



UNITED NATIONS

STATEMENT BY THE WORKING GROUP ON ARBITRARY DETENTION UPON CONCLUSION OF ITS MISSION TO MALAYSIA

(7-18 JUNE 2010)

Ladies and gentlemen,

The Working Group on Arbitrary Detention of the United Nations Human Rights Council conducted a country mission to Malaysia from the 7th of June 2010 until today, following an invitation from the Government. The delegation was headed by myself, as the Working Group Chair-Rapporteur, and composed by one of the Working Group's members, Mr. Roberto Garretón and by two members of the Working Group's Secretariat from the United Nations Office at Geneva.

First of all I would like to express my gratitude to the Government of Malaysia for its invitation and for the full cooperation extended to the Working Group in the conduct of its mission. During the entire visit, the Working Group enjoyed the fullest cooperation from the Government, including all the authorities it met with, who 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 detainees in confidence. The Working Group would also like to thank the representatives of the Malaysian civil society, as well as representatives of international organizations, particularly the United Nations Development Programme (UNDP), for its support during the mission.

During its fact-finding mission, the Working Group met with senior Government authorities from the Executive, Legislative and Judicial branches, including the Minister and the Secretary General of Home Affairs, the Deputy Minister and the Deputy Secretary General II of the Ministry for Foreign Affairs, the Chief of Justice, the Attorney General of Malaysia, the Commissioner General of Prisons and Director-General of Ikatan Relawan Rakyat (RELA). It also held meetings with the Advisory Board on Preventive Laws, the National Human Rights Institution SUHAKAM, the Bar Council and civil society representatives, as well as with former detainees. The Working Group also met with representatives from the United Nations Country Team and other United Nations Agencies.

During its official visit the Working Group visited Lenggeng Detention Centre, Kajang Prison, including the Women's Prison and the Drug Rehabilitation Centre, the Psychiatric Department at the General Hospital; Puncak Borneo Prison, the Women's Prison and the Integrity School in

Kuching; Pengkalan Chepa Prison, the Women's Prison and the Rehabilitation Programme in Kota Bharu; Kamunting Detention Centre in Taiping and Simpang Renggam Detention Centre in Johor Bahru. The Working Group interviewed prisoners and detainees in private in all of these facilities. The Working Group also conducted a surprise visit to the Simpang Renggam Police Station.

The Working Group would like to highlight the good conditions in all the prisons visited, including the recent construction and renovation, as well as the good rapport between the detainees and the guards. The Working Group did not receive any allegations of abuse of power or ill-treatment from prison guards. In addition, the Working Group was pleased to learn that the number of detainees under the Internal Security Act has decreased in recent times, and was able to interview all 15 persons who are currently in detention under this legislation. In this regard, the Working Group was informed about the ongoing revision of the preventive laws, focused mainly on five areas. Furthermore, the Working Group welcomes the fact that the SUHAKAM Commissioners have been recently appointed.

During the mission, the Working Group received information that during the period between 2003 and 2007, 1,535 persons died in prisons, rehabilitation centres and immigration detention centres. 85 other persons died in police custody. Most of those deaths occurred in hospitals and they include a high number of persons affected by HIV/AIDS. The Working Group was also informed that deaths in police custody had been investigated by the Royal Commission to Enhance the Operations and Management of the Royal Malaysian Police. However, the Working Group considers that investigations by external, independent bodies are also necessary, and inquests should be conducted on each case as soon the death takes place.

At the Lenggeng Detention Centre, the Working Group found overcrowding, poor sanitation and inadequate medical care. Allegations were received of inadequate food and a lack of ventilation. The unsanitary and overcrowded facilities have also given place to the transmission of communicable diseases, particularly skin diseases. Some detainees also stated that the overcrowding led to confrontations and fighting between the detainees, with very limited or no intervention from the security guards. The Working Group would like to remind the Government of Malaysia of its obligation to guarantee the right to safety of all foreigners, particularly when deprived of their liberty.

Excessive powers attributed to the Police and to the volunteer organization RELA facilitate the arrest and detention of numerous individuals in immigration detention centres. This even includes refugees who are in possession of identity cards issued by the United Nations High Commissioner for Refugees due to their status, as well as Malaysian nationals. Once the detainees have served prison sentences as a result of their illegal presence in Malaysian territory, they are held in immigration detention centres during an indefinite period, while awaiting deportation to their countries of origin. 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 Governments refuse to intervene, may stay in detention indefinitely, in contravention of international law and the Working Group's jurisprudence. The Working Group calls on the Government of Malaysia to ratify the 1951 Convention relating to the Status of Refugees.

The Working Group is seriously concerned about the Preventive Laws in force in Malaysia, mainly: The Internal Security Act (ISA) 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 preventing him or her from committing a future crime. These laws deny the detainee the right to a fair and public hearing by an independent and impartial tribunal, consecrated in the Universal Declaration of Human Rights and other principles of international customary law. They also severely restrict detainees' access to legal counsel.

These Preventive Laws allow State institutions, particularly the Police and the Attorney General's Office, to elude the normal penal procedure for common crimes and offences. They also give the Minister of Home Affairs excessive powers to keep people in detention indefinitely, without the need to sustain evidence in court or to prove criminal responsibility. In the detention centres reserved for detainees under these laws, the delegation found people charged with common offences which should in principle be treated under the regular penal procedure.

In this regard, the Working Group was informed that the Penal Code had been amended to establish the commission and financing of terrorist acts and hostage taking as specific offences under Malaysian law. However, suspected terrorists are still being detained under the ISA 1960. The ISA allows the Police to arrest people without a judicial arrest warrant and hold them for up to 60 days in special police remand centres. People can be held in detention during this period without the right to see their relatives or legal counsel and without being taken before a judicial court, resulting in incommunicado detention. Afterwards, the Minister of Home Affairs may authorize further detention for up to two years, a period which may be extended for an unlimited number of times. Once released, detainees are often subjected to restricted 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.

Although detainees may appeal every six months to the Advisory Board on Preventive Laws, its recommendations are not binding, nor are they made public. The Working Group could observe that the detainees are not notified of its recommendations. Also worrying is the fact that ISA decisions cannot be reviewed by any court. Detainees may file habeas corpus applications, based only on procedural issues, and not on merits. Nevertheless, even when a writ of habeas corpus is granted and the detainee is released, he or she is frequently rearrested immediately after the release. The Working Group was also informed that ISA was used in 2008 to detain a Member of Parliament, a blogger and a journalist for exercising their rights.

The Government justifies the need for these laws based on its obligation to guarantee national security and the security of its citizens. Nevertheless, detention without trial and without charges, for flexible and extendable term limits, at the will of the authorities, affects not only the rights to personal freedom, free trial and presumption of innocence, but also the right to security of person, which guarantees the right to liberty for all persons if they have not committed any crime.

The Working Group notes with concern that thousands of people are detained under the Emergency Ordinance and the Dangerous Drugs Act. In this regard, the Minister of Home Affairs may issue a detention order for up to two years, if he considers that such a measure is necessary for the protection of the public order; the suppression of violence or the prevention of offences involving violence. Suspected drug traffickers may be detained for up to 60 days before the Minister for Home Affairs issue a detention order. Afterwards, the suspect may be held for

successive two-year periods, with periodical review by the Advisory Board. In this case, the opinion of the Advisory Board is binding for the Minister.

Appearances before the Advisory Board, regardless of which legislation the person has been detained under, do not fulfil the minimal fair trial guarantees. 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. Ultimately, the Advisory Board is not a decision-making body, and may only make recommendations.

In the regular penal procedure, the limit to the initial police detention is 24 hours. However, this is usually extended by a magistrate for up to two weeks. It is of concern to the Working Group that in some cases, the Police may arrest individuals without a warrant. It is also worrying that the extension of the 24-hour period is conceded by magistrates in practically all cases. The Working Group was informed that, although in some cases magistrates reduced the term of the extensions requested by the Police, they still granted the extensions to assure further investigations. Many detainees, especially those detained under the preventive laws, 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 lawyer. Some of them reported that police officers even told them that to consult a lawyer would make their situation more complicated. Additionally, virtually all detainees interviewed, especially those detained under the preventive laws, indicated that they had been subjected to torture or ill-treatment in order to obtain confessions or evidence in police detention. This is facilitated by the fact that many are held in incommunicado detention, at least initially.

Based on the above, the Working Group recommends that the four preventive laws be repealed or, if amended, ensure they are in conformity with article 10 of the Universal Declaration of Human Rights.

On the other hand, the Working Group did not receive any complaints concerning the treatment by the guards in prisons and detention centres. The Group could observe that conditions in prisons and in Simpang Renggam Detention Centre are considerably better than those at the Immigration Detention Centres, which are in a deplorable state.

The ratio in prisons between people in pre-trial detention and those convicted seems proportional and adequate, with approximately a third of detainees on remand. However, the interviews with detainees showed that pre-trial detention is considerably long, mainly due to a large backlog of cases in the courts. Additionally, most of the prisoners and detainees interviewed stated that they did not have defence lawyers, mostly as a result of the lack of financial resources to pay for them. In some cases, prisoners and detainees did seem not to understand the importance or the benefits of having a lawyer. The Working Group was informed that a legal aid system for the regular penal procedure does not exist, with the exception of those persons charged with crimes that can be sentenced to the death penalty. The Bar Associations in Peninsular Malaysia and in Borneo Island are fulfilling the role of the State on this issue, granting legal aid on a pro bono basis to thousands of detainees.

The situation of detention in Malaysia would improve if the judiciary were fully independent, based on the principle of separation of powers, and composed of independent and impartial judges and magistrates. In that sense, the Working Group was informed that the amendment to Article 121 of the Constitution, which eliminated the term "judicial power", seriously affected the hierarchy between the Executive, the Legislative and the Judiciary. As a result, recourse to

judicial review has been severely restricted, in spite of the fact that Article 128 of the Federal Constitution foresees judicial review against governmental actions on constitutional grounds.

The Working Group considers that detention of immigrants 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 resorted to. Immigrants should have an effective remedy to challenge the necessity and legality of their detention at any time. Additionally, immigration detention should not be applied to refugees, asylum-seekers and vulnerable groups of migrants, including unaccompanied minors, families with minor children, pregnant women, breast-feeding mothers, elderly persons, persons with disabilities, or people with serious and/or chronic physical or mental health problems.

The Working Group also recommends strengthening the status, powers and functions of SUHAKAM, in accordance with the Paris Principles. It also calls upon the State to take all necessary measures to ensure that it maintains its "A status" accreditation before the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

A final report on the visit will be presented to the Human Rights Council in March 2011.

Thank you.

The former Commission on Human Rights established the five-member Working Group in 1991 to investigate allegations of arbitrary deprivation of liberty. Its mandate was extended in 1997 to cover the issue of administrative custody of immigrants and asylum-seekers. The other three members are Ms. Shaheen Sardar Ali (from Pakistan); Mr. Mads Andenas (from Norway) and Mr. Vladimir Tochilovsky (from Ukraine).

*For further information on the Working Group, please visit the following webpage:
<http://www2.ohchr.org/english/issues/detention/index.ht> or consult
<http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>*

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