the most frequently examined requisites are set under Proviso (a)(i) and (ii) of the section 113(1), namely the voluntariness requirement and the proper administration of the specific caution where the statement is made after arrest.

Although the words, ‘voluntary’ or ‘voluntariness’ do not appear anywhere in section 113 CPC or in any other equivalent admissibility provisions including section 24 of the Evidence Act 1950, our courts have equated such provisions incorporating the vitiating factors of ‘inducement, threat or promise’ found for example in proviso (a)(i) to section 113 CPC and also section 24 of the Evidence

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<sup>45</sup> Section 8 Internal Security Act 1960

<sup>46</sup> Section 73(1) Internal Security Act 1960

<sup>47</sup> Refer to annexure 2

Act, to the concept of 'voluntariness' at common law. Hence in the Federal Court case of *Dato Mokhtar Hashim & Anor v PP* (1983) 2 MLJ 232, Eusoffe Abdoolcader FJ observed:

'No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement *Ibrahim v R*<sup>48</sup> and this test was accepted as the House of Lords as the correct approach in *DPP v Ping Lin*<sup>49</sup> in which the House said that is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of the ways referred to...the classic test for admissibility of an accused's confession that the prosecution must established beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression, should be applied in a manner which is part objective, part subjective.'

In *Dato Mokhtar bin Hashim v PP*, a decision of the Federal Court, the court found that the trial judge was wrong in failing to exclude the statement made by the accused because it was the result of prolonged period of questioning ranging into the small hours of the morning which 'appeared to be suggestive of oppression'. In so holding, the court the definition of oppression propounded by Sachs J in *Priestley* as 'something which tends to sap and has sapped that free will which must exist before the confession is voluntary', which was adopted in *R v Prager*.

On the matter of voluntariness generally, expressions such as 'You had better tell the truth' have been held to import a threat and would vitiate the admissibility of ant statement made by the accused thereby.<sup>50</sup> On the other hand, a reminder spoken in Malay by the recording officer to the accused that he should tell the truth and not lies 'jangan cakap bohong, cakap betul-betul' or words to that effect in the Singapore High Court case of *PP v Ramasamy a/l Sebastian*<sup>51</sup> was held not to constitute a threat.

On of the vitiating effect of 'oppression'<sup>52</sup>, was of the view that 'psychological oppression can be more insidious than, and just as effective, as physical pressure on a suspect who may in many cases will be incapable of evaluating its effect upon him and not sufficiently articulate to explain the circumstances and effect to the court'. In this case, it was held that the technique adopted by Inspector Giam in questioning the appellant soon after he had forced out of his bed where he been sound asleep, during the early hours in the morning, and while handcuffed, could have implied some impropriety on the part of Giam, and the accused's statement was held to be inadmissible. Prolonged interrogations in contravention of rule 20 of the Police Lock-up Rules 1953, which requires prisoners to be kept behind bars between the hours of 6.30pm and 6.30am to ensure that

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<sup>48</sup> [1914] AC, pp. 599, 609, per Lord Summer

<sup>49</sup> [1975] 3 All ER 175; [1975 AC 574

<sup>50</sup> See *Public Prosecutor v Naikan* (1961) MLJ 147

<sup>51</sup> (1991) 1 MLJ 75

<sup>52</sup> *Edgar Joseph Jr SCJ in Hasibullah b. Mohd Ghazali v PP*

they have sufficient rest, has been held to constitute oppression so that any statement recorded during those prohibited hours would be vitiated.<sup>53</sup>

**5. Describe the remedies available and provided in practice to victims of torture and other forms of ill-treatment, including complaints systems, compensation mechanisms and medical rehabilitation.**

Tan Sri Abdul Rahim Mohd Noor v PP:

This may appear to be a run of the mill case of voluntary causing hurt but it attracted the widest worldwide publicity that any other such like case could not possibly do. It can be said that this case created history in Malaysia as it shook the nation to the very core. The appellant, the Inspector General of Police was originally charged in the Kuala Lumpur Sessions Court on 22 April 1999 for an offence of attempting to cause grievous hurt to the former Deputy Prime Minister Dato' Seri Anwar Ibrahim while he was under police custody in the lock-up at the Police Headquarters in Bukit Aman Kuala Lumpur on the night of 20 September 1998. It was fixed for hearing on 20 September 1999 exactly one year after the incident. After a number of postponements all at the instance of the appellant, the case was finally fixed for hearing on 14 March 2000. On that day the learned Deputy Public Prosecutor tendered an amended charge under s. 323 of the Penal Code, an offence of voluntary causing hurt. The appellant immediately pleaded guilty and after the facts were given and admitted to by the appellant and after hearing the mitigating submission, the learned Sessions Judge convicted the appellant and sentenced him to two months' imprisonment and a fine of RM2000 in default two months' imprisonment.

The appellant appealed against the whole of the sentence to the High Court while the Public Prosecutor cross-appealed against the inadequacy of the sentence imposed by the Sessions Court. The appeal finally came up for hearing in the High Court Kuala Lumpur on 10 November, 2000 ie, over two years after the incident. The learned judge dismissed the appeal against the two months' custodial sentence but allowed the appeal against the fine and quashed it. The Public Prosecutor's cross-appeal was dismissed.

At the hearing of the appeal against the two months' custodial sentence, the two learned counsel for the appellant submitted that the custodial sentence was excessive and urged upon us to impose a fine instead on the ground that the custodial sentence is unsuitable on the proved facts. They also submitted that the learned Sessions Judge had failed to adequately consider the salient aspects of the case, like the antecedents and contributions to the nation of the appellant. They added that the arrest and conviction taken together were sufficient humiliation to the appellant and that he had unreservedly apologised to Dato' Seri Anwar Ibrahim and his family. The learned counsel also cited a number of authorities for offences under s. 323 of the Penal Code where upon conviction the court had imposed fines or binding over orders.

The learned Deputy Public Prosecutor in his submission urged upon the judges not to disturb the custodial sentence as the learned Sessions Judge had made the right consideration and had applied

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<sup>53</sup> See Dato Mokhtar Hashim & Anor v PP: some 40 hours continuous interrogations without affording the person sufficient rest, sleep, proper food, and denial of his praying routine; PP v Kamde b. Raspani: some 17 hours uninterrupted interrogations; PP v Lee Chee Meng & Anor (1991) 1 MLJ 226

correct principles of sentencing, and that the Public Prosecutor was satisfied with the High Court judge's sentence.

The facts of the case as admitted by the appellant showed that on the night of 20 September 1998, Dato' Seri Anwar Ibrahim was arrested and taken to the police headquarters at Bukit Aman and placed in the lock-up at the ground floor. At about 10.45pm the appellant came down from his 30th floor office to the lock-up and ordered his men through hand signals to blindfold Dato' Seri Anwar Ibrahim and to handcuff him with his hands behind his back. The appellant then entered the lock-up and rained blows on Dato' Seri Anwar Ibrahim who screamed with pain. His screams were heard by two senior officers who were close by and they intervened to stop any further assault by the appellant by pulling him away from Dato' Seri Anwar Ibrahim. Four medical reports were tendered by the prosecution on the extensive injuries sustained by Dato' Seri Anwar, including the infamous black-eye.

The learned Sessions Judge considered all aspects of the case including the appellant's contributions to the nation, his long service in the police force and his clean record and also a number of authorities on the principles of sentencing before he imposed the sentence in question.

It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest of justice must also include the interest of the community. In assessing sentence the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be of the uppermost consideration.

The appellant at the time of the offence held the highest office in the police force and therefore should have been a role model to the force. Instead he stooped to the lowest level when he acted as he did. His actions towards an arrested person is despicable and inhuman, to say the least, more so in this case when the arrested person was, on his orders, blindfolded with his hands handcuffed behind his back. We cannot fathom the need to blindfold and handcuff a prisoner who was already in the police lock-up. This, to us, is an indication of the deliberate nature of the assault on a defenceless victim. This is the worst act of indiscipline in a disciplined force.

We have gone through the record of appeal thoroughly and considered the submissions of learned counsel and the learned Deputy Public Prosecutor. It is not true to say that the learned Sessions Judge had failed to consider certain aspects of the case. The records show that he did consider every aspect of the case including all mitigating factors put forth, and also the appellant's long service to the nation. In the circumstances of this case we can find nothing to interfere with the sentencing discretion of the Sessions Judge. By the same token we are of the view that the High Court too, ought not to have interfered with this discretion. In quashing the imposition of the fine, the learned judge of the High Court had said that he did this because the learned Sessions Judge did not give reasons for imposing the fine. Merely because he did not give specific reasons for imposing the fine, it is our view that this alone is no reason to quash it. The overall reasons given by the learned Sessions Judge encompass the whole of the sentence.

On the facts and circumstances of this case, we think that the sentence imposed by the learned Sessions Judge is on the lenient side. For reasons best known to him, of which we cannot comprehend, the Public Prosecutor then chose not to cross-appeal on sentence to this court. We say we cannot comprehend because when the Sessions Court imposed the sentence, the Public Prosecutor thought it fit to cross-appeal on sentence to the High Court. The Public Prosecutor's petition of appeal showed how unhappy he was with what was termed as gross inadequacy of the sentence and that he had urged upon the court to enhance the sentence. When the High Court, however, reduced that sentence by quashing the imposition of the fine, the Public Prosecutor chose not to cross-appeal in respect of the inadequacy of sentence. We find it rather strange that when the sentence was higher it was thought to be grossly inadequate but when it was reduced, it was deemed to be adequate. We are mindful of the fact that the law and the Constitution give absolute power to the Public Prosecutor to appeal or not, whether to charge a person or not and with what charge and such powers are to be exercised at his discretion but we are reminded that the community expect him to exercise it fairly, honestly and professionally.<sup>54</sup>

Be that as it may it is, however, not the practice of an appellate court to impose its own sentence over that of the trial court especially when the Public Prosecutor chooses not to appeal.

The Court of Appeal judges took the opportunity to remind the lower courts that they should take cases of police officers assaulting anyone very seriously. When a police officer, be he of whatever rank, is found guilty of assaulting a member of the public and more so of an arrested person as in this case, the courts should send a message of the public abhorrence of such acts - by coming down hard on him and nothing short of a custodial sentence, even for a first offender, would suffice.

As mentioned earlier the judges found nothing wrong in law with the sentence imposed by the learned Sessions Judge. We dismiss the appeal and restore the Sessions Court's sentence of two months imprisonment and a fine of RM2,000 in default two months. The custodial sentence shall begin from today 30 April 2001

**6. Provide information about the protections afforded to persons being forcibly returned to a country in which they may face torture or other forms of ill-treatment.**

NIL.

**7. Have the national courts been asked to consider any cases of alleged torture that have taken place outside the territory of your country and not involving citizens of your country? If so, please describe the position of national courts in exercising their jurisdiction in such cases. For example, General X was a Balkan military officer accused of torturing civilians during the regional conflict. He is currently holidaying in your country. What would the position of your national courts be if they were asked to try him for torture?**

NIL.

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<sup>54</sup>See PP v. Zainuddin & Anor[1986] 1 CLJ 468; [1986] CLJ 232 (Rep); [1986] 2 MLJ 100, p. 103

- 8. Have the national courts considered the extent of their jurisdiction over international intervention forces? If so, please provide details of the cases and copies of the judgments, if possible.**

NIL.

- 9. Describe the nature and extent of procedures and safeguards, both legal and practical, in place to protect against torture by non-state actors.**

NIL.