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Rapport du Groupe de travail sur la détention arbitraire

Additif

Mission en Malaisie*, **

Résumé

Le Groupe de travail sur la détention arbitraire a effectué une visite en Malaisie du 7 au 17 juin 2010 à l'invitation du Gouvernement. Tout au long de cette visite, il a bénéficié à tous les égards de l'entière coopération des autorités. La délégation a eu la possibilité de se rendre dans toutes les prisons et tous les lieux de détention et de s'entretenir en privé avec tous les détenus qu'elle souhaitait rencontrer.

Dans son rapport, le Groupe de travail prend acte de plusieurs aspects positifs, tels que le recours nettement moins fréquent à la loi sur la sécurité intérieure (1960), la remise en liberté d'une personne dont la détention avait été déclarée arbitraire par le Groupe de travail et la libération de certains dirigeants de l'organisation HINDRAF arrêtés en 2007 pour avoir organisé des manifestations contre la marginalisation présumée de personnes de souche indienne. Le Groupe de travail note également que la plupart des prisons malaisiennes sont conformes aux normes internationales régissant les conditions de détention.

Toutefois, en ce qui concerne le système de justice pénale, le Groupe de travail fait observer que les suspects passent relativement beaucoup de temps en détention avant jugement, parfois plusieurs années. Souvent, les fonctionnaires de police n'informent pas les détenus de leur droit de contacter des membres de leur famille et de s'entretenir avec un avocat de leur choix. Les informations restreintes communiquées avant le jugement

* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit, qui est joint en annexe au résumé, est distribué dans la langue originale seulement.

** Soumission tardive.

empêchent les défendeurs de se défendre et les éléments sur lesquels repose l'accusation ne sont pas toujours accessibles. La loi impose des restrictions excessives au droit de faire recours et le recours en *habeas corpus* est rarement utilisé et seulement pour des questions de procédure.

Le Groupe de travail souligne que les garanties des droits de l'homme sont mises à mal par quatre lois préventives, principalement la loi sur la sécurité intérieure mais également l'ordonnance visant à préserver l'ordre public en cas d'urgence, la loi sur les mesures préventives spéciales concernant les stupéfiants dangereux et la loi sur l'assignation à résidence. Le Groupe de travail recommande au Gouvernement d'abroger toutes ces lois dès que possible. Parallèlement, les décisions prises au titre de l'ordonnance visant à préserver l'ordre public en cas d'urgence et les décisions rendues par le Conseil consultatif chargé d'examiner les recours devraient avoir un effet contraignant sur le Ministère de l'intérieur, et les décisions relatives à la loi sur la sécurité intérieure devraient faire l'objet d'un contrôle judiciaire.

La détention pratiquée en vertu des pouvoirs conférés aux autorités en matière d'immigration ne semble pas conforme au droit international des droits de l'homme. Le Groupe de travail considère que la détention de migrants devrait faire l'objet d'une décision de justice, au cas par cas, et selon des critères juridiques définis clairement et de façon exhaustive par la loi. Le Groupe de travail a reçu des plaintes au sujet de mauvais traitements infligés à des détenus, du manque de nourriture, d'eau et de soins médicaux, ainsi que d'installations sanitaires laissant beaucoup à désirer dans la plupart des centres de détention pour migrants. Il y a lieu de souligner en particulier le problème du surpeuplement du centre de détention de Lenggeng. Le Groupe de travail se dit préoccupé par les coups de bâton infligés à des migrants en situation irrégulière et les pouvoirs conférés au corps de volontaires de la Malaisie (RELA) qui lui permet d'être présent dans les centres de détention et de traquer les étrangers qui vivent en Malaisie sans documents valides.

Le Groupe de travail recommande également au Gouvernement de modifier ses lois et politiques relatives à la détention des demandeurs d'asile, des réfugiés et des migrants en situation irrégulière afin que la détention fasse l'objet d'une décision de justice, au cas par cas et conformément à des critères clairement définis; d'exclure la détention systématique des groupes vulnérables de migrants et de prévoir dans tous les cas un examen périodique automatique par un tribunal de la nécessité et de la légalité de la détention, ainsi qu'un recours efficace pour les détenus.

Enfin, le Groupe de travail recommande au Gouvernement malaisien de renforcer le statut, les pouvoirs et les fonctions de la Commission malaisienne des droits de l'homme (SUHAKAM), conformément aux Principes de Paris.

Annexe

Report of the Working Group on Arbitrary Detention on its mission to Malaysia (7–17 June 2010)

Contents

I. Introduction

1. The Working Group on Arbitrary Detention conducted a country mission to Malaysia from 7 to 17 June 2010 at the invitation of its Government. The Chairperson-Rapporteur of the Working Group, El Hadji Malick Sow (Senegal), and its member Roberto Garretón (Chile), expressed their gratitude to the Government of Malaysia for the invitation and for the full cooperation extended to the Group in the conduct of its mission. The members of the Working Group were accompanied by the Secretary of the Working Group, another staff member of the Office of the United Nations High Commissioner for Human Rights, as well as by two local interpreters.

2. During the entire visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government and of all authorities it dealt with. The authorities provided the delegation with all the necessary information and arranged all the meetings it requested. The delegation was able to conduct visits to detention facilities and to interview all detainees requested in confidence.

3. The Working Group would like to thank the representatives of Malaysian civil society, as well as representatives of international organizations and agencies, particularly the Office of the Resident Coordinator, for its full support during the mission.

II. Programme of the visit

4. During its official visit, the Working Group visited Lenggeng detention centre, Kajang prison, the women's prison, the drug rehabilitation centre, the psychiatric department at the General Hospital and the Cyberjaya police station in Selangor. In Sarawak, the Working Group visited Puncak Borneo Prison, the women's prison and the Integrity School. In Kelantan, it visited Pengkalan Chepa Prison, the women's prison and the rehabilitation programme. The Working Group also visited Kamuting detention centre in Perak and Simpang Renggam detention centre in Johor. In all these facilities, the Working Group interviewed prisoners and detainees in private, without the presence of guards or witnesses.

5. The Working Group met with senior Government authorities from the executive, legislative and judicial branches, including the Minister for Home Affairs, the Deputy Minister and Deputy Secretary-General II of the Ministry for Foreign Affairs, the Chief Justice and the Attorney General of Malaysia. It also held meetings with the Advisory Board on Preventive Laws, the national human rights institution SUHAKAM, the Bar Council, former detainees and civil society representatives, as well as relatives of former detainees. The Working Group also met with representatives of United Nations agencies. The mission concluded with a debriefing with the Government on the preliminary observations of the Working Group and a press conference.

III. Institutional and legal frameworks

A. Political system

6. Malaysia, a federation of 13 States and 3 federal territories with around 28 million inhabitants, has a parliamentary system of government. The Federal Constitution is the supreme law of the land. It consecrates the rights of Malaysian citizens and establishes a dual justice system based on secular laws (criminal and civil) and sharia (Syariah) laws,

which only applies to Muslims. The dual system of law is provided in article 121 (1A) of the Constitution.

7. The Constitution provides for freedom of opinion, expression, speech and of the press. The law can, however, establish limitations “in the interest of security (or) public order”. The Constitution also provides for freedom of religion, although Islam is the official religion and the practice of Islamic beliefs other than Sunni Islam is restricted.

8. According to the Bar Council of Malaysia, Malaysian courts have taken the clear position that the Universal Declaration of Human Rights is not legally binding and that it would only be given effect insofar as it is not inconsistent with the Constitution.

9. The court system, as far as it is relevant to the present report, was established by the former British colonial power and is based on English common law. It consists of high courts with original jurisdiction over all criminal cases involving serious crimes and most civil cases. A first-class magistrate has jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed 10 years of imprisonment or is punishable with a fine. The magistrate may only pass sentences not exceeding 5 years of imprisonment. The jurisdiction of a second-class magistrate is limited to offences for which the maximum term of imprisonment does not exceed 12 months or which are punishable only with a fine.

10. Civil suits are heard by sessions courts. Juvenile courts try offenders under the age of 18 years. The Court of Appeal has appellate jurisdiction over high court and sessions court decisions. The Federal Court hears appeals of court of appeal decisions. A special court tries cases against the King and sultans. The military has a separate system of courts. Village head courts (*Penghulu*), may adjudicate minor civil matters. Syariah (sharia) Law deals with religious and family issues and is implemented at the State rather than the federal level. Muslims and ethnic Malays are bound in some matters by Islamic religious laws administered by Islamic courts.

11. Indigenous people in Sarawak and Sabah also have a separate system and hierarchy of native courts that has been established in those two States under the Native Courts Ordinance (1992) respectively, to hear and determine disputes among native customary laws.

12. The country does not have a solid, fully independent judiciary based on the principle of separation of powers and composed of independent and impartial judges and magistrates. The amendment to clause 1 of article 121 of the Federal Constitution, which eliminated the term “judicial power”, seriously affected the hierarchy between the three powers of the State, as the judiciary is no longer at the same level as the executive or the legislative. According to the authorities, that amendment does not affect the hierarchy between the three branches of the State because there is no such hierarchy or ranking among these branches. According to the authorities, the position and effect of clause 1 of article 121 of the Federal Constitution prior to and after the amendment remained the same, as both subject the judicial power of the courts to federal law. The jurisdiction and powers of the courts were at all times subjected to federal law.

13. The Working Group notes, however, that Government action, constitutional amendments, legislation and other factors undermine judicial independence. As the courts now only have judicial power as accorded to them by Parliament, recourse to judicial review has been severely restricted, despite the fact that article 128 of the Constitution foresees judicial review of governmental actions on constitutional grounds. As a result, the checks and balances on the actions of the executive power and law enforcement agencies are very weak.

B. International human rights obligations

14. Malaysia is a State party to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, albeit with certain reservations. Its accession to the former was subject to the understanding that its provisions did not conflict with Islamic sharia law and the Constitution. Malaysia ratified the Convention on 6 July 2010 but not the Optional Protocol thereto. On 19 July 2010, Malaysia withdrew its reservations to articles 5 (a), 7 (b) and 16 (2) of the Convention. Malaysia has also withdrawn its reservations to articles 1, 13 and 15 of the Convention on the Rights of the Child. Malaysia ratified the Convention on the Rights of Persons with Disabilities on 19 July 2010, with declarations on articles 3 (b), 3 (a), 5 (2) and 30, and reservations to articles 15 and 18.

15. Malaysia has not ratified most of the major international human rights instruments. It is yet to ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention relating to the Status of Refugees and the Protocol thereto, the Convention relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness and the Rome Statute of the International Criminal Court (see appendix II). Malaysia is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

C. Judicial guarantees

16. Trials are public, although judges may order restrictions on press coverage. There are no jury trials. Defendants have the right to counsel. Strict rules of evidence apply in court and witnesses are subject to cross-examination. Bail is sometimes available for those who have committed minor offences, including minor drug offences. Depending on the seriousness of the offence, a detainee can be held in remand for up to one year. Detainees are not allowed to make or receive phone calls, but may write and receive letters. They are permitted one visit a week and have unlimited access to their defence lawyer.

17. Defendants enjoy the presumption of innocence and may appeal court decisions to higher courts. They also may appeal for clemency to the King or local State rulers.

18. With regard to the criminal justice system, the Working Group observes the relatively long periods accused persons spend in pretrial detention, sometimes for several years. This is often due to understaffed and crowed courts.

19. The Federal Constitution provides that no person should be deprived of his or her life or personal liberty, save in accordance with the law. It also provides that when a person is arrested, he is informed as soon as possible of the grounds of arrest and is allowed to consult and be defended by a legal practitioner of his choice (article 5, clause 3). However, police agents often fail to inform detainees about their rights to contact family members and consult a lawyer of their choice. Police officers often question suspects without giving them access to legal counsel.

20. The Federal Constitution guarantees the rights of a detained person to legal counsel. A detained person may appoint and consult a legal counsel of their own choice. The right to legal counsel starts from the time of arrest. The right to legal counsel is also available to a detained person during a remand proceeding. This is specifically provided for under section 117 (5) of the Criminal Procedure Code, which states that, in deciding on the period of detention, a magistrate should allow representations to be made himself or by a legal

counsel of choice. In relation to guidelines on how this right to counsel may be exercised, section 28A (c) provides that the consultation under paragraph (b) should be within the sight of a police officer and in circumstances, insofar as practicable, where their communication will not be overheard. Access to legal counsel and communications of detained persons with their relatives are both guaranteed under the Federal Constitution. With regard to offences to the Internal Security Act, Federal Court Judge Siti Normah Yaacob, in the case of *Mohamad Ezam Bin Mohd Noor v. Ketua Polis Negara* (2002) held that the Act made no provision for denial of access to legal representation, which would be inconsistent with article 5 (3) of the Federal Constitution.

21. The Working Group did receive, however, information that limited pretrial discovery impedes the right of defendants to defend themselves. Government-held evidence is not consistently made available. The law imposes excessive restrictions on appeals.

22. The right of detainees and prisoners charged with minimal offences to legal counsel would be further strengthened and improved with the establishment of the national legal aid foundation, which was proposed by the Malaysian Bar Council to the Prime Minister on 7 January 2010. On 3 March 2010, the Government agreed that the foundation would be set up as a company limited by guarantee under section 16 of the Companies Act 1965 (Act 125).

23. The objectives of the national legal aid foundation are:

(a) To fund the conduct of legal aid in criminal proceedings for and on behalf of those needing legal aid;

(b) To provide services for lawyers to represent those needing legal representation in criminal proceedings;

(c) To promote, establish, finance and supervise research in respect of legal aid;

(d) To initiate and carry out educational programmes designed to promote the understanding of members of the public of their rights, powers, privileges and duties under the laws of Malaysia;

(e) To provide information to the public on the availability of legal aid in criminal proceedings.

24. Communication between detainees and their relatives, is guaranteed in Malaysia and was upheld in the case of *Abdul Ghani Haroon v. Ketua Polis Negara and Another Application* (2001). In this case, the court held that the detention was, inter alia, mala fide by reason of deliberate and unreasonable denial of access to family members. The family members had been denied access to the applicants for almost 40 days, despite a formal request having been made to the Inspector General of Police. The court also ruled that “to deny the applicants and their families access to one another for such a long period is cruel, inhuman and oppressive not only to the applicants but to their families as well”. Article 149 of the Federal Constitution provides the power to legislate preventive detention laws. In relation to a detainee held under the Internal Security Act, the law does not explicitly provide for the right of family members or legal counsel to have full information on detention. Rule 27 of the Internal Security (Detained Persons) Rules (1960), which is similar to Regulation 2000, only hints at such a right in the case of the death of a detainee.

25. The Working Group also received complaints that women do not receive fair treatment from sharia courts.

26. The Federal Constitution, the Criminal Procedure Code (Act 593) and the Internal Security (Detained Persons) Rules do have provisions against incommunicado detention and the courts do recognize a detainee’s right of access to legal representations and family members. Rule 81 (1) (a) of the Internal Security (Detained Persons) Rules stipulates that

family members or a legal adviser of a detainee held under the Internal Security Act is entitled to visit the detainee. Nevertheless, the habeas corpus recourse is currently solely used on procedural aspects. In 2009, only 92 habeas corpus recourses were filed: of those, only 10 were declared funded.

IV. Findings

A. Preventive laws

27. General concern was expressed by lawyers and members of civil society concerning the four preventive laws: the Internal Security Act (1960); the Emergency (Public Order and Prevention of Crime) Ordinance; the Dangerous Drugs (Special Preventive Measures) Act and the Restricted Residence Act. These laws establish investigative detention to prevent a suspect from fleeing, destroying evidence or from committing a future crime. They impede the detainee’s right to a fair trial, consecrated in the Universal Declaration of Human Rights and by international human rights customary law. They also severely restrict detainees’ access to legal counsel.

28. Preventive laws have been promulgated in order to prevent subversion and to suppress organized violence against persons and property. It is meant to safeguard the public interest and security of Malaysia. These preventive laws allow State institutions, particularly the police and the Office of the Attorney General, to elude the normal penal procedure for common crimes and offences. It also gives the Minister for Home Affairs excessive powers to keep people in detention indefinitely. The Emergency Ordinance is used for this purpose in particular. In the detention centres reserved for detainees under these laws, the Working Group found people charged with common offences who should in principle be treated under the regular penal procedure. To put people under these preventive laws allows the police and the Minister for Home Affairs to detain persons without the need to sustain evidence or to probe penal responsibility.

1. Internal Security Act

29. The Working Group was informed that the Penal Code had been amended to establish that the commission and financing of terrorist acts and hostage-taking are specific offences under Malaysian law. The Internal Security Act would as a result not be necessary. However, suspected terrorists are still being detained under the Act.

30. The Internal Security Act has its origins in a similar act during the British colonial period and is based on article 149 of the Constitution, which allows for legislation to be enacted to combat threats against the security of the State by organized violence or insurgency. Since its promulgation in 1960, approximately 20,000 persons have been detained under the Act. The Working Group held private interviews with the 15 detainees being held in the country under the Act at the time of its visit.

31. The Internal Security Act allows the police to arrest people without a judicial arrest warrant and hold them for up to 60 days in special police remands centres. People can be held in detention during such period without the right to legal counsel and without being taken before a judicial court. The Minister for Home Affairs may authorize further detention for up to 2 years, a period which may be further extended for an unlimited number of 2-year periods. Once released, detainees are subjected to restrictive conditions, usually limiting freedom of residence in the national territory, freedom of travel inside and outside the country and even freedom of opinion, expression and association.

32. The Ministry of Home Affairs has taken steps to conduct a review of the Internal Security Act to ensure that it is relevant to the security environment of the present day without compromising the stability and security of the country. The Government has organized consultations with various stakeholders, including the Malaysian Bar Council and civil society organizations, to look into areas that could improve further the existing Act, namely with regard to the five main areas causing public dissatisfaction over the Act: (a) ministerial powers; (b) treatment of detainees and welfare of their families; (c) duration of detention (60 days); (d) detention without trial (arbitrary detention); and (e) public perception (the Act is used for political interest).

33. The tabling of amendments to the Internal Security Act had to be postponed, however, as the Government felt it was necessary to take a look at the other preventive laws in the country, namely the Prevention of Crime Act (1959), section 27 of the Police Act (1960), the Banishment Act (1959) (revised in 1972), the Restricted Residence Act (1933), the Dangerous Drugs (Special Preventive Measures) Act (1985), and the Emergency Ordinance (Public Order and Crime Prevention) (1969).

34. Although detainees may appeal every six months to the Advisory Board on Preventive Laws, its recommendations are not binding and they are not made public. The Working Group observed that detainees are not notified of its recommendations. Also worrying is the fact that decisions concerning the Internal Security Act cannot be reviewed by any court. Detainees may file habeas corpus applications, based only on procedural issues, not on their substantive merits. Nevertheless, even when habeas corpus is granted and detainees are released, they are frequently arrested again immediately after release. The Working Group was also informed that the Act was used in 2008 to detain a Member of Parliament, a blogger and a journalist for exercising their rights. The Working Group met with the Member of Parliament.

35. The Advisory Board makes recommendations to His Majesty Yang Di Pertuan Agong, whose decision is binding for the Minister. The writ of habeas corpus is available to all cases of detention without trial; this is guaranteed by article 5 of the Federal Constitution. Access to legal counsel and communication with relatives are provided for under Internal Security (Detained Persons) Rules, as well as other criminal legislation dealing with detention. The prison procedure does not deprive prisoners from having meetings or discussions with their respective legal advisers. This legal right is provided and ensured for all prisoners. Moreover, the Prison Department has further assisted the prisoners to meet or enlist legal counsel for court proceedings, appeals, pardon petitions and other legal matters requiring the presence of a lawyer.

36. The Working Group was informed of the release of some leaders of the Hindu Rights Action Force (HINDRAF), who were arrested and detained under the Internal Security Act for organizing protests in 2007 against the alleged marginalization of ethnic Indians. They were charged with sedition, and some were accused of having links with the Liberation Tigers of Tamil Eelam.

37. The Working Group met Mat Sah Bin Mohammad Satray, whose detention was declared arbitrary by the Working Group and contrary to articles 9 and 10 of the Universal Declaration of Human Rights.[1] Mr. Satray was released from Kamuntang Prison in September 2009 and placed under harsh control orders restricting his movements and freedom of speech. He must report every Monday to the Ampang police station. The restrictions are so severe that he cannot even visit the local supermarket behind his house or his mother’s grave.

[1] See A/HRC/13/30 Add.1, opinion No. 32/2008.

2. Emergency Ordinance and Dangerous Drugs Act

38. The Working Group notes that many more people are detained under the Emergency Ordinance and the Dangerous Drugs Act. The Minister for Home Affairs may issue a detention order for up to 2 years if he considers that such a measure is necessary to protect public order, suppress violence or prevent offences involving violence.

39. Suspected drug traffickers may be detained for up to 60 days before the Minister for Home Affairs issues a detention order. Afterwards, the suspect may be held for successive 2-year periods, with periodic review by the Advisory Board. In this case, the opinion of the Advisory Board is binding for the Minister.

40. Malaysia recognizes a person’s right for a fair hearing or trial under article 8 (1) of the Federal Constitution, which provides that all persons are equal before the law and entitled to the equal protection of the law. However, section 16 of the Internal Security Act does not require the Minister, members of the Advisory Board or any public servant to disclose facts or to produce documents, but only those considered to be against the national interest to disclose or produce. The procedure of the Advisory Board is governed by Internal Security (Advisory Board Procedure) Rules (1972). The Rules are supported by article 151 (3) of the Federal Constitution, which provides for restrictions on preventive detention and does not require any authority to disclose facts the disclosure of which would, in its opinion, be against the national interest. According to the authorities, the restrictions applied with regard to hearings before the Advisory Board are justified to protect the national interest and security, as promulgated in article 29 (2) of the Universal Declaration of Human Rights.

41. The Working Group considers that an appearance before an advisory board does not fulfil minimal fair trial guarantees. Many accused of common crimes are held under the Emergency Ordinance. Defence lawyers may appear on behalf of the detainee, but attend the hearing without access to all the documentation, including evidence, and have no right to call witnesses.

B. Powers of the police and the Ikatan Relawan Rakyat Malaysia

42. The Ikatan Relawan Rakyat Malaysia Volunteer Corps (RELA) was established on 11 January 1972 with the main task of preserving and maintaining national security. Its objective is to assist the relevant authorities in maintaining peace and security for the public and the country as a whole. Through amendments to the Essential Rules (Amendment) 2005 on 1 February 2005, RELA was given the power to assist enforcement authorities, namely the police and the Immigration Department, to apprehend foreigners without proper documentation. Their roles and functions are thus to implement operations to apprehend illegal immigrants, preserve local security and peace (patrol duty in crime prevention), undertake “psychological warfare” activities; act as the “eyes and ears” of the Government, perform local social and socio-economic activities, and assist other enforcement agencies, such as the Royal Malaysian Police, the Malaysian Department of Insolvency, the Ministry of Domestic Trade, Cooperatives and Consumerism, the Road Transport Department and local authorities in carrying out their duties.

43. The excessive powers attributed to the police and the RELA leads to situations whereby refugees with a recognized status granted by the United Nations High Commissioner for Refugees and even Malaysian nationals may be sent to immigration detention centres. Once detainees have served their prison sentences for their illegal presence on Malaysian territory, they are held in detention centres for an indefinite period while awaiting deportation to their countries of origin.

44. Citizens of countries with a strong consular presence can be more or less easily deported. However, those nationals whose countries do not have a consulate in Malaysia, or whose Government refuses to intervene, may stay in detention indefinitely.

45. RELA has shifted its focus to crime-prevention, including cases such as snatch thefts, one of the major components of the six national key results areas announced by the Government in 2009. In this regard, RELA members are directly involved in the "feet on street" programme in four sensitive areas, namely in the States of Selangor, Johor, Penang and Kuala Lumpur. Through this programme, RELA works closely with the police, conducting street patrols, with the aim of deterring snatch theft crimes. RELA members involved in the programme are required to undergo two weeks of compulsory basic training. To date, 3,663 RELA members have been inducted into the programme.

46. RELA has been accused of being responsible for a large number of detentions, particularly inside the country. Despite being a volunteer force, RELA is meant to help police and other authorities to conduct neighbourhood patrols and track down foreigners living in Malaysia without valid documents. Most detentions by RELA were directed against non-ethnic Malays and foreigners, reason for which several interlocutors accused RELA of promoting discrimination.

47. During a meeting with the General Director of RELA, the Working Group was informed that most RELA personnel had not been trained, and that those trained had only followed a one-day orientation course. Nonetheless, the General Director expressed his intention to boost RELA membership from the current 1.6 million to 2.6 million in 2011. Many civil society representatives have accused RELA of extorting money from immigrants in an irregular situation and physically abusing them.

48. The Government informed the Working Group that it took a serious view at allegations of unprofessional conduct of RELA officers, including allegations of abuse of illegal immigrants at immigration detention centres. Although investigations have to date shown that the allegations were unfounded, the Government took preventive steps by placing the administration of all detention centres under the Immigration Department with effect from 1 July 2009. The Government therefore wishes to assure that there is no more opportunity of any form of abuse by RELA officers, given that it is no longer in charge of detention centres.

C. Police detention

49. In some cases, police agents may arrest individuals without a warrant. Although in the regular penal procedure the limit for initial police detention is 24 hours, this is usually extended by a magistrate for up to 2 weeks. Extension of the 24-hour period is almost always granted by magistrates. Although in some cases magistrates reduce the term of the extensions requested by the police, they still grant extensions to assure further investigations.

50. The Working Group notes that virtually all detainees interviewed stated that they had been subjected to ill-treatment and even torture in police stations and detention centres in order to obtain confessions or incriminatory evidence. Many detainees told the Working Group that they were not informed of their rights while in police detention, particularly the right to contact their relatives or to consult a defence lawyer. Some reported that police officers even told them that to consult a lawyer would make their situation even more complicated.

D. Pretrial detention

51. In prison, the ratio of people in pretrial detention to those convicted seems proportional and adequate; approximately a third of detainees are on remand.

52. Interviews with detainees, however, showed that pretrial detention is unusually long, mainly owing to a large backlog of court cases. Additionally, most detainees and prisoners interviewed did not have defence lawyers, mostly as a result of their lack of financial resources to pay for one. In some cases, detainees and prisoners did not seem to understand the importance or the benefits of having a defence lawyer.

53. A legal aid system for the regular penal procedure does not exist, though some aid is provided to persons charged with crimes that can result in the death penalty. The bar associations in peninsular Malaysia and on Borneo play the role of the State on this issue, granting legal aid on a pro bono basis to thousands of detainees.

E. Detention centres and prisons

54. Government officials told the Working Group that the main objective of detention is to rehabilitate, not to punish. A prison sentence can be reduced by a third for good behaviour. There is no parole for non-nationals, but they could benefit from a reduction of their sentence for good behaviour.

55. The Working Group did not receive any complaints concerning treatment by guards in detention centres and prisons. Several convict prisoners did state, however, that they had been caned, some of them receiving up to 24 strokes. Most had been found guilty of drug trafficking, drug possession, rape or robbery. Whippings are supervised by prison authorities and attended by medical doctors.

56. There are a total of 36,040 prisoners (25,320 convicted and 10,720 on remand), not only under the four preventive laws; 531 prisoners are on the death row, although the last execution took place in 2009. Serious crimes numbered 18,784, while petty offences amounted to 17,256. There are 15 detainees under the Internal Security Act, and between 5,000 and 6,000 detainees held under the Emergency Ordinance.

57. Kajang women’s prison, Tawau prison, Sandakan prison, Penor prison and Kajang prison face serious overcrowding. In Kajang prison, the Working Group found 3,290 prisoners: 2,492 were convicts. A total of 160 prisoners had been placed in maximum security. In the women’s prison, there were 1,160 detainees: 797 convicted; 9 on death row (5 foreigners), and 363 on remand. In the drug rehabilitation centre, there were 440 detainees.

58. In Puncak Borneo prison, opened in October 2008, there were 614 prisoners, including 48 women. Its capacity is for 1,000 prisoners. A total of 18 prisoners were on death row, although no execution has taken place in the State of Sarawak since 1998. Juvenile prisoners between 18 and 21 years old were held in a separate section.

59. The Working Group observed that Pengkalan Chepa prison held 1,596 detainees: 1,133 convicted, 461 on remand, 22 on death row, 29 juvenile offenders, 102 women and 16 on parole. However, its capacity is only for 1,000 prisoners. Convicted prisoners are held in buildings A and B; those remanded in building D; building C is for juvenile offenders. In building C, there were 29 identity cards, but only 28 detainees. When the Working Group asked the guards, they claimed that the missing detainee was outside cleaning. A boy was later presented, but was clearly not the boy on the identity card. The Working Group observed that segregation cells were used not for punishment, but to

provide additional security to detainees requesting it or to those with psychological disorders.

60. Convicts go through four different stages of a rehabilitation programme, which is based on reforming the prisoner's attitude, developing skills and providing training and teaching. Stage one, on orientation and discipline-building, normally takes three months. Stage two, self-development, concerns personal enhancement and character reinforcement: Muslims follow the Halaqah programme on Islamic teaching; while non-Muslim prisoners meet with counsellors. Stage three is about skills development and professional training, while Stage four is to follow a community pre-release programme to assist reintegration into civil life.

61. Prisoners can stay for a maximum of two weeks in segregation cells, where they are sent under the order of the Prison Director. The Working Group observed that the conditions in prison and in Simpang Renggam detention centre were considerably better than those at the immigration detention centres.

62. In Simpang Renggam rehabilitation centre, there were 1,235 detainees. Its capacity is for 2,000 detainees. The average duration of detention is 2 years, although some detainees had been held for 6 years.

F. Deaths in custody

63. The Working Group received information that, during the period from 2003 to 2007, 1,535 people died in prisons, rehabilitation centres and immigration detention centres; 85 other people died in police custody. Most deaths occurred in hospitals and included a high number of persons affected by HIV and AIDS.

64. The issue of deaths in police custody was being investigated by the Royal Commission to Enhance the Operations and Management of the Royal Malaysian Police. The Working Group believes, however, that investigations by external, independent bodies are also necessary. In the Working Group's view, inquests should be conducted in each case as soon as a death takes places.

G. Detention pursuant to immigration powers

65. With regard to detention outside the context of criminal law, during its visit, the Working Group was seriously concerned by the administrative detention regime applied to asylum-seekers, refugees and migrants in an irregular situation. In a population of around 28 million, between 3 to 4 million are foreign immigrants. It is estimated that at least half of them are in an irregular situation or without the necessary documentation. Malaysia is a transit point for asylum-seekers, particularly those from Afghanistan and Myanmar. Some 90,000 foreigners have refugee status as determined by the Office of the United Nations High Commissioner for Refugees (UNHCR) and mainly live in Kuala Lumpur. A significant number of migrants from, inter alia, Bangladesh, Indonesia and Nepal also live in the country without authorization.

66. There is no special legislation relating to refugees and asylum-seekers in Malaysia, since they are not recognized as such under domestic law; indeed, current legislative framework does not even recognize the terms “refugees” and “asylum-seekers”. It is understood that any non-citizens of Malaysia entering the country without the necessary documents and permits are categorized as illegal migrants, dealt with according to the relevant laws and punished accordingly.

67. Illegal migrants are detained under the Immigration Act for the purposes of making inquiries or investigations into an offence under the law, and also for removing from Malaysia any foreigners who violate the provisions under the Act.

68. While immigrants in an irregular situation are subjected to mandatory detention under the Immigration Act, they do have some recourse to a court law. Article 5 of the Federal Constitution provides that detained persons should not be detained for more than 24 hours without authorization by a magistrate, although in the case of immigrants, this period is extended to 14 days. Migrants are detained by order of the Director General of Immigration and, under the criminal Procedure Code, by a magistrate. Detention of migrants in a prison is governed by the Prisons Regulations (2000), which contain safeguards on fundamental liberties, inter alia the rights to food, clothing, medical examination and treatment, education and recreation, the right to visits and communication.

69. The Government has not ratified the Convention relating to the Status of Refugees or the Protocol thereto. The Government has yet to put in place a national legal and administrative framework for dealing with asylum-seekers and refugees. While the Government does not restrict the access of undetained asylum-seekers to the Office of UNCHR, it does nothing to facilitate access and, as part of its immigration enforcement efforts, often arrests and detains asylum-seekers and refugees.

70. Although Malaysia is not a party to the Convention relating to the Status of Refugees and the Protocol thereto, Malaysia has fulfilled its international obligations to persons who have entered Malaysia claiming to be refugees and asylum-seekers through special arrangements on humanitarian grounds with UNHCR.

71. Persons committing offences under the immigration laws (either travelling without travel documents or committing criminal offences) are detained by the relevant authorities. However, section 8 (3) of the Immigration Act 1959/63 also sets out to determine persons categorized and prohibited from entering Malaysia. In the event, however, that such offenders are from vulnerable groups, including minors, families with minor children, pregnant women, elderly persons, persons with disabilities and other such persons, the authorities are required, on the basis of humanitarian grounds, to take all reasonable measures to treat such persons with appropriate care and attention.

72. The Working Group believes that detention of migrants should be decided upon by a court of law, on a case-by-case basis, and pursuant to clearly and exhaustively defined criteria in legislation under which detention may be used. The Government should not use immigration detention for asylum-seekers, refugees and vulnerable groups of migrants, including unaccompanied minors, families with minor children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, or people with serious and/or chronic physical or mental health problems.

73. In all cases, immigrants should be provided with automatic periodic review by a court of law of the necessity and legality of their detention at any time.

74. Refugees and asylum-seekers are prosecuted for immigration-related offences and may be indefinitely detained at immigration detention centres or deported. Malaysia has no laws or regulations relating to the status of refugees and asylum-seekers in line with international standards. The 24 hours allowed for the police to bring a detainee before a magistrate becomes 2 weeks in the case of a foreigner detained under immigration laws.

75. In the absence of national refugee legislation, UNHCR performs core protection functions, including registration of asylum-seekers, determination of refugee status, issuance of identification documentation and promotion of solutions, including voluntary return, local integration or resettlement in a third country. UNHCR performs these functions, however, as a result of the Government’s unwillingness to perform what are

clearly State functions of asylum management. UNHCR does so in the absence of a comprehensive legal and administrative framework for managing asylum-seekers.

76. The Government believes that the issue of refugees and asylum-seekers requires commitments from all States to cooperate in addressing the problems of the mass influx of refugees and asylum-seekers faced by many countries, including Malaysia. Such commitments would need to take into account the resources available of each State and their relevant domestic laws and migration policies. States should take measures jointly to eliminate the problems that give rise to persons having to migrate from their country of origin. Apart from addressing the issue of refugees, efforts need to be made to assist the countries of origin to alleviate the root causes of why their people migrate to other countries; only then would the international community to be able address the problem of refugees and migration as a whole.

77. The capacity of the 13 immigration detention centres in the country is around 6,000 places. All centres are under the control of the Immigration Department. Approximately 10,000 people were deported in 2009.

78. The Government is working to address the issue of overcrowding, the number of detainees has been reduced to an average of 4,500 to 4,800 from the total capacity of 6,640 of all detention centres. Cooperation with non-governmental organizations and international bodies is vital to improve management of immigration detention centres. The Government is therefore working closely with the International Committee of the Red Cross (ICRC) and organizations such as Buddhist and Shelter.

79. The Government recognized that there is a need to improve conditions in immigration detention centres. It is taking steps such as by establishing a new set-up comprising personnel from various departments. The Government is also currently looking at emulating best practices in detention centre management of other countries such as Australia and the Netherlands. An additional allocation of RM100 million was recently approved by the Government to upgrade physical conditions and renovations of the centres concerned.

80. The Working Group was informed that at least six asylum-seekers and migrants had died of leptospirosis, an infectious disease, in immigration detention camps. In 2009, 14 detainees died in immigration detention centres.

81. Capacity at Lenggeng detention centre is 1,250, including a block for 250 women. As a transit place, detainees should stay for a maximum of 14 days for investigation. The Working Group found evidence of overcrowding, insufficient access to potable water, poor sanitation and inadequate medical care. Allegations were received of inadequate food and lack of ventilation. The unsanitary and overcrowded conditions facilitated the transmission of communicable diseases, particularly skin diseases. Three detainees died during the first five months of 2010. Some detainees also stated that the overcrowding often led to confrontations and fighting between the detainees, with very limited or no intervention at all from the security guards.

82. The Working Group found a 14-year-old boy who had been in the centre since June 2008. He stated that he was born in Malaysia, although his documents indicated that he was Indonesian, as both his parents are Indonesian. He was adopted by a Malaysian family after his parents returned to Indonesia in 2006. His adoptive family had not visited him since 2009. He has no bed in his cell and was uncertain about his future.

83. According to the Government, all immigrants are subject to the same criminal justice system in Malaysia; detainees may therefore challenge the necessity and legality of their detention at any time. This is a common principle of the criminal justice system in Malaysia. Migrants who are found in an irregular situation (without valid travel documents)

or commit an offence are charged in court. After the sentence period has been served, migrants are kept in immigration detention centres until deportation. The Working Group reminds the Government that it is an obligation of the State to guarantee the right to safety of all foreigners when it decides to place them in detention.

84. In Sabah, concern was also expressed at the detention of foreign children whose parents had been deported.

85. Migrants found to have violated immigration laws are liable to imprisonment, substantial fines and, in some cases, caning. Since 2002, caning has been used to punish immigration offences, such as illegally entering the country. The Working Group was informed that most of the 10,000 people caned each year are immigrants in an irregular situation.

86. Upon the conclusion of its visit, the Working Group was informed that no migrant in detention was denied the necessary medical treatment.

H. Monitoring mechanisms

87. Of positive note is the work carried out by the Human Rights Commission of Malaysia, SUHAKAM, which in 2009 and 2010 regularly visited prisons and attempted to monitor prisons and detention facilities. It is essential that this work be continued and indeed increased, particularly with respect to immigration detention. Its mandate also includes carrying out analyses and awareness-raising and training activities, as well as receiving and investigating individual complaints. The Working Group invites the Government of Malaysia to strengthen the status, powers and functions of SUHAKAM, in accordance with the Paris Principles. It also calls upon the State to take all measures necessary to ensure that it maintains its A-status during the reaccreditation process by the International Coordinating Committee.

88. Act 597 of 1999 concerning the establishment of SUHAKAM was amended twice in 2009 to strengthen the Commission further. The Act now provides that commissioners are to be appointed by the Yang di-Pertuan Agong of Malaysia on the advice of the Prime Minister, who, in turn, consults a committee. The committee consists of the Chief Secretary to the Government, the Chairman of the Commission and three other members who are knowledgeable or possess practical experiences in human rights, including former judges or commissioners. Members, however, should not be currently active or involved in politics, or current or former enforcement officers.

I. Detention of minors

89. Courts for children try offenders under the age of 18. The Working Group notes with concern the low minimum age of criminal responsibility (10 years) and the discrepancies in this regard in the Penal Code, the Sharia Criminal Procedure (Federal Territories) Act 1977 and the interpretation in the Sharia Court. It also notes with concern the long pretrial detention periods and the delays in dealing with cases involving children.

V. Conclusions

90. **The Working Group expresses its appreciation to the Government of Malaysia for the invitation and for its full cooperation during its mission to the country. It notes a number of positive aspects with regard to the institutions and laws safeguarding against cases of arbitrary deprivation of liberty.**

91. **Among the positive aspects, the Working Group notes the release of some leaders of the Hindu Rights Action Force, who were arrested and detained under the Internal Security Act for organizing protests in 2007 against the alleged marginalization of ethnic Indians. The Working Group also notes the release of Mat Sah Bin Mohammad Satray, whose detention had been considered arbitrary by the Working Group and contrary to articles 9 and 10 of the Universal Declaration of Human Rights.**

92. **Most prisons visited were found to meet international standards and regulations on conditions. This finding does not, however, apply to immigration detention centres.**

93. **With regard to the criminal justice system, the Working Group observes the relatively long periods accused persons spend in pretrial detention, sometimes for several years, often because of understaffed and crowed courts.**

94. **Police agents often fail to inform detainees about their rights to contact family members and to consult a lawyer of their choice. Police agents often question suspects without giving them access to legal counsel.**

95. **Limited pretrial discovery prevents defendants from defending themselves properly. Government-held evidence is not consistently made available. The law imposes excessive restrictions on appeals.**

96. **The Working Group received complaints that women do not receive fair treatment from sharia courts.**

97. **Human rights guarantees in Malaysia are hindered by the four preventive laws, mainly the Internal Security Act but also the Emergency (Public Order and Prevention of Crime) Ordinance, the Dangerous Drugs (Special Preventive Measures) Act and the Restricted Residence Act.**

98. **The Internal Security Act allows police to detain incommunicado and without a warrant any person deemed a threat to national security or economic life for up to 60 days of investigation. Under the Act, the Minister for Home Affairs may extend detention for an initial period of up to two years without reference to the courts, and may issue further detention orders for a period up to two years indefinitely. Suspects can be detained without normal judicial review or formal charges. Some of those released before the end of their detention period are subjected to "imposed restricted conditions", which usually limit their freedom of opinion, speech, association and travel inside and outside the country.**

99. **The Working Group is worried about the deaths that occur during police arrests and while people are in police custody.**

100. **The regime applied to migrants in an irregular situation, refugees and asylum-seekers is not seen to be in line with international human rights law. Immigrants in an irregular situation arriving in the country are subjected to mandatory detention without genuine recourse to a court of law. The conditions of detention at most of the immigration detention centres visited adversely affect the ability of detainees to challenge the lawfulness of their detention. The Working Group received complaints of detainee abuse, inadequate food, water and medical care, and poor sanitation in the immigration detention centres.**

101. **The Working Group expresses its concern about the excessive powers granted to the non-official organization RELA, particularly its activities concerning asylum-seekers, refugees and migrants in an irregular situation. The Working Group received allegations of ill-treatment and beatings by RELA militants.**

102. **The Working Group expresses its concern about the arrest of journalists, political opposition leaders and Internet bloggers for political reasons.**

103. **The Working Group further expresses its concerns about the situation of overcrowding in prisons, but mainly in immigration detention centres.**

VI. Recommendations

104. **On the basis of its findings, the Working Group addresses the recommendations below to the Government of Malaysia.**

A. General recommendations

105. **The Government should increase its efforts to develop a human rights culture in Malaysia. The judiciary should train magistrates, judges and prosecutors in international human rights law in order to increase the capacity of applying international human rights principles and standards in the resolution of judicial cases.**

106. **The Government should become a party to the main international instruments on human rights, particularly the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention relating to the Status of Refugees and the Protocol thereto, the Convention relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness and the Rome Statute of the International Criminal Court.**

107. **The Government should also study the possibility of becoming a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Optional Protocol thereto, as well as of revising the reservations and declarations it made to those conventions to which it is a State party.**

B. Concerning criminal detention

108. **The Government should take steps to abrogate all norms that limit the independence of the judiciary, the independence of judges and magistrates, the impartiality of prosecutors and the free exercise of the legal profession, as well as all norms that restrict judicial review and strengthened executive influence over the judiciary.**

109. **The Government should bear in mind that no one should be detained without a fair trial. Consequently, it should take steps to repeal the Internal Security Act and the other three preventive laws, namely, the Emergency (Public Order and Prevention of Crime) Ordinance, the Dangerous Drugs (Special Preventive Measures) Act and the Restricted Residence Act.**

110. **During the transition period, while the Internal Security Act is still in force, decisions by the non-judicial Appeals Advisory Board should be binding on the Home Minister, and decisions with regard to the Act should be subjected to judicial review.**

111. **Access to legal counsel and communication from detainees with their relatives should be guaranteed.**

112. **Habeas corpus recourse should be developed to protect the right to liberty of all persons living under Malaysian jurisdiction. It is currently solely used on procedural aspects.**

113. **The authorities should develop a parole system.**

114. **The authorities should work on a reduction of recidivism by the rehabilitation of prisoners with the assistance of the community.**

115. **Prisoners categorized as minor offenders should not be imprisoned but made to do community work.**

116. **Furthermore, the Working Group recommends that the Government:**

(a) Raise the minimum age of criminal responsibility to 12;

(b) Include strict time limits for completing children cases;

(c) Ensure that deprivation of liberty of children conforms fully with the Convention on the Rights of the Child and other relevant international standards.

C. Concerning detention under immigration powers

117. **Regardless of immigration status, nobody should be subjected to arbitrary detention or appalling detention conditions. The Government is reminded that it is its responsibility to guarantee the right to physical and psychological integrity and the right to security in immigration detention centres.**

118. **The Government should ratify the Convention relating to the Status of Refugees and the Protocol thereto, and put in place a national legal and administrative framework for dealing with asylum-seekers and refugees that meets international standards.**

119. **The Government should also rule out detention of asylum-seekers and refugees as well as vulnerable groups of migrants, including unaccompanied minors, families with minor children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, people with serious and/or chronic physical or mental health problems.**

120. **The Government should, in all cases, provide for automatic periodic review by a court of law on the necessity and legality of detention.**

121. **The Government should also provide for an effective remedy for detainees to challenge the necessity and legality of detention at any time of the detention period and ex post facto, and define the circumstances.**

122. **As long as there is a regime of mandatory administrative detention for migrants in an irregular situation, the Government should legally define its maximum period rather than basing it on Government regulations or policy.**

123. **The Government should also provide for a system of legal aid for immigration detainees.**

124. **The Government should assume the responsibility of improving the conditions in immigration detention centres as a matter of urgency.**

125. **RELA, as a volunteer force, should not be used for law enforcement nor for guarding immigration detention centres.**

D. Concerning monitoring mechanisms

126. **The Working Group recommends that the Government strengthen the status, powers and functions of SUHAKAM, in accordance with the Paris Principles. The Working Group also calls upon the State to take all measures necessary to ensure that it maintains its A-status.**

127. T**he Government should facilitate the access of international organizations such as UNHCR and ICRC to monitor conditions in detention.**

128. T**he Government should facilitate the access of SUHAKAM and non-governmental organizations to immigration detention facilities, police lock-ups and prisons to monitor conditions and provide additional services in partnership with the Government.**

Appendix I

Detention facilities visited

In Selangor

- Lenggeng detention centre
- Kajang prison
- Women’s prison
- Drug rehabilitation Centre
- Psychiatric Department of the General Hospital
- Cyberjaya police station

In Sarawak

- Puncak Borneo prison
- Women’s prison
- Integrity School

In Kelantan

- Pengkalan Chepa prison
- Women’s prison
- Rehabilitation programme

In Perak

- Kamuting detention centre

In Johor

- Simpang Renggam detention centre

Appendix II

United Nations human rights conventions to which Malaysia is a State party

- Convention on the Elimination of All Forms of Discrimination against Women (reservations to articles 9 (2); 16 (1) (a); 16 (1) (c); 16 (1) (f); 16 (1) (g)). Reservations to articles 5 and 7 were removed on 6 July 2010
- Convention on the Rights of the Child (reservations to articles 2, 7, 13, 14, 28, paragraph 1 (a) and 37). Reservations to articles 1, 13 and 15 were removed in 2010
- Convention on the Rights of Persons with Disabilities (6 July 2010)
- Other main relevant international instruments:

  (a) Convention on the Prevention and Punishment of the Crime of Genocide;

  (b) Geneva Conventions of 12 August 1949 and Additional Protocols thereto; except Additional Protocol III;

  (c) ILO fundamental conventions, except Nos. 87, 105 and 111.