

REVIEW  
OF THE  
INTERNAL  
SECURITY  
ACT  
1960



**SURUHANJAYA HAK ASASI MANUSIA MALAYSIA**

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**REVIEW OF THE INTERNAL SECURITY ACT 1960**



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# EXECUTIVE SUMMARY



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## 1. History of the Internal Security Act 1960

In 1948, a state of emergency was proclaimed throughout Peninsula Malaya as a result of the declared policy of the Communist Party of Malaya (CPM) to wrest political power through armed struggle. Twelve years later, the Government announced its intention to declare the Emergency at an end on 31 July 1960.

In the same year, a Bill titled “an Act to provide for the internal security of the Federation, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of the Federation and for matters incidental thereto” was moved in Parliament. The Internal Security Act 1960 (ISA) became law in West Malaysia on 1 August 1960 and East Malaysia on 16 September 1963.

## 2. The purpose of the Internal Security Act 1960

In moving the second reading of the Bill for the ISA in Parliament on 21 June 1960, the then Deputy Prime Minister, the late Tun Abdul Razak, explained the rationale for the ISA thus:

The Hon'ble Prime Minister and other Members of the Government, including myself, have made it quite clear on a number of occasions that, because the Emergency is to be declared at an end, the Government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he has failed by force of arms. It is for this reason that this Bill is before the House. It has two main aims: firstly to counter subversion throughout the country and, secondly, to enable the necessary measures to be taken on the border area to counter terrorism.<sup>1</sup>

It is clear from the Parliamentary Debates of 21 and 22 June 1960 that the “evil enemy” referred to by the late Tun Abdul Razak was the Communist terrorist threat. However,

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<sup>1</sup> Parliamentary Debates, *Dewan Rakyat* (21.6.1960), p. 1185

despite the fact that in 1989 the CPM officially renounced their policy of armed struggle in Malaysia and signed a pact to that effect with the Government, the ISA remains in force today, and it is generally acknowledged that its application and proposed application have not been restricted solely to containing the Communist insurgency.

This wide-ranging application and proposed application of the ISA leave an impression that the ISA is an ordinary piece of legislation to be used under ordinary circumstances. This impression, however, is an inaccurate one. The ISA is in fact an extraordinary and very specific piece of legislation. If at all its provisions were to be invoked, they ought only to be invoked under extraordinary circumstances.

The preamble to the ISA contemplates the use of the provisions of the legislation only in circumstances where there is a present and imminent danger that a substantial body of persons both inside and outside of Malaysia is seeking to overthrow the lawful Government of Malaysia through unlawful means, which must include instilling fear amongst a substantial number of citizens because they resort to organised violence against persons and property. Therefore, the provisions of the ISA should not be used in cases where the commission of such offence may be dealt with under ordinary criminal law using ordinary criminal procedures.

The Malaysian Federal Constitution in fact highlights the exceptional nature of the ISA. Unlike any other ordinary law in Malaysia, the Constitution expressly provides for certain additional conditions that must be met before a piece of legislation which limits the rights of a person such as the ISA, may be enacted. These conditions are primarily provided for under article 149 of the Constitution.

### **3. The Internal Security Act 1960 and Human Rights**

The concerns in relation to the ISA from the human rights perspective may be divided into two categories: First, there is concern in relation to the provisions of the ISA. It is alleged that they infringe the principles of human rights. Second, there is concern in relation to the application of the provisions of the ISA. It is alleged that under the ISA, citizens and non-citizens alike have been subjected to arbitrary detention and inhuman or degrading treatment whilst in detention. The findings of this report show that there is

merit in both these categories of concerns.

With regard to the provisions of the ISA, the majority of the provisions that are contained in the ISA create criminal offences that are to be administered under the normal penal system and do not thus necessarily infringe human rights principles *per se*. However, there are two main provisions of the ISA that do contravene human rights principles. They are sections 8 and 73. They confer upon the Minister and the Police, respectively, the power to detain a person without trial.

The power to detain a person without trial goes against human rights principles in that the person detained is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proved guilty. These rights are enshrined in articles 3, 10 and 11(1) Universal Declaration of Human Rights (UDHR).

With regard to the application of the provisions of the ISA, the manner in which sections 8 and 73 of the ISA have been applied to date has led to infringements of human rights in two main ways: First, some individuals have been arrested and detained on grounds which do not satisfy the criteria of being prejudicial to the national security of the country and the detentions as such were contrary to the purpose of the ISA. For example, individuals have been detained under the ISA for allegedly counterfeiting coins, falsifying documents and human trafficking. These situations could have been dealt with under the relevant laws creating the relevant criminal offences. Other examples of arbitrary detention include the arrest and detention of individuals for the collateral or ulterior purpose of gathering of intelligence that were wholly unconnected with national security issues and the arrest and detention of a director of a bank who was believed to have caused the bank to suffer substantial losses. The right of a person not to be subjected to arbitrary arrest or detention is enshrined in article 9 of the UDHR.

Second, although such treatment or punishment does not appear to be part of a systemic or endemic routine, there have been individuals who have been subjected to some form of inhuman or degrading treatment or punishment whilst in detention. Examples include the punishment of detainees for allegedly committing a disciplinary offence under the relevant rules governing the place of detention in which the detainees were held without due enquiry as required by the relevant rules and the detention of

detainees in an orientation cell without proper toilet facilities. Further, the Inquiry Panel established by the Human Rights Commission of Malaysia (SUHAKAM) to conduct a public inquiry into the conditions of detention under the ISA (this public Inquiry shall hereinafter be referred to as the “SUHAKAM Open Inquiry on the ISA”) made the following finding in relation to detainees detained under section 73 of the ISA:

... there appears to be sufficient evidence to justify a finding of cruel, inhuman or degrading treatment of some of the detainees who testified before the Inquiry Panel. Slapping of detainees, forcible stripping of detainees for non-medical purposes, intimidation, night interrogations, and deprivation of awareness of place and the passage of time, would certainly fall within the ambit of cruel, inhuman and degrading treatment, by virtue of the need to interpret this term so as to extend the widest possible protection to persons in detention.<sup>2</sup>

The right of a person not to be subjected to inhuman or degrading treatment or punishment is enshrined in article 5 of the UDHR.

This report identifies three root causes of the infringements of the right of a person not to be arbitrarily arrested or detained and the right of a person not to be subjected to inhuman or degrading treatment: First, where the power to detain an individual is not accompanied by the right of the detainee to a fair and public trial, there is no accountability for the exercise of the power by the relevant detaining authority to an independent and impartial body. This absence of accountability gives rise to the possibility of abuse in the form of arbitrary arrest or detention and imposition of inhuman or degrading treatment or punishment.

Second, there are inadequate safeguards in the law (either the ISA or the rules and regulations governing the places of detention in which detainees detained under the ISA are held) to check possible abuse of the power to detain without trial. For example:

- (a) Although the preamble to the ISA is very clear as to the precise circumstance in which the provisions of the ISA ought to be invoked (if at all), the precise grounds on which persons may be detained under sections 8 and 73 are, at best, very vague. Questions abound as to the exact meaning of the phrases “prejudicial to

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<sup>2</sup> SUHAKAM (2003), p. 16 (paragraph 6.2.11)

the security of Malaysia”, “prejudicial to the maintenance of essential services of Malaysia” or “prejudicial to the economic life of Malaysia”. This lack of clear criteria on the grounds on which an individual may be detained without trial gives rise to the possibility of persons being detained way beyond the framework of the ISA;

- (b) There are inadequate safeguards in the law to guard against incommunicado detention (where detainees are denied total access to the outside world). For example, whilst detainees under the custody of the Police are held in undisclosed places of detention, there is a lack of provision in the Lockup Rules 1953 specifically providing for unhampered regular visits by independent, qualified and responsible persons to supervise the strict observance of the relevant laws and regulations by the relevant authorities in charge of the administration of such undisclosed places of detention. Further, although the Lockup Rules 1953 and the Internal Security (Detained Persons) Rules 1960 do in fact allow detainees some access to the outside world which include access to family members, legal counsel or to a medical officer, it is not entirely clear as to the exact time in which detainees may be allowed such access. Therefore, there have been detainees who have been denied access to counsel for up to 60 days and detainees who have been denied access to family members for up to 40 days whilst in police custody.

The lack of access to the outside world for a prolonged period of time coupled with the detention of persons in undisclosed places of detention without independent supervision pose an inherent danger of abuse of power, particularly in terms of torture or other cruel, inhuman or degrading treatment during interrogations. The relevant detaining authorities, being beyond outside scrutiny for their actions, may believe that they can act with impunity and without restraint as it is often difficult to mount an effective prosecution without independent witnesses;

- (c) The ISA does not contain a provision limiting the life of the legislation;
- (d) The ISA does not contain an express provision which specifically requires the

relevant detaining authority to be accountable to Parliament for its actions under the Act.

The findings of this report show that the original provisions of the ISA did in fact contain some very important safeguards against abuse of the power to detain without trial. However, over the years they have been gradually eroded.

For example, in 1971, the grounds on which a person may be detained under sections 8 and 73 of the ISA were extended to include actions which are alleged to be prejudicial to the maintenance of essential services of Malaysia and prejudicial to the economic life of Malaysia. This extension added to the ambiguity of the exact grounds on which a person may be detained without trial under the ISA. This extension also appears to have been done without first meeting the requirements of article 149 of the Constitution.

In the same year (1971), the maximum number of days in which the Police could detain a person under section 73 of the ISA was increased from 30 days to the present 60 days. Deprivation of a person's liberty for such an extended period (although the person has not been convicted for any offence) appears to have been made based on the apparent insufficiency of 30 days for the files of a person detained under section 73 of the ISA to be brought from the Police at contingent level to the headquarters of the Police and subsequently to the Ministry of Home Affairs. This amendment bears the inherent danger of detainees being detained under section 73 of the ISA for a period of time that is beyond what is "strictly necessary".

In 1988, the ISA was amended in order to validate detentions made under section 8(1) of the ISA although the relevant detainees are detained in a place of detention that is different from the one as directed by the Minister. This amendment increases the possibility of incommunicado detention and consequently, the inherent danger of inhuman or degrading treatment.

In 1989, the ISA was amended to exclude any judicial review of the grounds of detention made under section 8 of the ISA. Thus detainees held under this section are not only denied a fair and public trial, they are also denied their minimum right to an effective opportunity to be heard promptly by an independent Judiciary which may decide on the

lawfulness of their detention and may order their release if their detention were to be found unlawful. This increases the risk of individuals being detained beyond the framework of the ISA, thereby resulting in the increased danger of individuals being subjected to arbitrary detention.

Third, there have been occasions where detainees have not been conferred the basic fundamental rights that are contained within the framework of the Constitution which include the fundamental right to be informed of grounds of arrest and the right to be produced promptly before a Magistrate. This appears to be because of a legal provision which specifically oust such right or the different interpretations of the law or as a result of the occasional imperfect implementation of the law by the detaining authorities. The proper conferment of these basic fundamental rights may guard against abuse of the power to detain without trial.

#### **4. The Balance between National Security and Human Rights**

It is clear that human rights principles have built-in flexibility that allows for limitation of some individual rights and freedoms in the preservation of national security and public order. However, there are caveats. When resorting to powers or measures that lead to the limitation of rights, certain stringent conditions, which are as follows, must apply:

First, the limitation of rights of an individual must be imposed solely for the purpose of protecting a **legitimate aim** that is prescribed by international human rights principles. Second, the limitation of rights must be **absolutely necessary** for the protection of the legitimate aim. Third, the limitation of rights must be **proportional** to the protection of the legitimate aim. It must be remembered, however, that, there are some rights and freedoms that cannot be limited and they include the freedom from torture or other cruel, inhuman or degrading treatment or punishment. Fourth, there must be **adequate safeguards** so as to avoid any abuse of powers.

These conditions must be adhered to at all times as they greatly assist in the very difficult but not impossible task of striking a fair balance between two very important but, at times, competing public interests – legitimate national security concerns, on the one hand, and fundamental freedoms of an individual, on the other.

The Government, being the ultimate entity entrusted with the solemn duty of ensuring national security, is given wide latitude to make judgements when interpreting the “legitimate aim” and when applying the principles of “necessity” and “proportionality” in the determination of the scope of the limitation of the rights of an individual. The aim of this wide latitude is to enable the Government to adapt international human rights standards in accordance with the local environment. Such judgements, however, must not be made arbitrarily. Further, it is reasonable to say that in a democracy, the Government cannot possibly have the sole right of interpretation in the application of these principles. Instead, the right of interpretation of these principles by the Judiciary and other responsible institutions or citizens of the nation must also be respected.

By considering the law and practice in relation to the ISA to date in light of the four human rights principles on the limitation of the rights of a person, it is clear that the balance between national security and human rights under the ISA is disproportionately weighted in favour of national security. Therefore, the time has come for all Malaysians to reconsider this issue constructively and rationally with the view to redressing this imbalance. The recommendations contained in this report seek to redress the imbalance between national security and human rights under the ISA.

## **5. Recommendations**

### **5.1 Repeal and Replacement of the Internal Security Act 1960**

At the heart of the recommendation is the repeal of the ISA. In place of the ISA, this report recommends that a new comprehensive legislation that takes a tough stand on threats to national security (including terrorism) but which at the same time is in line with human rights principles be enacted. This new legislation would have the following characteristics:

- (a) The legislation contains a schedule which prescribes a list of specific offences which relate to threats to national security (including terrorist offences);
- (b) Since the legislation relates to issues of national security, the criminal procedure,

inquiry and facts relating to the cases arising under the legislation should be dealt with by learned and experienced Judges and therefore the designated offences contained in the Schedule should be wholly dealt with and triable in the High Court;

- (c) The legislation contains provisions which reflect the following:
- (i) The Police may detain a person for the purposes of investigations on the basis that there are reasonable grounds to believe that the person in question has committed, abetted, conspired, or has attempted to commit one or more of the designated offences contained in the Schedule of the new legislation;
  - (ii) The detention of the person by the Police may be for a maximum period of 24 hours, after which the person must be produced before a High Court Judge;
  - (iii) If more time is required for investigations and there is an absolute need to detain the person for more than 24 hours, an order by a High Court Judge must be sought;
  - (iv) The High Court Judge may order the further detention of the person for maximum periods of seven days each time provided that the person in question is not detained for more than 29 days in total from the date of his or her arrest. The High Court Judge in determining whether to extend or not to extend the detention of a person will have to look at the investigations diary of the Police. This provision is similar to section 119 of the Criminal Procedure Code;
  - (v) Upon the expiration of the 29 days in total from the date of his or her arrest, the person in question must either be released or charged with one of the designated offences in the Schedule of the new legislation under regular criminal procedure; and

- (vi) Individuals arrested, detained or charged for one of the designated offences in the Schedule should not be allowed bail;
- (d) Apart from the above procedure, a person arrested and detained pursuant to the new legislation must be accorded the same rights (for example, access to the outside world) that are accorded to a remand prisoner under ordinary criminal law;
- (e) Apart from the circumstances set out in the preceding paragraphs, a person may not be arrested and detained under any other circumstances pursuant to this new legislation;
- (f) The legislation shall only be in force for a period of one year. Any further renewal of one year each can only be effected by authority of Parliament.

## **5.2 Interim Recommendations**

In light of the possibility that the enactment of such a comprehensive legislation will take time, it is recommended that in the interim, any further application of the ISA should only be done with adequate safeguards in place.

### **5.2.1 Legislative Reform**

In relation to legislative reform, it is recommended that:

#### **(a) Internal Security Act 1960**

- (i) Criteria for the ambit of “prejudicial to the security of Malaysia”, “prejudicial to the maintenance of essential services of Malaysia” and “prejudicial to the economic life of Malaysia” be determined;
- (ii) Section 8(1) be amended to reduce the initial period of detention from two years to three months;

- (iii) Section 8(7) be amended to reflect the fact that a person may be further detained for a maximum period of three months after which he or she must be charged in court or be released;
- (iv) Sections 8A – 8D be deleted in order to allow judicial review of detention orders made under section 8;
- (v) Section 11 be amended to accord a detainee whose detention order is extended under section 8(7) with the same rights that was accorded to the detainee under section 11 when he or she was initially detained;
- (vi) Section 12(1) be amended to require the Advisory Board to review detention orders made under section 8 within three months of a person's detention;
- (vii) Section 73(3) be amended to reduce the maximum period of detention under section 73. It is recommended that the maximum period of detention should not exceed 14 days. This period is equivalent to the maximum period which is available to the Police to detain a person for the purposes of further investigations under section 117 of the Criminal Procedure Code;
- (viii) Any proposal to restrict the powers of the Court in any manner whatsoever to review the lawfulness or otherwise of arrest and detention made pursuant to section 73 be considered very carefully;
- (ix) The ISA be amended to insert new provisions relating to the following matters:
  - the relevant detaining authority shall be required to report to Parliament annually on the use of sections 8 and 73. Such reporting should include matters relating to the total number of persons arrested, detained and released under sections 8 and 73 of the ISA respectively;

- the ISA shall only be in force for a period of one year unless renewed in Parliament on an annual basis.

**(b) Lockup Rules 1953**

- (i) A detainee be given information as to the procedure he or she will be subjected to and his rights whilst in detention, which include the right to counsel whilst in custody and the right to appear before a Magistrate within 24 hours of his or her arrest (excluding the time of necessary journey). This may involve the amendment of rule 14 or the insertion of a new provision;
- (ii) Rule 22 be amended to expressly allow family members and counsel access to detainees as soon as possible and in any event within seven days of their arrest and detention;
- (iii) Rule 22(4) be amended to extend family visits from 15 minutes to at least 30 minutes;
- (iv) Rule 22(8) be reviewed on compassionate grounds. It is suggested that it be required that an officer be present only within sight but not within hearing during family visits to ensure privacy between detainees and members of their families;
- (v) A new provision be inserted whereby the Police shall inform family members of detainees of their arrest within 24 hours;
- (vi) A new provision be inserted whereby a detainee shall be informed of the grounds for his or her arrest and detention, the allegations of fact on which the arrest and detention are based and of such other particulars as the detainee may reasonably require in order to prepare for his or her defence;

- (vii) A new provision be inserted whereby a detainee shall be brought before a Magistrate within 24 hours of arrest (excluding the time of necessary journey);
- (viii) The Lockup Rules 1953 be amended generally to comply with international human rights standards.

**(c) Internal Security (Detained Persons) Rules 1960**

- (i) Rule 81(4) be amended in order to provide for a longer period of time for family visits. It is suggested that the period of time be extended from 30 minutes to at least 60 minutes;
- (ii) Rule 81(5) be amended in order to expressly provide for interviews between a detainee and his or her legal adviser to be held within sight but not within hearing of an officer;
- (iii) A new provision be inserted to provide that detainees shall be entitled to as many visits as their legal advisers consider necessary for the preparation of their defence or appeal;
- (iv) The Internal Security (Detained Persons) Rules 1960 be amended generally to comply with international human rights standards.

**5.2.2 Administrative Directives and Procedures**

In relation to administrative directives and procedures, it is recommended that:

**(a) Detention under Section 8 of the ISA**

- (i) The power to detain without trial under section 8 of the ISA be exercised with utmost care and in good faith;
- (ii) The detention orders made under section 8 of the ISA of persons whose

arrest and detention under section 73 of the ISA have been declared unlawful by the Judiciary be reviewed without delay with the view of releasing such persons where it is justiciable to do so;

- (iii) The power to detain under section 8 of the ISA be used as a last resort;
- (iv) Notwithstanding section 12 of the ISA, the Advisory Board make every effort to consider representations made by detainees as a matter of urgency. Consequently, if necessary, the Board should be provided with sufficient resources to ensure that it is able to cope with its workload;
- (v) During family visits, detainees detained under section 8 of the ISA should not be physically separated from their families with any type of barrier;
- (vi) Detainees detained under section 8 of the ISA be allowed to exercise their right to satisfy the needs of their religious life unless the actions of such persons go well beyond what can normally be regarded as professing and practising one's religion;
- (vii) Measures which may be taken to imply that re-education or rehabilitation is in any way appropriate for persons not convicted of any criminal offence should not be implemented;
- (viii) The orientation programme that is currently being conducted for persons detained under section 8 of the ISA, which appears to imply some form of rehabilitative measure, be reviewed. The aim of the orientation programme ought to be solely for the purpose of acquainting ISA detainees to a restrictive lifestyle. The programme therefore ought to be for a short period of not more than one week and the ISA detainees who are undergoing the orientation programme should be placed in regular accommodation;
- (ix) Duties be carried out in compliance with the rules and regulations of the Internal Security (Detained Persons) Rules 1960;

- (x) Detainees detained under section 8 of the ISA be allowed visits by and to consult and communicate, without delay or censorship and in full confidentiality, with their legal counsel.

**(b) Detention under Section 73 of the ISA**

- (i) The power to arrest and detain under section 73 of the ISA be exercised with utmost care and in good faith;
- (ii) Persons whose alleged acts constitute commission, abetment, conspiracy or attempts of offences which fall under normal criminal law and as such may properly be considered by a criminal court should be arrested and detained using mainstream provisions of the Criminal Procedure Code and not the provisions of the ISA;
- (iii) Investigations be conducted effectively, expeditiously and in good faith so that a person is not detained for a period longer than absolutely necessary;
- (iv) The further detention of an individual under section 73(3) provisos (a), (b) and (c) be authorised by the relevant ranking officers only after due consideration and only if justified on the following grounds:
  - to obtain relevant evidence whether by questioning or otherwise;  
or
  - to preserve relevant evidence; or
  - pending a decision from the Minister as to whether to detain the individual under section 8; or
  - pending a decision as to whether the detained person should be charged with an offence;

- (v) All necessary reports be forwarded to the Minister for his or her further direction immediately upon completion of the required further investigations in order not to arbitrarily prolong the period of detention of a person arrested and detained under section 73 of the ISA;
- (vi) Persons arrested and detained under section 73 of the ISA should not be detained together with other categories of detainees in the police lockup;
- (vii) SUHAKAM be allowed to conduct surprise visits to any place of detention where detainees arrested and detained under section 73 of the ISA are held (including Police Remand Centres) in order to facilitate the inspection of the conditions of such place of detention and the interviews, in private, of such detainees regarding their treatment whilst in detention pursuant to principle 29 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BOP);
- (viii) Family members of detainees arrested and detained under section 73 of the ISA be informed of their arrest within 24 hours;
- (ix) Detainees arrested under section 73 of the ISA be produced before a Magistrate within 24 hours of arrest in accordance with article 5 of the Constitution and be allowed access to counsel during their production before the Magistrate;
- (x) If for good reason(s) the detainee is not allowed access to counsel during the aforesaid production before a Magistrate, detainees arrested and detained under section 73 of the ISA be allowed access to family members and counsel as soon as possible and in any event within seven days of their arrest;
- (xi) Detainees arrested and detained under section 73 of the ISA be provided with a written document containing a simple explanation of the rights of

detainees whilst in custody. Detainees who are illiterate be orally informed of their rights in a language that they understand;

- (xii) Appropriate training be conducted for all law enforcement personnel in order to create greater awareness of their obligation to absolutely refrain from exercising any form of torture or other cruel, inhuman or degrading treatment or punishment against detainees;
- (xiii) All law enforcement officers should be made aware of the fact that as agents of the State, they are required to conduct themselves in a manner which evinces understanding of and absolute respect for the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

**(c) Judicial Review of Detention under Sections 8 and 73 of the ISA**

- (i) *Habeas corpus* applications be disposed off expeditiously. This includes expedient exchange of affidavits between the parties;
- (ii) Notwithstanding that detainees are not legally required to be present at their *habeas corpus* proceedings, provision be made to require the physical presence of detainees before the Court during *habeas corpus* applications as this could act as a safeguard against torture or other cruel, inhuman or degrading treatment and also allow counsel to have ready access to their clients;
- (iii) Notwithstanding article 151(3) of the Constitution and/or section 16 of the ISA, where it is claimed that a particular piece of evidence cannot be disclosed because such disclosure would not be in the national interest, the matter be dealt with in the following manner:
  - upon being informed that a particular piece of evidence cannot be disclosed because such disclosure would not be in the national interest, the presiding Judge immediately hold the *habeas corpus*

proceedings in chambers;

- upon convening the Court in chambers, the presiding Judge, on his or her own, determine whether the disclosure of the piece of evidence in question will in fact go against the national interest;
- if the presiding Judge decides that the disclosure of the piece of evidence does in fact go against the national interest, the evidence need not be disclosed in Court;
- if the presiding Judge decides that the disclosure of the piece of evidence does not in fact go against the national interest, the evidence must be disclosed in Court.

## **6. Conclusion**

This review of the ISA in this report is made pursuant to section 4(1)(b) of the Human Rights Commission of Malaysia Act 1999 (Act 597) which provides that one of the functions of SUHAKAM is to “advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken”. SUHAKAM therefore hopes that the relevant authorities will consider its recommendations contained in this report with the view to adopting them.

# REVIEW OF THE INTERNAL SECURITY ACT 1960



# INTRODUCTION

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## 1. History of the Internal Security Act 1960

On 12 June 1948,<sup>1</sup> a state of emergency was proclaimed throughout Peninsula Malaya as a result of the declared policy of the Communist Party of Malaya (CPM) to wrest political power through armed struggle. Twelve years later, the Government announced its intention to declare the Emergency at an end on 31 July 1960.<sup>2</sup>

In the same year, a Bill titled “an Act to provide for the internal security of the Federation, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of the Federation and for matters incidental thereto” was moved in Parliament. The Internal Security Act 1960 (ISA) became law in West Malaysia on 1 August 1960<sup>3</sup> and East Malaysia on 16 September 1963.<sup>4</sup>

## 2. The purpose of the Internal Security Act 1960

In moving the second reading of the Bill for the ISA in Parliament on 21 June 1960, the then Deputy Prime Minister, the late Tun Abdul Razak, explained the rationale for the ISA thus:

The Hon'ble Prime Minister and other Members of the Government, including myself, have made it quite clear on a number of occasions that, because the Emergency is to be declared at an end, the Government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he has failed by force of arms. It is for this reason that this Bill is before the House. It has two main aims: firstly to counter subversion throughout the country and, secondly, to enable the necessary measures to be taken on the border area to counter terrorism.<sup>5</sup>

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<sup>1</sup> Das, C.V. (1996), p. 101

<sup>2</sup> Parliamentary Debates, *Dewan Rakyat* (21.6.1960). p. 1184

<sup>3</sup> Act 18 of 1960

<sup>4</sup> L.N. 232/1963

<sup>5</sup> Parliamentary Debates, *Dewan Rakyat* (21.6.1960). p. 1185

It is clear from the Parliamentary Debates of 21 and 22 June 1960 that the “evil enemy” referred to by the late Tun Abdul Razak was the Communist terrorist threat. However, despite the fact that in December 1989<sup>6</sup> the CPM officially renounced its policy of armed struggle in Malaysia and signed a pact to that effect with the Government, the ISA remains in force today, and it is generally acknowledged that its application and proposed application have not been restricted solely to containing the Communist insurgency. For example, the ISA has been used for reasons that range from combating alleged Islamic militancy to containing alleged currency-counterfeiting and document falsification syndicates. In addition, there have also been reports on proposals to use the ISA in a number of instances, which include detaining *tekongs* (trawler skippers) in order to check the influx of illegal immigrants in Malaysia.<sup>7</sup>

This wide-ranging application and proposed application of the ISA leave an impression that the ISA is an ordinary piece of legislation to be used under ordinary circumstances. This impression, however, is an inaccurate one. The ISA is in fact an extraordinary and very specific piece of legislation. If at all its provisions were to be invoked, they ought only to be invoked under extraordinary circumstances.

The preamble to the ISA states:

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

- (1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and
- (2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;

AND WHEREAS the action taken and threatened is prejudicial to the security of Malaysia;

AND WHEREAS Parliament considers it necessary to stop or prevent that action;

Now therefore PURSUANT to Article 149 of the Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows:

Thus, the preamble to the ISA contemplates the use of the provisions of the legislation

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<sup>6</sup> Das, C.V. (1996), p. 360

<sup>7</sup> Ahmad, Z.A. (10.11.2001). In fact, there have been individuals who had been detained under the ISA for human trafficking: see Section 2.1 of Part Three.

only in circumstances where there is a present and imminent danger that a substantial body of persons both inside and outside of Malaysia is seeking to overthrow the lawful Government of Malaysia through unlawful means, which must include instilling fear amongst a substantial number of citizens because they resort to organised violence against persons and property. In short, if at all the provisions of the ISA were to be invoked, they ought to be only invoked where there is a present and imminent menacing threat to the national security of Malaysia. Therefore the provisions of the ISA should not be used in cases where the commission of such offence may be dealt with under ordinary criminal law using ordinary criminal procedures.

The exceptional nature of the ISA is in fact highlighted by the Malaysian Federal Constitution. Unlike any other ordinary law in Malaysia, the Constitution expressly provides for certain additional conditions that must be met before a piece of legislation which limits the rights of a person such as the ISA, may be enacted. These conditions are primarily provided for under article 149 of the Constitution.<sup>8</sup> Article 149 makes it a pre-requirement for an Act of Parliament to recite the precise action that the Act intends to stop or prevent for a piece of legislation to be valid notwithstanding that it is inconsistent with some of the provisions in the Constitution which relate to fundamental liberties of an individual. Furthermore, it would appear that the actions that such an Act of Parliament intends to stop or prevent are confined to those listed in article 149 of the

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<sup>8</sup> Article 149 of the Constitution states:

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation –

- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
- (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
- (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
- (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
- (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
- (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

Constitution “and not to achieve some different end”.<sup>9</sup>

### 3. The Background of SUHAKAM’s Review of the Internal Security Act 1960

Since its enactment, there have been allegations and complaints that Malaysia has in fact witnessed a persistent erosion of fundamental human rights guaranteed by the Constitution and international human rights instruments and law. In fact, since its establishment in April 2000, the majority of complaints which relate to alleged infringements of human rights that have been lodged with the Human Rights Commission of Malaysia (SUHAKAM) have been on matters concerning alleged abuses of fundamental liberties under the ISA.

There was a point in time when the Malaysian Government was reported to have contemplated with the idea of repealing the ISA<sup>10</sup> or at the very least, was sympathetic towards amending its provisions to be more in line with human rights principles.<sup>11</sup>

However, since the attacks on the United States of America (USA) on 11 September 2001, the Government is not only fervently defending the existence of the ISA as a counter terrorism measure, it is also reportedly proposing to amend the ISA in a manner which would further enhance the powers of the relevant authorities and consequently further limit fundamental human rights under the ISA.<sup>12</sup>

The September 11 attacks on the USA have indeed posed huge challenges to many aspects of human rights principles. On the one hand, human rights organisations have, together with Governments around the world, condemned all forms and manifestations of terrorism.<sup>13</sup> The September 11 terrorist attacks specifically were viewed as a crime against humanity.<sup>14</sup>

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<sup>9</sup> *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50, p. 54

<sup>10</sup> News Straits Times, The (26.10.2001); Star, The (25.10.2001)

<sup>11</sup> Cruz, A. F. (23.4.2001)

<sup>12</sup> Utusan Malaysia (4.10.2002) and Pooaparajah, S. and Hong, C. (10.11.2002)

<sup>13</sup> See for example, the Joint Statement by Mary Robinson, the then United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights (29.11.2001)

<sup>14</sup> See for example, Robinson, M. (25.9.2001)

On the other hand, the attacks on the USA on September 11 precipitated the adoption of new national security laws,<sup>15</sup> which have far reaching consequences on human rights. For example, the events of September 11 have resulted in the enactment of the USA PATRIOT Act 2001<sup>16</sup> in the USA, the Anti-terrorism, Crime and Security Act 2001 in the United Kingdom (UK), the Anti-Terrorism Act 2001 in Canada and the Prevention of Terrorism Ordinance 2001 in India. These new laws and enforcement measures that are adopted by Governments around the world, including old democracies, could lead to infringements of fundamental liberties and undermine legitimate dissent.<sup>17</sup>

National security laws, before 11 September 2001, were heavily criticised generally as draconian because they were seen to unduly restrict the civil liberties of a person detained under such laws. However, many liberals of yesteryears, including those in Malaysia, now appear to acknowledge national security legislation as a possible tool to counter terrorism and as such an acceptable limitation on the freedom of an individual for the sake of national interest.

For example, on 15 September 2002, *The Sunday Star* published its internet poll which appear to show that peace and harmony rank greater in importance than civil liberties among Malaysians polled – although it is noteworthy that the poll also seems to show that there is an apathetic silent majority.<sup>18</sup> In addition, a liberal writer like Karim Raslan, has made an “embarrassing admission” about feeling “less sure about my willingness to live with the uncertainties of democracy and unfettered freedom”.<sup>19</sup>

It is against this backdrop of the general fear of terrorism that a review of the ISA is conducted by SUHAKAM. This task is made more onerous in the light of the 12 October 2002 bombings in Bali, Indonesia – Malaysia’s very own neighbour – which killed more than 190 people.<sup>20</sup>

Nonetheless, SUHAKAM, as with the former United Nations High Commissioner for

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<sup>15</sup> The terms national security laws or national security legislation in this report refer to legislation aimed at protecting the national security of a country.

<sup>16</sup> The full name is: The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

<sup>17</sup> Amnesty International (2002), p. 3

<sup>18</sup> Wong, J. (15.9.2002)

<sup>19</sup> Raslan, K. (27.10.2002)

<sup>20</sup> The Sun (1.11.2002)

Human Rights, Mary Robinson, when addressing similar issues,<sup>21</sup> acknowledges that it must continue to discharge its statutory duties as provided for under section 4 of the Human Rights Commission of Malaysia Act 1999 (Act 597)<sup>22</sup> more vigorously now and as such, accept the challenge of seeking a balanced response to profound concerns over human security in our world today whilst still upholding, rigorously, international human rights standards.

#### 4. The Scope of SUHAKAM's Review of the Internal Security Act 1960

The majority of the provisions of the ISA create criminal offences that could be administered under the normal penal system and do not thus necessarily infringe human rights principles *per se*. However, there are two main provisions in the ISA that do contravene human rights principles. They are sections 8 and 73. These two provisions confer upon the Minister and the Police, respectively, preventive detention powers.

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Robinson, M. (25.9.2001) and Robinson, M. (6.6.2002)

Section 4 of the Human Rights Commission of Malaysia Act 1999 (Act 597) states:

- (1) In furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be –
  - (a) to promote awareness of and provide education in relation to human rights;
  - (b) to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;
  - (c) to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and
  - (d) to inquire into complaints regarding infringements of human rights referred to in section 12.
- (2) For the purpose of discharging its functions, the Commission may exercise any or all of the following powers:
  - (a) to promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;
  - (b) to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken;
  - (c) to study and verify any infringement of human rights in accordance with the provisions of this Act;
  - (d) to visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations;
  - (e) to issue public statements on human rights as and when necessary; and
  - (f) to undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.
- (3) The visit by the Commission to any place of detention under paragraph (2)(d) shall not be refused by the person in charge of such place of detention if the procedures provided in the laws regulating such places of detention are complied with.
- (4) For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

In fact, upon reviewing the nature of the complaints on infringements of fundamental liberties that have been lodged with SUHAKAM in relation to the ISA, it is noted that, to date, they mainly focus on the alleged abuse of these two provisions by the relevant detaining authorities. As such, SUHAKAM decided to concentrate its review on the law and practice to date in relation to these two provisions of the Act. This review of the ISA is based on the legislation as it stands as of 1 November 2002.

## **5. The Structure of the Report**

Part One of this report first considers the international human rights standards applicable to the detention of a person. It then proceeds to consider whether preventive detention is permissible within the international human rights framework. Finally, it sets out a model code for legislation that provides for preventive detention from the human rights perspective, notwithstanding the permissibility or otherwise of such detention within the international human rights framework.

Parts Two and Three examine the law and practice to date in relation to sections 73 and 8 of the ISA, respectively, from the human rights perspective.

Part Four considers the merit or otherwise of the call to repeal the ISA. It contains recommendations in relation to the preservation of national security and public order from the human rights perspective.

## **6. The Research Methodology**

This review of the ISA comprised five stages. The first stage of the review began with a preliminary identification of the areas of concern in relation to the provisions of the ISA. For the purposes of this stage, memoranda and complaints lodged with SUHAKAM by or on behalf of current and former ISA detainees, the family members of such persons and human rights non-governmental organisations (NGOs) such as SUARAM, HAKAM and *Gerakan Mansuhkan ISA* (GMI) were studied.

The second phase of the review consisted of a research based study of the ISA and the international human rights standards governing the provisions of national security

legislation which provides for preventive detention. For the purposes of this stage, published comments, opinions, articles, judgements and other written work on the ISA by various individuals and organisations which include the authorities, the judiciary, academics, legal practitioners, journalists, former and current ISA detainees and human rights advocates were studied and reviewed. Further, the national security legislation and the relevant case law in other jurisdictions were also considered.

The third stage of the review consisted of a more detailed study of the areas of concern in relation to the provisions of the ISA. For the purposes of this stage, SUHAKAM's findings at its Public Inquiry into the Conditions of Detention under the ISA (this public inquiry shall hereinafter be referred to as the "SUHAKAM Open Inquiry on the ISA") which was held over a period of two months, beginning on 18 June 2002 and during its visits to *Tempat Tahanan Perlindungan Kamunting* (Kamunting Detention Centre) (KEMTA) on 3 July 2001, 26 November 2001 and 13 April 2002 were considered. In addition, the relevant court cases, published testimonies of current and former ISA detainees and affidavits of current and former ISA detainees which have been filed in Court were also reviewed.

The fourth phase of the review consisted of dialogue sessions, discussions and interviews with individuals and organisations including the Bar Council of Malaysia, human rights NGOs such as GMI, former detainees and the Police.

The final and last stage of this review of the ISA was the preparation of this report, the findings, observations and recommendations of which are based on the first four stages of this review.

## **7. Acknowledgements**

SUHAKAM wishes to express its gratitude and appreciation to all persons who have assisted it in the production of this report including:

- Polis DiRaja Malaysia;
- KEMTA;
- The Bar Council of Malaysia and relevant members of the Malaysian Bar;
- NGOs;
- Current and former ISA detainees and their family members.

# PART ONE

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## Preventive Detention within the International Human Rights Framework

### 1. Definition of Preventive Detention for the Purposes of this Report

The term “preventive detention” in this report means the detention without trial of a person by the relevant detaining authorities on the basis of an enabling specific constitutional, statutory or other legal provision. The detention of the person is carried out as a precautionary measure based on a presumption that the actual or future conduct of the person has posed or will pose a threat to the national security of a nation. It does not relate to detention of a person for other policy objectives such as for criminal activity which cannot be proved in court (to prevent further criminal activity, particularly gangster, triad or mafia-type situations); for drug rehabilitation (to prevent illness or death, or the risks of others becoming addicted, and to enforce rehabilitation); or for reasons of mental illness (to prevent violence to the detainee or others, and for easier care and control). It also does not refer to detention pending trial.<sup>1</sup>

“Preventive Detention” defined in this manner is a common feature in national security laws of many jurisdictions, including Malaysia. In fact, in Malaysia, under the ISA, there are two distinct preventive detention provisions – the first relating to the preventive detention of a person by the Minister (under section 8 of the ISA) and the second relating to the preventive detention of a person by the Police (under section 73 of the ISA).

### 2. International Instruments Applicable to the Detention of a Person

The issue of detention relates to the deprivation of a person’s fundamental human right to personal liberty. Therefore, there are numerous international human rights instruments that relate to the rights of detainees. They range from the Universal Declaration of Human Rights (UDHR) and legally binding treaties upon ratification or accession by a nation to non-legally binding minimum guidelines.

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<sup>1</sup> Adapted from Cook, H. (1992), p. 1 and Hatchard, A.J. & Harding, J. (1993), p. 4

These instruments are aimed at, firstly, ensuring that individuals are not arbitrarily or unlawfully arrested and, secondly, establishing safeguards against other forms of abuse of detainees. If fully implemented, the danger of arbitrary detention and serious abuse of detainees can be reduced. Such protection is particularly important in relation to persons who are detained without trial.

It is, however, not the aim of this report to act as a compendium of all the international human rights instruments relating to the rights of detainees. As such, for the purposes of this report, SUHAKAM has identified the international human rights instruments concerning the rights of detainees that it considers to be the core international human rights instruments in this area and they are as follows:

**(a) Universal Declaration of Human Rights 1948 (UDHR)**

The UDHR was adopted by the United Nations General Assembly (UNGA) on 10 December 1948. It sets the common standards of rights and freedoms to be achieved by all peoples and nations.

In addition to listing numerous rights (civil, political, economic, social and cultural) to which people everywhere are entitled, the UDHR also provides an insight as to the consequences if the principles enshrined in the instrument are violated and when human beings are denied justice, freedom and their inherent dignity – the disregard and contempt for human rights have resulted in “barbarous acts which have outraged the conscience of mankind.”<sup>2</sup>

At the very minimum, there is a moral obligation on the part of Malaysia to abide by the principles of the UDHR because of two principal reasons: First, section 4(4) of the Human Rights Commission of Malaysia Act 1999 (Act 597) specifically provides for SUHAKAM to have regard to the provisions of the UDHR when carrying out its functions so long as they are not inconsistent with the Constitution.

Second, although the UDHR started its existence as a non-legally binding proclamation of rights and freedoms, the UDHR has (or at the very least

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<sup>2</sup> See preamble to the UDHR

substantial provisions of the UDHR have) achieved the status of customary international law. This is because the UDHR is unique in that no other human rights document has, as yet, directly influenced the contents of numerous (if not all) United Nations (UN) international instruments and resolutions in the field of human rights, major regional human rights instruments in Europe, Africa and the Americas and domestic legislation, including more than 40 national constitutions. In addition, it has been referred to by the International Courts of Justice and by national courts in several jurisdictions as an aid to the interpretation of relevant cases. Further, the UDHR is also invoked during discussions on human rights issues by parliamentarians, governments, lawyers and NGOs throughout the world.<sup>3</sup>

The UDHR is at Appendix 1.

**(b) International and Regional Treaties Applicable to the Detention of a Person**

The UDHR is the foundation for a number of international treaties on human rights adopted at both international and regional levels. The provisions of these treaties are legally binding on nations that have signed and ratified or acceded to them. The relevant international treaties applicable to detention of a person include:

**(i) International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR was adopted and opened for signature, ratification and accession by the UNGA Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with article 49 of the Covenant.

The UDHR, the ICCPR and three other international instruments form the UN International Bill of Human Rights.<sup>4</sup>

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<sup>3</sup> Jewa, T.S. (1996), p. 465, Robertson, A.H. & Merrills, J.G. (1996), p. 29, Cumper, P. (1999), p. 6, Robinson, M. (1998) and Hernández-Truyol, B.E. (date unknown)

<sup>4</sup> The other three instruments are the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

The ICCPR is at Appendix 2.

**(ii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**

The CAT was adopted and opened for signature, ratification and accession by the UNGA Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987 in accordance with article 27(1) of the Convention.

As the title of the Convention suggests, its provisions relate to the struggle against torture and other cruel, inhuman or degrading treatment or punishment. The provisions of the CAT are of particular importance in this area because detainees are generally recognised as one of the groups which is vulnerable to torture and other cruel, inhuman or degrading treatment or punishment.

The CAT is at Appendix 3.

Although the ICCPR and the CAT are open for signature, ratification and accession by nations that are members of the UN, Malaysia has yet to sign and ratify or accede to (as the case may be) either of these treaties. Therefore, their provisions are not legally binding on Malaysia until the Government signs and ratifies or accedes to (as the case may be) these instruments. Nevertheless, in the meantime, they may be persuasive in the legislative drafting and policy making of the Government given that they are generally recognised as instruments that form part of the minimum international standards relating to human rights.

In its Annual Reports of 2000 and 2001, SUHAKAM recommended that Malaysia sign and ratify or accede to (as the case may be) the ICCPR and the CAT.

**(iii) European Convention on Human Rights 1950 (ECHR)**

The Convention for the Protection of Human Rights and Fundamental Freedoms is more popularly known as the ECHR. It was opened for

signature in Rome on 4 November 1950 and came into force on 3 September 1953. The object of its authors was to take the first steps for the collective enforcement of certain rights stated in the UDHR.

In addition to laying down a catalogue of civil and political rights and freedoms, the ECHR sets up an enforcement machinery of the obligations of nations that are parties to the ECHR. Initially, three institutions were entrusted with this responsibility – the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe.

The increasing caseload, however, had prompted the creation of a single full-time court. This single full-time court was created to simplify the enforcement machinery of the ECHR, shorten the length of proceedings relating to the resolution of allegations of violations of the provisions of the ECHR by nations that are parties to the ECHR and strengthen the judicial character of the system.

The new European Court of Human Rights came into operation on 1 November 1998 and on 31 October 1998, the old Court ceased to function.<sup>5</sup>

The ECHR is at Appendix 4.

The ECHR, being a regional based treaty, is only open for signature and ratification by nations that are members of the Council of Europe.<sup>6</sup> Nevertheless, the provisions of the Convention are referred to in this report mainly because the

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<sup>5</sup> See the official website of the European Court of Human Rights at <http://www.echr.coe.int>  
<sup>6</sup> The Council of Europe is an intergovernmental organisation the activities of which cover all major issues facing European society other than defence. Its work programme includes the following fields: human rights, media, legal co-operation, social cohesion, health, education, culture, heritage, sport, youth, local democracy and transfrontier co-operation, the environment and regional planning. Any European state can become a member of the Council of Europe provided that it accepts the principle of the rule of law and guarantees human rights and fundamental freedoms to everyone under its jurisdiction. The Council of Europe should not be confused with the European Union. The two organisations are quite distinct. The 15 European Union states, however, are all members of the Council of Europe. (See the official website of the Council of Europe at <http://www.coe.int/PortalT.asp>)

human rights jurisprudence developed by the European Court of Human Rights in relation to the interpretation and implementation of the ECHR is arguably the most established jurisprudence in the field of human rights. As such, because the provisions of the ECHR are based on certain provisions of the UDHR, the case law developed by the European Court of Human Rights is an internationally respected source of guidance for the interpretation and implementation of the UDHR.

**(c) International Guidelines Applicable to the Detention of a Person**

More detailed guidelines governing the treatment of prisoners, including those who are detained without trial, may be found in the international instruments listed below. Whilst they do not impose legal obligations on a nation, they establish internationally recognised standards to which nations should aspire to achieve.

**(i) Standard Minimum Rules for the Treatment of Prisoners (SMR)**

The SMR was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. The provisions of Part I of the SMR are generally applicable to all prisoners (including prisoners who are arrested or detained without trial) whilst the provisions of Part IIE of the SMR are applicable specifically to prisoners who are arrested or detained without trial.

The provisions of the SMR are in fact not new to the prison system of Malaysia. This is because *Jabatan Penjara Malaysia* (Prisons Department of Malaysia) claims to be guided by the provisions of the SMR when carrying out its responsibilities.<sup>7</sup>

The SMR is at Appendix 5.

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See the website of *Jabatan Penjara Malaysia*, <http://www.prison.gov.my/akta.html>

**(ii) Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (BOP)**

The BOP was adopted by the UNGA Resolution 43/173 of 9 December 1988. It is the most recent, and in some respects, a far-reaching addition to the standards governing the practice of detention for a number of reasons: First, it introduces some important additional safeguards and in certain other respects clarifies and develops existing protective measures to guard against abuses of those in custody. Second, the BOP contains no provision permitting the derogation from any of its principles during times of emergency. Third, the BOP clearly applies to those held under any form of preventive detention, as its definition of “detained person” includes “any person deprived of personal liberty except as a result of conviction for an offence”.<sup>8</sup>

The UNGA, in its resolution adopting the text of the BOP, was “convinced” that the adoption of the BOP would make an important contribution to the protection of human rights and urged that “every effort be made so that the Body of Principles becomes generally known and respected.”<sup>9</sup>

The BOP is at Appendix 6.

### **3. Preventive Detention and International Human Rights Principles**

The detention of a person without trial contravenes a whole array of fundamental rights of a person who is detained under such a power. For a start, the detention of a person results in the deprivation of one of the most fundamental of all human rights recognised in international law – the right to personal liberty. This right is enshrined in article 3 of the UDHR, which states:

Everyone has the right to life, liberty and security of a person.

This principle is re-stated in article 9(1) of the ICCPR and article 5(1) of the ECHR.

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<sup>8</sup> See Cook, H. (1992), pp. 4 – 5

<sup>9</sup> UNGA Resolution 43/173 of 9 December 1988

The detention of a person is nevertheless a common feature in the normal penal system as a means of social protection and control. Therefore, generally, the detention of a person who has been given the opportunity to a fair and public trial by an independent judiciary and is convicted for an offence as a result, is a universally accepted limitation of the liberty of a person. However, herein lies the difference between the detention of a person carried out under the normal penal system and the detention of a person carried out pursuant to a power to detain without trial.

The detention of a person made pursuant to a power to detain without trial, by definition, denies the person the right to a fair trial. This right is enshrined in article 10 of the UDHR, which states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

This right to a fair trial is also enshrined in article 14(1) of the ICCPR and article 6(1) of the ECHR.

In addition, the detention of a person without trial denies the person the right to be presumed innocent until proved guilty. This right is enshrined in article 11(1) of the UDHR, which states:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

This right to be presumed innocent until proved guilty is also enshrined in article 14(2) of the ICCPR and article 6(2) of the ECHR.

The infringement of the fundamental rights of a person who is detained pursuant to the power to detain without trial, however, may not end here for a number of reasons: First, as persons who are detained pursuant to the power to detain without trial are denied the right to a *fair* trial, there is an absence of the requirement for accountability to an

independent and impartial body in the exercise of the power to detain a person without trial. This absence of accountability gives rise to abuse in the form of arbitrary arrest or detention. The right not to be subjected to arbitrary arrest or detention is provided for under article 9 of the UDHR, which states:

No one shall be subjected to arbitrary arrest, detention or exile

This right of a person is also provided in article 9(1) of the ICCPR and article 5 of the ECHR.

Second, as persons who are detained pursuant to a power to detain without trial are also denied the right to a *public* hearing, they are more likely to be subjected to incommunicado detention (where detainees are denied total access to the outside world). Therefore, there is a serious danger of the violation of the right of a person not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, particularly during interrogations. The relevant detaining authorities, being beyond outside scrutiny for their actions, may believe that they can act with impunity and without restraint as it is often difficult to mount an effective prosecution without independent witnesses.<sup>10</sup> The right of a person not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment is provided for under article 5 of the UDHR, which states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

This right is also enshrined in articles 7 and 10 of the ICCPR and article 3 of the ECHR.

In short therefore, the detention without trial of a person is an extreme form of detention. It denies a person the right to personal liberty, the right to a fair and public trial and the right to be presumed innocent until proved guilty. It also leads to the danger of violations of the right of a person not to be subjected to arbitrary arrest and detention and the right of a person not to be subjected to torture or to cruel, inhuman or degrading treatment.

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<sup>10</sup> Cook, H. (1992), p.34; Conroy, J. (2001), p. 229

The issue to consider therefore is whether preventive detention (the definition of which is set out at the beginning of this Part), being an extreme form of detention, is permissible within the international human rights framework. In order to arrive at a conclusion, two issues need to be considered very carefully: first, whether human rights principles allow for the limitation of the rights of a person and, second, if the answer is in the affirmative, under what circumstances and to what extent may the rights of a person be limited.

The answer to the first issue may be found in the UDHR itself – that is in article 29(2), which states:

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

Therefore, human rights principles clearly allow for the limitation of the rights of a person under certain circumstances. This principle on the limitation or derogation of rights under certain circumstances may also be found in article 4 of the ICCPR and article 15 of the ECHR.<sup>11</sup>

The more contentious issue, however, is the second issue, which is, under what circumstances and to what extent may the rights of a person be limited.

The European Court of Human Rights has developed an established set of principles that govern when the rights of a person may be limited. These principles may be used as a persuasive guide in relation to this issue and they are as follows:<sup>12</sup>

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<sup>11</sup> Apart from article 15 ECHR that provides for the general derogation by nations that are party to the ECHR from their obligations pursuant to the ECHR under certain circumstances, the limitation of the rights of a person in respect of specific rights are contained within the relevant article providing for the right in question.

<sup>12</sup> For a more detailed study on the human rights jurisprudence developed by the European Court of Human Rights in this area, see Macdonald, R. St. J. (1997) and Grosz, S., Beatson, J & Duffy, P. (2000), pp. 108 – 119 & 162 – 176. Note also that as the human rights jurisprudence developed by the European Court of Human Rights relates specifically to the ECHR, the principles in this section are adapted by analogy to the UDHR – the relevant international human rights instrument which SUHAKAM is required to have regard to pursuant to section 4(4) of the Human Rights Commission of Malaysia Act 1999 (Act 597) provided it is not inconsistent with the Constitution.

**(a) The limitation of rights of a person must be imposed solely for the purpose of protecting a legitimate aim that is prescribed by international human rights instruments**

For the rights of a person to be limited, it must be carried out solely for the protection of a legitimate aim that is specified by international human rights instruments.

In this regard, article 29(2) of the UDHR offers some guidance as to what amounts to the protection of a “legitimate aim” which allows for the limitation of the rights of a person and it is clear from article 29(2) that the preservation of national security and public order is one such “legitimate aim”.

The language of the UDHR, however, is very general. As such, it is necessary to seek more specific guidance from other international human rights instruments. In this regard, article 4 of the ICCPR and article 15 of the ECHR are particularly instructive. They provide the specific circumstance in which the fundamental human rights of a person may be limited in order to preserve national security and public order. In accordance with these articles, the rights of a person may be limited in order to preserve national security and public order only where there is a “public emergency which threatens the life of the nation”. Article 4 of the ICCPR further provides that the existence of the public emergency must be officially proclaimed.

Unfortunately, as noted by a number of writers,<sup>13</sup> the definition of the phrase “public emergency which threatens the life of a nation” within the human rights context is not entirely clear. One of the reasons is that the emergencies contemplated by the drafters of international or regional human rights instruments in the first half of the 20<sup>th</sup> century, such as the ECHR, are not necessarily similar to those that confront the world today.<sup>14</sup> The modern trend of the export of terrorism that recognises no boundaries, is a notable example.

Nevertheless, regardless of the ambiguity of the phrase within the human rights

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<sup>13</sup> For a discussion of the various views of several writers on this topic see for example Macdonald, R. St. J. (1997), pp. 233 – 241

<sup>14</sup> *Ibid.*, p. 233

framework, it would appear that the European Court of Human Rights has forged ahead to interpret the phrase, through its case law, on a case-by-case basis.

Thus, in terms of situations relating to serious threats to national security and public order (such as terrorism), the Court's jurisprudence appear to suggest that it will probably accept the assessment of the situation by the Government of a nation where there is evidence of prolonged and exceptional violence (particularly violence of a terrorist nature) in at least a significant area of a nation.<sup>15</sup>

However, if the cause of the emergency is economic, a Judge of the European Court of Human Rights has suggested that a higher standard of review and scrutiny of the assessment of the situation by the Government of a nation ought to be applied.<sup>16</sup>

**(b) The limitation of the rights of a person must be absolutely necessary for the protection of the legitimate aim**

For the rights of a person to be limited, the measure which restricts the rights of a person and which is used by the Government of a nation to curtail the public emergency in question must be absolutely necessary to reduce the crisis. The availability of other feasible but less drastic alternatives, which could equally be used to curtail the crisis, is an important consideration in this respect.

Therefore, to be able to limit the rights of a person in order to preserve national security and public order, the Government of a nation must be able to demonstrate that actions which it could have taken under ordinary laws and in conformity with human rights standards would not be sufficient to meet the threat.<sup>17</sup> From the case of *Ireland v the United Kingdom*,<sup>18</sup> it would appear that to be able to demonstrate this requirement, the Government must show, amongst others, that:

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<sup>15</sup> *Op. cit.*, p. 234

<sup>16</sup> Macdonald. R. St. J. (1997), p. 237

<sup>17</sup> *Ibid.*, p. 243

<sup>18</sup> *In the case of Ireland v the United Kingdom*, <http://www.echr.coe.int>, HUDOC, Application No: 5310/71, para. 36

- (i) There is widespread intimidation of the population which makes it impossible to obtain sufficient evidence to secure a criminal conviction against a person whose actions are known to be tantamount to a threat to national security and public order in the absence of an admissible confession or of police or army testimony;
- (ii) Police enquiries are seriously hampered by the tight grip that the network within which the person in question operates has on its safe-haven;
- (iii) Escaping across territorial borders of the nation is easy.

Further, when determining whether it is absolutely necessary for the rights of a person to be limited in order to preserve national security and public order, it would appear that three very important caveats need to be borne in mind and they are as follows:

- (i) To date, Governments have not been required to prove that the measures chosen to curtail the crisis are in fact effective in dealing with threats to national security and public order. However, as suggested by a Judge of the European Court of Human Rights, should an emergency situation continue to the point at which it appears to have become quasi permanent such restraint becomes questionable. This is because measures that do not lessen or solve threats to national security and public order are difficult to describe as “strictly necessary”,<sup>19</sup>
- (ii) Although widespread enactment of special legislation to counteract threats to national security (in particular terrorism) makes it increasingly easy for Governments to be able to point to a developing standard of response, it does not preclude the need to determine whether the extent the limitation imposed on the rights of a person is, in fact, absolutely necessary;<sup>20</sup>

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Macdonald, R. St. J. (1997), p. 238 – 239

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Colin Warbrick, *The European Convention on Human Rights and the Prevention of Terrorism*, 32 INT'L & COMP. L. Q. 82, 100 (1983) as referred to in Macdonald, R. St. J. (1997), p. 239

- (iii) The temptation to increasingly derogate from established human rights standards in the light of the apparent inability of the international community to find an effective solution or means of addressing threats to national security (in particular terrorism) must be resisted at all costs. The European Court of Human Rights recognised this temptation in *Klass v Germany* when it said and cautioned:

The Court, being aware of the danger ... of undermining or even destroying democracy on the grounds of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.<sup>21</sup>

**(c) The degree of limitation must be proportional to the protection of the legitimate aim**

If it is absolutely necessary for the rights of a person to be limited, the degree of limitation must be proportionate to the protection of the legitimate aim.

This requirement however does not imply some arithmetic calibration. The limits are to be found in current international human rights standards and justiciable intuitive recognition of what is and what is not an acceptable compromise of human rights based on three principal elements – severity of the crisis, the duration and the scope of the limitation of the rights of a person.<sup>22</sup>

(i) Severity of the crisis

When considering the issue of the severity of the crisis in question, it is necessary to consider two main issues: First, the magnitude of the emergency. In this regard, it is generally recognised that it is unrealistic to require that an emergency must affect the entire nation. Nevertheless, the adverse consequences of the emergency on the nation must be significant. Further, if the emergency only affects a specific area, then the limitation of the rights of a person must only be confined in that area.<sup>23</sup>

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<sup>21</sup> *Klass v Germany*, 28 Eur. Ct. H.R. (ser. A), as referred to in Macdonald R. St. J (1997), p. 238  
<sup>22</sup> Macdonald, R. St. J. (1997), pp. 235 and 243  
<sup>23</sup> *Ibid.*, pp. 239 – 240 & 244

Second, according to established interpretation, the crisis faced by the nation must be present and imminent. One commentator, however, has argued that such an interpretation narrows the concept of emergency and deprives Governments of the ability to take proactive measures when discharging their duty to preserve national security.<sup>24</sup>

(ii) Duration of the limitation of the rights of a person

The measure which limits the rights of a person taken to curtail a particular crisis must be a temporary measure.<sup>25</sup>

(iii) Scope of the limitation of the rights of a person

When determining the scope of limitation of the rights of a person, it is necessary to consider the types of rights that are being limited. Where the rights at issue are fundamental in nature, the degree of deviation allowed from the norm cannot differ substantially. Where the rights are somewhat of less importance, slightly greater deviation from normal standards may be allowed.<sup>26</sup>

Where the rights are non-derogable rights, no limitation can be placed on the rights of a person. Based on the ICCPR and the ECHR, such rights include the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, freedom from retrospective criminal liability and freedom of thought, conscience and religion.<sup>27</sup>

**(d) There must be safeguards to avoid abuse of emergency powers**

It is essential that effective safeguards must be implemented to avoid abuse of

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<sup>24</sup> Stein, T. "Derogations from Guarantees Laid Down in Human Rights Instruments", *Protection of Human Rights in Europe – Limits and Effects: Proceedings of the Fifth International Colloquy about the European Convention on Human Rights*, p. 131 as referred to in Macdonald, R. St. J. (1997), p. 241

<sup>25</sup> *In the Case of Ireland v United Kingdom*, <http://www.echr.coe.int>, HUDOC, Application No: 5310/71, para 36 and Macdonald, R. St. J. (1997), pp. 241 – 242

<sup>26</sup> Macdonald, R. St. J. (1997), pp. 234 – 235

<sup>27</sup> See Article 4(2) ICCPR and Article 15(2) ECHR

emergency powers.<sup>28</sup>

When interpreting the “legitimate aim” and when applying the principles of “necessity” and “proportionality” in the determination of the scope of the limitation of the rights of an individual, the Government of a nation, being the entity ultimately entrusted with the duty to preserve national security of the nation, is given a wide “margin of appreciation” to make judgements so as to be able to adapt international human rights standards in accordance with the needs of the local emergency. Such judgements must not, however, be made **arbitrarily**. Further, it is reasonable to say that in a democracy, Governments cannot possibly have the sole right of interpretation in the application of these concepts. Instead, the right of interpretation of these concepts by the Judiciary and other responsible institutions and citizens of a nation must also be respected.<sup>29</sup>

In this regard, Governments known for their democratic practices and that habitually uphold the rule of law will find it much easier to garner public support for a decision to limit the rights of a person to deal with emergencies when compared to a Government which habitually imposes limitation on the rights of a person for its own ends.<sup>30</sup>

Having considered the two issues of whether human rights principles allow for the limitation of the rights of a person and if, so under what circumstances and to what extent can those rights be limited, it is then necessary to return to the question as to whether preventive detention (as defined in this report) is permissible within the international human rights framework.

It is clear from the above analysis that human rights principles have built in flexibility that allows for the limitation of the rights and freedoms of a person in the preservation of national security and public order. However, it is also clear from the above analysis that when limiting the rights and freedoms of a person in order to preserve national security and public order, a fine balance must be struck between these two very important but at times competing public interests.

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<sup>28</sup> *Op. cit.*, p. 244

<sup>29</sup> Chan (1995), pp. 36 – 37

<sup>30</sup> Contrast the *Greek case* and *Lawless (Merit)*, 3 Eur. Ct. H. R. (ser. A) (1961) as referred to in Macdonald, R. St. J. (1997), p. 241

Therefore, balancing legitimate national security concerns on the one hand and the fundamental rights and freedoms of a person on the other, it is the opinion of SUHAKAM that preventive detention (as defined in this report) being an extreme form of detention, is only an acceptable limit on the rights of a person under extreme circumstances. Such circumstances must meet the following four stringent conditions:

- (a) there must be a “**public emergency which threatens the life of a nation**”. This means that there must be a **present and imminent** danger of prolonged and exceptional violence (particularly violence of a terrorist nature) in at least a significant area of the nation. The existence of the public emergency must also be officially proclaimed;<sup>31</sup>
- (b) preventive detention must be **absolutely necessary** to overcome the public emergency. This means that the Government must show that other less drastic alternatives such as vigilant policing and military surveillance and the provisions of ordinary criminal law and procedure are not feasible alternatives to curtail the public emergency;
- (c) the use of preventive detention must be **proportional** to the crisis at hand. This means that preventive detention must only be used as a **temporary measure** to curtail a crisis that is so severe that the Government is left with no other choice but to impose an extreme degree of limitation on the rights of a person. The comments made by the Gardiner Committee<sup>32</sup> are particularly instructive in this regard:

After long and anxious consideration, we are of the opinion that [preventive] detention cannot remain as a long-term policy. In the short term, it may be an effective means of containing violence, but the prolonged effects of the use of [preventive] detention are ultimately inimical to community life, fan a widespread sense of grievance and injustice,

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<sup>31</sup> There are three proclamations of emergency in Malaysia that have not been officially revoked and they are:

- (a) the 1964 Emergency;
- (b) the 1966 Sarawak Emergency; and
- (c) the 1969 Emergency.

<sup>32</sup> The Gardiner Committee was appointed by the UK Government in 1974 to consider what provisions and powers, consistent to the maximum extent practicable in the circumstances with the preservation of civil liberties and human rights, were required to deal with terrorism and subversion in Northern Ireland at that point in time.

and obstruct those elements in [a] society which could lead to reconciliation. [Preventive] detention can only be tolerated in a democratic society in the most extreme circumstances; it must be used with the utmost restraint and retained only as long as it is strictly necessary;<sup>33</sup>

- (d) there must be **adequate safeguards** so as to avoid any abuse of preventive detention powers. In this regard the words of the late Tun Abdul Razak when he introduced the Bill for the ISA in Parliament are instructive:

If there must be preventive detention then there must also be in a democratic country, safeguards for the individual ...<sup>34</sup>

For the recommended safeguards that ought to accompany preventive detention powers, please refer to Section 4 of this Part.

In arriving at this view, SUHAKAM is guided by the fact that as much as it is duty bound to promote and protect the rights of a person, it is equally duty bound to promote and protect the rights of others. In this regard, SUHAKAM notes that serious and menacing threats to the national security of a nation may lead to, amongst others, the loss of innocent lives (including innocent loved ones), fear among members of the public (thereby inhibiting, among others, their movements), serious damage to property (including the homes of innocent people) and the lowering of the standard of living among members of the public. The right to life and security of a person is enshrined in article 3 of the UDHR, the right to freedom of movement is enshrined in article 13 of the UDHR, the right to a family life is enshrined in article 16 of the UDHR, the right to property is enshrined in article 17 of the UDHR and the right to an adequate standard of living is enshrined in article 25 of the UDHR.<sup>35</sup>

#### 4. Model Code for Legislation providing for Preventive Detention

The following are the recommended safeguards that ought to accompany preventive detention powers if such powers were to be conferred upon the relevant detaining

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<sup>33</sup> Quoted by the European Court of Human Rights in *In the case of Ireland v United Kingdom*, <http://www.echr.coe.int>, HUDOC, Application No: 5310/71, para. 74

<sup>34</sup> Parliamentary Debates, *Dewan Rakyat* (21.6.1960), p. 1188

<sup>35</sup> See also *Op. cit.*, paras. 188 – 224, 233 – 235 and 243

authorities in accordance with international human rights standards. They are mainly based on the provisions contained in the international instruments listed above and also on the findings of Harding and Hatchard who derived a model code for preventive detention legislation based on a comparative survey on preventive detention laws in numerous countries, including Bangladesh, India, Kenya, Malawi, Malaysia, Pakistan and Tanzania.<sup>36</sup>

**(a) There must be a constitutional basis for the enactment of national security legislation which provides for preventive detention and it shall only be in force in times of emergency, the existence of which is officially proclaimed**

National security legislation that provides for preventive detention must clearly state the constitutional basis on which it is enacted. Further, the national security legislation must state clearly the specific circumstances in which the provisions of such legislation may be invoked. The legislation should also be regarded as an irregular law. Based on international human rights instruments, especially the ICCPR, such legislation may only be in force in times of public emergency which threatens the life of the nation, the existence of which must be officially proclaimed.<sup>37</sup>

**(b) There must be a limitation period for the existence of the national security legislation**

There must be a time limit for the existence of the national security legislation and it must only be subject to renewal for another limited period upon the periodic review by the legislature of the necessity for the statute.<sup>38</sup>

**(c) The Executive must be accountable to the Legislature for its decisions**

The power to detain without trial must ultimately be vested in a Minister, who must be answerable to the legislature for his or her decisions.<sup>39</sup>

**(d) Time limits provided for under national security legislation must be strictly adhered to**

All time limits provided for under the national security legislation which provide for

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<sup>36</sup> The findings of Hatchard and Harding are published in the book entitled *Preventive Detention and Security Law: A Comparative Survey*.

<sup>37</sup> Harding, A.J. & Hatchard, J. (1993), p. 7 and Article 4 ICCPR

<sup>38</sup> *Ibid.*, pp. 7 – 8. See also Article 4(3) ICCPR and Article 15(3) ECHR

<sup>39</sup> *Op. cit.*, pp. 8 and 10. See also Article 4(3) ICCPR and Article 15(3) ECHR

preventive detention must be followed promptly and at the very least within the period specified by the statute.<sup>40</sup>

**(e) The detaining authorities must be liable for the failure to adhere to all aspects of the law in relation to the national security legislation**

Disciplinary proceedings or criminal proceedings, where appropriate, should be taken against individual officers who have failed to comply with the law. Such failure to comply with the law should render detention invalid. Detainees must be compensated in tort damages for any period of unlawful detention.<sup>41</sup>

**(f) The grounds for detention must be clear**

The constitution or the legislation providing for detention without trial must state very clearly with definitions of key terms, the specific grounds on which a person may be detained without trial. Detention should only be permissible on grounds that relate to national security. Detention should not be permissible where the acts alleged may properly be dealt with in a criminal court. Further, where the grounds relate to possible future or anticipated conduct, detention should not be permissible unless there is clear evidence that the relevant act may be committed.<sup>42</sup>

**(g) The period of detention must be reasonable**

The maximum period of detention should not exceed six months. Immediately after the expiration of the six-month period, the detainee must be released or charged in court, where the detainee shall be entitled to trial. Re-detention may not be permitted except on fresh grounds. Where the legislation confers upon the Police concurrent or preliminary powers of arrest, such power must be limited as to time.<sup>43</sup>

**(h) The place of detention must be designated for the purpose of detention under the national security legislation**

The place of detention where detainees are held must be a place designated for

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<sup>40</sup> Harding, A.J. & Hatchard, J. (1993), p.10

<sup>41</sup> *Ibid.*, p. 10; Article 9(5) ICCPR and Article 5(5) ECHR

<sup>42</sup> *Op. cit.*, p. 8

<sup>43</sup> Harding, A.J. & Hatchard, J. (1993), p. 8; Article 9(3) ICCPR; Article 5(3) ECHR and Principle 38 BOP

the purposes of detention. If the detainee so requests, he or she shall if possible, be kept in a place of detention reasonably near to his or her place of residence. The place of detention should not be unnecessarily altered during the period of detention. Promptly after arrest and after each transfer from one place of detention to another, the detainee shall be entitled to notify or require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest and detention or of the transfer and of the place where he is kept in custody.<sup>44</sup>

**(i) Detainees must have access to the outside world**

Communications of detainees with the outside world, which include access to the following persons or body, shall not be denied for more than a matter of days:<sup>45</sup>

**(i) Access to family members**

Detainees have the right to be visited by and to correspond with members of their family subject to reasonable conditions and restrictions as specified by law or lawful regulations.<sup>46</sup>

**(ii) Access to Counsel**

Detainees shall be entitled to communicate and consult with their legal counsel and shall be allowed adequate time and facilities for consultation with their legal counsel.<sup>47</sup>

**(iii) Access to a medical officer**

At every place of detention, there shall be available the services of at least one qualified medical officer.<sup>48</sup>

**(iv) Access to other appropriate persons or body**

Detainees are entitled to visits from other appropriate persons. Thus, if the detainee is a foreigner he or she may also communicate with

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<sup>44</sup> *Ibid.*, p. 9; Principles 16(1) and 20 BOP

<sup>45</sup> Principle 15 BOP

<sup>46</sup> Rule 92 SMR and Principle 19 BOP

<sup>47</sup> Articles 14(3)(b) and 14(3)(d) ICCPR; Articles 6(3)(b) and 6(3)(c) ECHR; Rule 93 SMR; Principle 17 BOP

<sup>48</sup> Rules 22 – 26 SMR; Principles 24 – 25 BOP

diplomatic and consular representatives of his or her country. Further, in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.<sup>49</sup>

**(j) The rights of detainees must be respected at all times and any limitation thereof must be expressly stated in the statute**

Any limitation of the rights of a detainee must be expressly stated by law.<sup>50</sup>

Further, the following rights must be conferred upon a detainee:

**(i) Right to be informed of the reasons for arrest and detention**

Detainees must be informed of the reasons for their arrest and/or detention, promptly. This includes being informed of the specific grounds on which it is concluded that their arrest or detention is necessary, and the precise allegation of facts which led the relevant detaining authority to be satisfied that such grounds exist. The grounds or allegations must not be expressed in the alternative. These must be clearly expressed, and must not be vague, overlapping or inconsistent. Communications, either orally or in writing, must be made in a language they understand.<sup>51</sup>

**(ii) Right to be brought promptly before a judicial authority**

Detainees must be brought promptly before a judge or any other officer authorised by law to exercise judicial power. They must be allowed the right to speak to the judge or officer in private. The judge or officer must be allowed to order medical examination of detainees, where such an examination is deemed necessary.<sup>52</sup>

**(iii) Right to challenge the lawfulness of detention**

Detainees must be allowed the right to challenge the lawfulness of their

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<sup>49</sup> Rule 38 SMR and Principles 16(2) and 29 BOP

<sup>50</sup> Article 29(2) UDHR

<sup>51</sup> Harding, A.J. & Hatchard J. (1993), p. 8; Article 9(2) ICCPR; Article 5(2) ECHR and Principles 10 and 14 BOP

<sup>52</sup> *Ibid.*, p. 9; Article 9(3) ICCPR; Article 5(3) ECHR and Principle 37 BOP

detention before a review body chaired by a person of judicial standing. The review body must have a statutorily prescribed code of procedure that complies with the requirements of natural justice. Where it is claimed that the production of certain evidence is contrary to national security, the review body must have the power to scrutinise the evidence itself to verify the claim. The review body must be empowered to order the release of detainees if it is not satisfied that continued detention is necessary.<sup>53</sup>

**(iv) Right to be informed of rights**

Detainees must be promptly provided with written information on and an explanation of his rights and how to avail themselves of such rights. If the detainee is illiterate, the aforesaid information shall be conveyed to him or her orally.<sup>54</sup>

**(k) Torture or cruel, inhuman or degrading treatment or punishment must be prohibited**

All persons under any form of detention shall be treated in a humane manner and with respect for the inherent dignity of the human person. No circumstance whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. Further, corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences. It shall be prohibited to take undue advantage of the situation of a detainee for the purpose of compelling him or her to confess, to incriminate himself or herself otherwise or to testify against any other person. No detainee while being interrogated shall be subject to violence, threats or methods of interrogation which would impair his or her capacity of decision or judgement. The duration of any interrogation of a detainee and the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law. Detainees or their counsel shall have access to these information.<sup>55</sup>

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<sup>54</sup> *Op. cit.*, p. 9 and Principle 32 BOP  
Rule 35 SMR; Principles 13 and 14 BOP

<sup>55</sup> Article 5 UDHR; CAT; Article 7 and 10(1) ICCPR; Article 3 ECHR; Rules 27 – 34 SMR and Principles 1, 6 and 21 – 23 BOP

**(l) The living conditions of detention must meet the minimum standards imposed by international human rights principles**

All accommodation provided for the use of detainees and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation. Detainees shall be required to keep their persons clean and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness. All clothing shall be clean and kept in proper condition. Every detainee shall be provided with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. Every detainee shall have suitable exercise. Untried detainees shall be kept separate from convicted prisoners.<sup>56</sup>

**(m) The constitution or the national security legislation must expressly provide for judicial review of arrest and detention**

The constitution or the legislation providing for the power to detain without trial should expressly state that judicial review of the exercise of such a power cannot be ousted or restricted. Judicial review of preventive detention orders is to be exercised whether on *habeas corpus* application or otherwise. Applications for judicial review must be dealt with speedily and in the same manner as the power to review other administrative acts. The Judiciary should enforce rigorously all procedural restrictions on the power to detain without trial and the failure to observe any restriction should be regarded as invalidating the detention. Further, the judiciary should be empowered to test the reasonableness of the detention made by the executive and as such must be prepared to scrutinise the allegations of fact as well as the grounds for the detention.<sup>57</sup>

**(n) Foreigners must not be detained unnecessarily**

Foreign nationals must either be charged under criminal law, detained pending extradition, or deported under immigration law, but must not be otherwise

<sup>56</sup>  
<sup>57</sup>

Article 95 and Parts I and IIC SMR  
Harding, A.J. & Hatchard, J. (1993), pp. 8 – 9; Article 8 UDHR; Article 9(4) ICCPR; Article 5(4) ECHR; Principles 4, 9,11, 32 and 37 BOP

detained.<sup>58</sup>

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<sup>58</sup>

*ibid.*, p. 10

# PART TWO

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## Preventive Detention Under Section 73 of the Internal Security Act 1960

### 1. The Law

#### 1.1 Section 73 of the Internal Security Act 1960

Section 73 of the ISA states:

- (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe –
  - (a) that there are grounds which would justify his detention under section 8; and
  - (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
- (2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
- (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:  
Provided that –
  - (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
  - (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
  - (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.
- (4) – (5) (Repealed)
- (6) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorised in that behalf by a Chief Police Officer.
- (7) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorised generally or specially by the Minister.

## **1.2 The Lockup Rules 1953**

The detention of a person under section 73 of the ISA is governed by the Lockup Rules 1953. This is by virtue of the application of rule 94 of the Internal Security (Detained Persons) Rules 1960, which states:

Where the place of detention of a detained person is a lockup appointed under section 8 of the Prisons Ordinance, 1952, these rules shall not apply to such detained person or to such lockup but the Lockup Rules, 1953, shall apply to such detained person in such lockup.<sup>1</sup>

## **2. The Issues**

### **2.1 Grounds for Detention**

Under section 73 subsections (1) and (2) of the ISA, respectively, a person may be arrested without warrant and detained pending enquiries by a police officer if:

- (a) the police officer has reason to believe that there are grounds which would justify the person's detention under section 8 of the ISA and the person had acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof; or
- (b) the person, upon being questioned, fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he was found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

Although the preamble to the ISA is clear as to the precise circumstance in which the provisions of the ISA ought to be invoked, the precise grounds on which persons may be

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<sup>1</sup> The Prisons Ordinance 1952 has been repealed by the Prison Act 1995 (Act 537) but the Lockup Rules 1953 still apply.

arrested and detained under section 73 are, at best, very vague. Questions abound as to the exact meaning of the phrases “prejudicial to the security of Malaysia”, “prejudicial to the maintenance of essential services of Malaysia” or “prejudicial to the economic life of Malaysia”.

This lack of clear criteria in the law as to the grounds on which a person may be detained without trial gives rise to the possibility of persons being detained way beyond the contemplated framework of the ISA and outside the ambit of a “public emergency which threatens the life of a nation”. Consequently, this lack of clear criteria gives rise to the danger of violation of the right of a person not to be arbitrarily arrested and detained.

In fact, there have been instances where the arrest and detention of a person under section 73 of the ISA either did not or do not appear to fall within the contemplated framework of the ISA or the ambit of “public emergency which threatens the life of a nation”. For example:

**Case 1** At the SUHAKAM Open Inquiry on the ISA, Othman bin Mohamad Ali alleged that a climbing expedition on Gunung Ledang with some friends had been construed by the Police as evidence of his involvement in military training.<sup>2</sup>

**Case 2** In the case of *Mohamad Ezam Mohd. Noor v Ketua Polis Negara & Other Appeals*, the Court found that certain *Reformasi* (Reformation) activists were arrested and detained for the collateral or ulterior purpose of intelligence gathering which was wholly unconnected with national security. They were not interrogated on their alleged militant activities but rather on their political activities and beliefs. The Court found that the exercise of the powers of detention by the Police was *mala fide* and improper.<sup>3</sup>

**Case 3** In the case of *Re Tan Sri Raja Khalid Bin Raja Harun; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun*, a director of the

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<sup>2</sup> SUHAKAM (2003), p. 11 (paragraph 6.1.3)

<sup>3</sup> [2002] 4 CLJ 309, p. 331

Perwira Habib Bank at that time, who was also a managing director of a company providing consultancy services, was detained under section 73 of the ISA. It was alleged that the director provided consultancy services to the Bank through the said company, which resulted in massive loans by the Bank to various parties thereby causing substantial losses to the Bank. *Lembaga Tabung Angkatan Tentera* (Board of the Armed Forces Fund) held 46.48% of shares of the Bank. All servicemen in the armed forces who did not qualify for pension were required by law to contribute to *Tabung Angkatan Tentera* (Armed Forces Fund). In addition, a large number of members of the armed forces were account holders of the Bank. Therefore, it was alleged that there was reason to believe that the said substantial losses suffered by the Bank had evoked feelings of anger, agitation, dissatisfaction and resentment among members of the armed forces. As such, it was likely that such feelings might be ignited and lead to their resorting to violent action, thereby affecting the security of the country. The Court found that it was incredible that losses sustained by a public bank where depositors also include members of the public at large could result in any organised violence by soldiers.<sup>4</sup>

This view on the ambiguity of the grounds on which a person may be detained under section 73 of the ISA is supported by the High Court in the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, where it opined that the phrase “prejudicial to the security of Malaysia”:

... is too general or vague in nature (so too are the phrases ‘prejudicial to the maintenance of essential services of Malaysia’ and ‘prejudicial to the economic life of Malaysia’).<sup>5</sup>

The ambiguity in the grounds on which a person may be detained under section 73 of the ISA was compounded by the Internal Security (Amendment) Act 1971. This amending Act extended the grounds on which a person may be detained under section 73 of the ISA to include actions which are alleged to be “prejudicial to the maintenance of essential services” or “prejudicial to the economic life of Malaysia”.

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<sup>4</sup> [1988] 1 MLJ 182, pp. 185 and 188

<sup>5</sup> [2001] 2 MLJ 689, p. 699

Intriguingly, no amendments were made to the preamble to the ISA to recite the relevant provision under article 149 of the Constitution – article 149(1)(e) – which would allow section 73 of the ISA to be invoked to detain a person whose activities are allegedly “prejudicial to the maintenance of essential services of Malaysia”. Further, there does not appear to be any provision in article 149 of the Constitution which would allow for a person to be detained for an act which is allegedly “prejudicial to the economic life of Malaysia”.<sup>6</sup>

Therefore, it would appear that the extension of the grounds on which a person may be detained under section 73 of the ISA as a result of the Internal Security (Amendment) Act 1971 has two adverse consequences: First, the extension adds to the ambiguity of the grounds of detention on which a person may be detained without trial under the ISA. Second, the manner in which the extension was made also appears to disregard the safeguards provided for by the Constitution in relation to the enactment of legislation that infringes upon the rights of a person such as the ISA.

## **2.2 Period of Detention**

Under section 73(3) of the ISA, a person may be detained for up to a maximum period of 60 days provided that the individual shall not be detained:

- (a) for more than 24 hours except with the authority of a police officer of or above the rank of Inspector;
- (b) for more than 48 hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
- (c) for more than 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the

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<sup>6</sup> It is noted, however, that in the Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1971, it was stated that the enlargement of the purposes of detention is made pursuant to article 149(1)(a) of the Constitution, which speaks of organised violence against persons or property. According to the Explanatory Statement, “Organised violence is prejudicial to essential services and economic life”.

Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.

At the SUHAKAM Open Inquiry on the ISA, the Police informed SUHAKAM that the main purpose of the 60-day period in detention is to gather further intelligence from a person, relating to his or her alleged involvement in activities prejudicial to the national security of Malaysia. Prior to the arrest, sufficient intelligence would already have been collected to positively identify and target the person for arrest. The information is generally obtained through surveillance and the testimonies of other persons from the same organisation, who have co-operated with the Police. However, the Police generally require more time to gather additional information about the extent of the person's involvement in such activities prejudicial to national security, as well as the role which the person may play in an organisation involved in such activities.<sup>7</sup>

The power to deprive a person who has not been convicted of any offence of his or her liberty for up to 60 days appears to be disproportional to the aim of the power – which is to gather *further* intelligence on the detained person's alleged involvement in acts prejudicial to the security of Malaysia. As such, the power to detain a person without trial for up to 60 days under section 73 of the ISA appears to be unreasonable, excessive and ought to be reduced for the following reasons:

First, as claimed by the Police themselves, before the arrest of a person, sufficient intelligence on the person's involvement in acts that would merit his or her arrest and detention under section 73 of the ISA would already have been available to the Police. Therefore, 60 days appear to be too long a period in order for the Police to complete the necessary further investigations.

Second, similar laws in other jurisdictions provide for shorter periods of detention for purposes of investigations by the Police (or any other persons within the Executive) in relation to matters pertaining to national security. For example:

- (a) Section 236A of the United States Immigration and Nationality Act as inserted by section 412 of the USA PATRIOT Act provides for the detention of a foreign

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<sup>7</sup> SUHAKAM (2003), p. 6 (paragraph 2.2)

- national who is suspected of being a threat to the national security of the USA by the Attorney General for a maximum period of seven days, after which the Attorney General has to place the person in removal proceedings or charge the person with a criminal offence;
- (b) Section 41 and paragraphs 29 and 36 of Schedule 8 of the UK Terrorism Act 2000 provide for the detention by the Police of a suspected terrorist for a period of up to seven days; and
  - (c) Sections 83.3(6) and 83.3(7) of the Canadian Criminal Code as inserted by section 4 of the Canadian Anti-Terrorism Act allows for the Police to detain a person who is suspected of planning to carry out a terrorist activity for up to 72 hours.

Third, under the original provisions of the ISA, the Police could detain a person under section 73 of the ISA for a maximum period of 30 days. The maximum number of days in which the Police may detain a person under section 73 of the ISA was increased to the present 60 days by the Internal Security (Amendment) Act 1971. According to the Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1971, this increase in the maximum period of detention was made “based on difficulties which have arisen in practice”. From the Parliamentary Debates of 30 July 1971, it would appear that the practical difficulty referred to in the Explanatory Statement was the apparent insufficiency of 30 days for the files of a person detained under section 73 of the ISA to be brought from the Police at contingent level to the headquarters of the Police and subsequently to the Ministry of Home Affairs.<sup>8</sup> This rationale for the increase of the maximum period of detention under section 73 of the ISA is no longer applicable given the advancement in telecommunication and transportation technology in this day and age.

The apparent unduly long maximum period of detention under section 73 of the ISA bares the danger of a person being deprived of his or her liberty beyond what is strictly necessary. In fact, there have been instances where the total number of days in which a person has been detained under section 73 of the ISA does not appear to be strictly

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<sup>8</sup> Parliamentary Debates, *Dewan Rakyat* (30.7.1971), p. 4095

necessary. For example:

**Case 1** At the SUHAKAM Open Inquiry on the ISA, Raja Petra Raja Kamaruddin, a director of the Free Anwar Campaign, and also an ex-ISA detainee who was released on the 52<sup>nd</sup> day of his detention under section 73 of the ISA, testified that in his case, all the questions by the Police had been answered and everything had been documented and signed by the 30<sup>th</sup> day. “So the next 30 days they kept me because they have the power to keep me for another 30 days, *not* because they needed to keep me for another 30 days to assist in the investigation”.<sup>9</sup>

**Case 2** In the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, the Court held that the Police extended the period of detention of the detainees in this case without first considering the actual necessity for the extension as required by the law.<sup>10</sup>

**Case 3** In the case of *Nasharuddin Nasir v Kerajaan Malaysia & Ors (No. 2)*, the Court held that the relevant ranking officers failed to convince the Court that they did in fact apply their minds when extending the detention of the detainee under section 73 of the ISA in this case.<sup>11</sup>

It is therefore noteworthy that the current Minister in Charge of Legal Affairs at the Prime Minister Department is of the opinion (as reported) that the one area in which the ISA could be improved is the duration of detention under section 73 of the ISA.<sup>12</sup>

### 2.3 Place of Detention

Section 73(7) of the ISA provides that persons detained under section 73 may be detained in any prison, or in any police station, or in any other similar place authorised generally or specifically by the Minister.

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<sup>9</sup> SUHAKAM (2003), p. 11 (paragraph 6.1.1)

<sup>10</sup> [2001] 2 MLJ 689, pp. 701 – 703

<sup>11</sup> [2003] 1 CLJ 353, pp. 360 – 362

<sup>12</sup> Cruz, A. F. (23.4.2001)

According to police witnesses at the SUHAKAM Open Inquiry on the ISA, generally, during the first 48 hours of detention under section 73, detainees are held in the lockup of a police station, together with all other suspects held under the Criminal Procedure Code for alleged criminal offences. After the initial 48 hours, detainees will be transferred to specially gazetted Police Remand Centres (PRC), which are located at undisclosed locations. Detainees are transported to the PRC blindfolded from the police lockup in order to preserve the secrecy of the PRC.<sup>13</sup>

Whilst it is appreciated that there may be a need for detainees to be held in undisclosed places of detention on grounds of genuine national security concerns, the power to detain a person in an undisclosed place of detention for a long period of time nevertheless poses an inherent danger of abuse of power, particularly in terms of torture or other cruel, inhuman or degrading treatment or punishment during interrogations. This is because the detaining authority, being beyond outside scrutiny for its actions, may believe that it can act with impunity and without restraint as it is often difficult to mount an effective prosecution without independent witnesses.<sup>14</sup> In this regard, it is instructive to note the following comment made by the late Tun Abdul Razak during the Parliamentary Debate on the Bill for the ISA in reply to the suggestion that statements made to the Police are very often obtained by threats:

... no one in the police force, anywhere in the world, would deny that such a case has not occurred; ...<sup>15</sup>

In fact, there are many written accounts by former detainees which appear to illustrate this fear of abuse of power as a result of being detained in an undisclosed location. For example:

**Case 1** Kua Kia Soong, who was arrested under section 73 of the ISA, claimed that he was taken to a PRC near Batu Caves but he was not aware of its exact location throughout the 60 days of his detention. When describing the cell in which he was detained he said:

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<sup>13</sup> SUHAKAM (2003), pp. 8 and 9 (paragraphs 4.1 and 5.1)

<sup>14</sup> Cook, H. (1992), p. 34, Conroy, J. (2001), p. 229

<sup>15</sup> Parliamentary Debates, *Dewan Rakyat* (22.6.1960) p. 1348

... The first thing which struck me on entering the cell was the suffocating confinement of the walls. The biggest window to the beyond was a hatch on the dark green heavy door. This hatch was scarcely large enough for a fist and a mug. ...

The cell itself measured roughly eight foot by nine-and-a-half foot or two-and-a-half ceiling squares. The wall directly opposite the door had an L-shaped section of breeze-blocks with ventilation slits which did not allow vision outside. ...

A concrete platform protruded from the wall opposite the door. With a thin slab of plywood atop, this was the bed which was big enough for a six footer. Contiguous with this, on the same side of the wall was my "attached bathroom", all three-and-a-half by three of it. It was wholly dominated by a squat-toilet and a tap. A wooden swing door provided something like three-foot height worth of privacy from the patrolling guard who would look through the hatch as he passed.

In this claustrophobic space I was to spend sixty-one days of solitary confinement...<sup>16</sup>

**Case 2** Raja Petra Kamaruddin, who was detained under section 73 of the ISA, was detained in two different secret locations somewhere in Kuala Lumpur. He described his journey to the first place of his detention as follows:

... I am blindfolded and handcuffed and bundled into an old van. This is not the usual police vehicle. The van turns right so I assume we are going up *Jalan Ipoh* [Ipoh Road]. Not knowing where they are taking me is frightening enough, but not being able to see as well is very traumatic. I again feel helpless. ...

... Inside the cellblock the blindfold and handcuffs are removed and I am shown into my cell. I enter the cell and the door closes behind me. I hear the loud clank of the latch and padlock.

I am now cut off from the free world I have known for fifty-one years. This is certainly a different world altogether, locked up in a concrete box for, God knows, how long.<sup>17</sup>

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<sup>16</sup> Kua, K.S. (1999), pp. 19 – 21

<sup>17</sup> Raja Petra Kamaruddin (2001), pp. iv, 7 – 8

This danger of the abuse of power particularly in terms of torture or other cruel, inhuman or degrading treatment or punishment during interrogations is further compounded as a result of the lack of provision in the Lockup Rules 1953 specifically providing for unhampered regular visits by independent, qualified and responsible persons to supervise the strict observance of the relevant laws and regulations by the relevant authorities in charge of the administration of such undisclosed places of detention. Such supervision is recommended by principle 29 of the BOP, which states:

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

## **2.4 Access to the Outside World**

Access to the outside world by persons detained under section 73 of the ISA is governed primarily by rule 22 of the Lockup Rules 1953, which states:

- (1) A prisoner shall be entitled, subject as hereinafter provided, to such visits from his relatives, friends and advocates as are consistent with the proper discipline of the lockup.
- (2) No prisoner shall receive more than one visit in each week from relatives or friends.
- (3) Not more than two persons shall be admitted to visit a prisoner at any one time.
- (4) No visit shall last for more than fifteen minutes.
- (5) Every visitor shall furnish the Officer-in-Charge or the Deputy-Officer-in-Charge with his name and address and if the Officer-in-Charge or the Deputy-Officer-in-Charge has any reason for suspicion, he may search or cause to be searched a male visitor and may direct a woman police officer to search a woman visitor, but such search shall not take place in the presence of any prisoner or visitor.
- (6) If any visitor refuses to be searched or if the Officer-in-Charge or the Deputy-Officer-in-Charge is of the opinion that the admission of such visitor would be

- prejudicial to the security and good order in the lockup, the Officer-in-Charge or the Deputy-Officer-in-Charge may deny admission to such visitor.
- (7) If any article is found as a result of a search which in the opinion of the Officer-in-Charge or the Deputy-Officer-in-Charge is likely to be dangerous to the health or life of any prisoner or likely to facilitate escape from the lockup, he may impound such article.
  - (8) Unless the Officer-in-Charge otherwise directs, the Deputy-Officer-in-Charge, or a subordinate police officer or constable detailed by such Deputy, together with an interpreter in any case where such officer or constable does not understand the language spoken, shall be within the sight and hearing during the whole of any visit of a prisoner, except in the case of visits by an advocate, when the interview shall take place in the sight of, but not in the hearing of, the subordinate police officer or constable detailed.

In addition to rule 22, rule 23 of the Lockup Rules 1953 also provides for access to counsel. Rule 23 states:

A prisoner may be allowed visits by his advocate, including any representative of such advocate as such advocate considers necessary for the preparation of his defence or appeal. The Officer-in-Charge or the Deputy-Officer-in-Charge may take such action as he considers necessary to establish the identity of any person claiming to be an advocate or his representative.

Further, there are numerous provisions in the Lockup Rules 1953 that provide detainees access to a medical officer. The most notable of these are rules 10, 36 and 38 which state:

Rule 10

The Medical Officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall certify whether the prisoner is fit for imprisonment and, if convicted, the class of labour which he can perform.

Rule 36

The Officer-in-Charge or the Deputy-Officer-in-Charge shall without delay report to the Medical Officer any case of apparent mental disorder or of injury to or illness of any prisoner.

Rule 38

The Medical Officer shall visit each lockup whenever requested to do so by the Officer-in-Charge, and he shall enter in the Journal his comments on the state of the lockup and the prisoners confined therein.

Thus, clearly, there are legislative provisions that allow detainees some access to the outside world, in particular access to family members, counsel and a medical officer. Indeed, access to counsel is guaranteed by article 5(3) of the Constitution.<sup>18</sup>

The law, however, is not entirely clear as to the exact time in which detainees may be allowed such access. For example, in relation to access to family members, rule 22(2) of the Lockup Rules 1953 appears to merely implicitly provide that detainees should be allowed access to family members within seven days of their arrest as it provides detainees with one visit “in each week”. In relation to access to medical treatment, rule 10 vaguely provides that a detainee ought to have access to a medical officer “so far as possible” whilst rule 38 merely provides for visits by a medical officer to the lockups “whenever requested to do so”.

At the SUHAKAM Open Inquiry on the ISA, the Police explained that access to the outside world, particularly in relation to access to family members and access to counsel, is withheld to prevent the detainees from passing or receiving any information from persons outside the place of detention.<sup>19</sup> Further, the Police have also explained that detainees are denied access to the outside world because such access may impede police investigations.<sup>20</sup>

Whilst the explanation given by the Police is noted, the following three observations are made: First, visitors are searched before and after the visit, with the effect that the likelihood of detainees passing or receiving information from their families remains minimal at most.<sup>21</sup> Second, at the time of arrest, the Police must already have some basis to believe that the detainee was in fact a threat to national security.<sup>22</sup> Third, principle 15 of the BOP provides that communication of the detained person with the outside world, and in particular his family or counsel must not be denied for more than a matter of days.

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<sup>18</sup> Article 5(3) of the Constitution states:  
Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

<sup>19</sup> SUHAKAM (2003), p. 19 (paragraph 6.4.2)

<sup>20</sup> See for example, *ibid.*, p. 10 (paragraph 5.6) and *Nasharuddin bin Nasir v Kerajaan Malaysia & Ors* [2002] 6 MLJ 65, pp. 68 – 69

<sup>21</sup> *Op. cit.*, p. 20 (paragraph 6.4.5)

<sup>22</sup> See Section 2.2 of this Part

Therefore, applying the principles of necessity and proportionality, detainees should not be denied access to the outside world for a period of time that is strictly unnecessary. The lack of express provision in the law as to the exact time in which detainees are allowed access to the outside world, unfortunately, bears this danger. In fact, there have been instances where detainees appear to have been denied access to the outside world for an unduly long period of time. For example:

**Case 1** At the SUHAKAM Open Inquiry on the ISA, a number of detainees complained of not being able to have access to their families within the first two weeks of detention. Additionally, the Police informed the Inquiry Panel that detainees were not allowed to see their lawyers during the entire 60-day period of detention.<sup>23</sup>

**Case 2** In the case of *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals*, the detainees were denied access to legal counsel throughout the duration of their 60-day period of detention.<sup>24</sup>

**Case 3** In the case of *Nasharuddin bin Nasir v Kerajaan Malaysia & Ors*, the detainee's family members were allowed to see him only after 19 days had passed since his arrest. Further, he was denied access to counsel although 23 days had passed from the date of his arrest.<sup>25</sup>

**Case 4** In the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, the detainees were not allowed access to family members and access to counsel although 40 days had passed since their arrest.<sup>26</sup>

**Case 5** In the case of *Lutpi bin Ibrahim & Anor v Ketua Polis Negara*, the detainees were denied access to counsel although 21 days had passed

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<sup>23</sup> SUHAKAM (2003), p. 10 and 19 (paragraphs 5.6 and 6.4.1)

<sup>24</sup> [2002] 4 CLJ 309, p. 384

<sup>25</sup> [2002] 6 MLJ 65, pp. 68 and 71

<sup>26</sup> [2001] 2 MLJ 689, pp. 694 – 695 and 704

since their arrest.<sup>27</sup>

**Case 6** In the case of *Nik Adli Nik Abdul Aziz v Ketua Polis Negara*, it would appear that the “pro-active steps” the detainee’s wife had undertaken to obtain information from the Police and/or visit the detainee was met with “stony administrative silence”.<sup>28</sup>

There is cause for concern when detainees are denied access to the outside world for a period of time that is strictly unnecessary for a number of reasons: First, the link between incommunicado detention and torture or other cruel, inhuman or degrading treatment, particularly during interrogations, is well documented.<sup>29</sup>

Second, to deny detainees and their family members access to one another for an unnecessarily long period is in itself cruel, inhuman and oppressive not only to the detainees but to their families as well.<sup>30</sup>

Third, to deny detainees access to counsel, a right which is provided for under article 5(3) of the Constitution, will inevitably result in the lack of ability for counsel of the detainee to fully prepare the detainee’s case which is to be presented in Court. This in turn inevitably denies the detainee access to justice.<sup>31</sup>

Fourth, whilst SUHAKAM is not aware of persons detained under section 73 of the ISA being denied medical treatment, it is nevertheless noted that the provisions in the Lockup Rules 1953 in relation to the access to a medical officer fall short of international human rights standards. In particular, they fall short of rules 22 to 26 of the SMR. These rules, amongst others, provide that the services of at least one qualified medical officer who should have some knowledge of psychiatry must be available at a place of detention. They also provide that a medical officer should daily see all sick detainees or detainees who complain of illness and must regularly inspect and provide advice to the person in charge of a place of detention in relation to health and hygiene matters.

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<sup>27</sup> [1998] 3 MLJ 375, p. 377

<sup>28</sup> [2002] 1 CLJ 161, p. 163

<sup>29</sup> See for example, Cook, H. (1992), pp. 34 – 35, Conroy, J. (2001). See also Section 2.3 of this Part

<sup>30</sup> See *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689, p. 704

<sup>31</sup> See for example, *Mohamad Ezam Mohd. Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309, pp. 347 – 349 and 387

Finally, in relation to access to family members, the following further observations are made:

- (a) the time limit of 15 minutes imposed by rule 22(4) of the Lockup Rules 1953 on visits to detainees is too short and ought to be made longer on humanitarian grounds; and
- (b) there is a requirement for an officer to be present both within sight and hearing during the entire period of a family visit of a detainee imposed by rule 22(8) of the Lockup Rules 1953. This requirement ought to be reviewed also on compassionate grounds.<sup>32</sup>

## **2.5 Rights of Detainees**

The Constitution confers upon detainees certain fundamental rights: First, article 5(3) of the Constitution confers upon a detainee the right to be informed of the grounds of his or her arrest. Article 5(3) states:

Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

Perhaps more significantly, this right is also guaranteed by article 151(1)(a) of the Constitution, which states:

- (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention –
  - (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;”

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<sup>32</sup> See also SUHAKAM (2003), p. 20 (paragraph 6.4.6)

At the international level, the right of a detainee to be informed of the grounds of his or her arrest or detention is also provided for by, amongst others, article 9(2) of the ICCPR and principle 10 of the BOP.

Second, article 5(4) of the Constitution confers upon a detainee the right to be brought promptly before a judicial authority. Article 5(4) of the Constitution states as follows:

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

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days"

And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

Thus, article 5(4) of the Constitution confers upon a detainee two distinct rights: the right to be produced before a Magistrate within 24 hours (excluding the time of any necessary journey) and the right not to be detained for more than 24 hours without a Magistrate's authority.

Whilst section 73 of the ISA allows detention for more than 24 hours without the order of a Magistrate contrary to article 5(4) of the Constitution,<sup>33</sup> the ISA does not specifically oust the right of a person detained under section 73 of the ISA to be produced before a Magistrate within 24 hours (excluding the time of any necessary journey). Therefore, it would appear that persons detained under the ISA, as with any other detainees, have the right to be produced before a Magistrate within 24 hours of their arrest (excluding the time of any necessary journey) pursuant to article 5(4) of the Constitution in the absence

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<sup>33</sup> See also *Mohamed Ezam Mohd. Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309, pp. 388 - 389 and Article 149 of the Constitution

of the expressed exclusion of this right by the ISA.

In arriving at this view, SUHAKAM is guided by three principles: First, the principle that the fundamental liberties and rights of a person must be given the widest and most liberal interpretation and application whereas any provision in the Constitution or any law which seeks to restrict such fundamental liberties must be given a narrow and restricted interpretation.<sup>34</sup> Second, the principle that all rights must be accorded to detainees unless they have been expressly excluded by statute.<sup>35</sup> Third, international principles, such as article 9(3) of the ICCPR and principle 37 of the BOP, provide for the right of a person who is arrested or detained on a criminal charge to be produced promptly before a judicial authority.<sup>36</sup>

However, although the right to be informed of the grounds of arrest and the right to be produced promptly before a Magistrate are rights provided to a detainee within the Malaysian constitutional framework, there have been occasions where detainees held under section 73 of the ISA were not conferred these rights. For example:

**Case 1** At the SUHAKAM Open Inquiry on the ISA, the Inquiry Panel found that neither was Tan Hock Lee able to consult with a lawyer nor was he brought before a Magistrate within 24 hours. The Inquiry Panel observed that Tan Hock Lee, who had spent one year and five months in detention under the ISA, did not appear to be aware of the fact that it is his constitutional right to be guaranteed access to lawyers and to a Magistrate. In addition Sahak bin Tahib, detained in alleged connection with the Al-Ma'unah group, also informed the Inquiry Panel that he was not aware of his constitutional right to have access to a lawyer and to appear before a Magistrate.<sup>37</sup>

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<sup>34</sup> See for example, *Ong Ah Chuan v Public Prosecutor*; *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, p. 70; *Chng Suan Tze v The Minister of Home Affairs & Ors and Other Appeals* [1989] 1 MLJ 69, pp. 81 – 82; *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481, p. 486 – 487 and *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 245, p. 251

<sup>35</sup> See for example, *Mohamed Ezam Mohd. Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309, pp. 388 – 389 and Section 4 of Part One

<sup>36</sup> Although these principles relate to persons detained pursuant to a criminal charge, there is no reason for them not to apply to non-criminal detention. (see Article 5(2) ICCPR and Principle 3 BOP)

<sup>37</sup> SUHAKAM (2003), pp. 20 – 21 (paragraph 6.5.4)

**Case 2** In the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, the Court held that the arresting officers did not inform the detainees the grounds of their arrest.<sup>38</sup>

It would appear that detainees were not conferred these rights either because of differing interpretations of the law (this is in relation to the production of a detainee before a Magistrate within 24 hours)<sup>39</sup> or because of the occasional improper implementation of the law (this is in relation to the detainees not being informed of the grounds of their arrest).

The rights that are conferred upon detainees by the Constitution act as safeguards against abuse of the power to detain a person (an important factor with regard to the power to detain a person without trial) in a number of ways: First, as implied by article 151(1)(a) of the Constitution, the right to be informed of the grounds of arrest or detention provides a person with the opportunity to challenge the grounds of his or her arrest, thereby reducing the risk of arbitrary detention, which is inherent in the power to detain a person without trial.

Second, although one of the aims of producing a person before a Magistrate within 24 hours of his or her arrest has been negated by section 73 of the ISA (that is, the Police do not need a Magistrate's authority to detain a person for more than 24 hours under section 73 of the ISA), such production may nevertheless serve the other aims of producing a detainee before a Magistrate. They include ensuring that detainees held under section 73 of the ISA would have access to the outside world almost immediately after their arrest. This would reduce the period of incommunicado detention, which consequently reduces the risk of detainees who are held under the ISA, of being subjected to torture or other cruel, inhuman or degrading treatment or punishment whilst in detention.

Finally, it is noted that there does not appear to be any provision in the Lockup Rules

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<sup>38</sup> [2001] 2 MLJ 689, p. 700

<sup>39</sup> The production of a detainee detained under section 73 of the ISA before a Magistrate within 24 hours of arrest (excluding the time for necessary journey), has not been a standard practice in Malaysia: see SUHAKAM (2003), pp. 21 – 22 (paragraph 6.5)

1953 that directly relate to the duty of the Police to inform persons arrested and detained by the Police (whether under the ISA or otherwise) of their rights. The legislative provision which may relate to this right (albeit indirectly) is rule 14 of the Lockup Rules 1953 which states as follows:

Notices in English, Romanised Malay, Chinese and Tamil setting forth the facilities to which prisoners are entitled as regards communication with friends or legal advisers, the granting of bail and the provision of medical assistance shall be displayed at the entrance to each lockup. In all cases where it is necessary the contents of the notice shall be communicated to all prisoners in a language they understand.

This falls short of international human rights standards, in particular rule 35 of the SMR and principles 13 and 14 of the BOP which provide that a person, at the moment of arrest or at the commencement of detention or promptly thereafter, must be provided with written information on and an explanation of his or her rights and how to avail himself or herself of such rights in a language he or she adequately understands. Where the person is illiterate, the information must be conveyed to him or her orally.

## **2.6 Treatment of Detainees**

The treatment of persons arrested and detained under section 73 of the ISA is governed primarily by rules 42 to 47 of the Lockup Rules 1953. They state as follows:

42. Subordinate police officers and constables shall at all times be responsible for the safe custody of prisoners under their charge and shall count the prisoners frequently and always –
  - (a) on receiving charge;
  - (b) on handing over charge; and
  - (c) on leaving any building or work,and shall enter the muster in the Journal and shall sign the same.
43. No police officer shall make any unauthorised communication concerning any prisoner to any person whatsoever, nor shall he hold intercourse with the friends or relatives of any prisoner unless expressly authorised so to do by the Officer-in-Charge.
44. No police officer shall converse unnecessarily with any prisoner, or by word, gesture or demeanour act in such a manner as may tend to annoy a prisoner.
45. Except in cases of imperative necessity, no police officer shall enter the cell of a prisoner at night, unless he be accompanied by another police officer.

46. No police officer shall strike or apply physical force to a prisoner unless compelled to do so in self-defence or in defence of another person.
47. (1) No police officer shall receive any fee or gratuity from, or on behalf of, any prisoner or any visitor to any prisoner.  
(2) Except as provided in Rule 26 no police officer shall have any money dealings with, or on behalf of, any prisoner or any visitor to any prisoner.

Further, rules 30 to 33 of the Lockup Rules 1953 govern the type of punishment that may be used against a person detained under section 73 of the ISA who has been found to have committed a disciplinary offence listed in rule 29 of the Lockup Rules 1953. Rules 30 to 33 state as follows:

30. Every offence against discipline shall be investigated by the Officer-in-Charge as soon as possible and after due enquiry the Officer-in-Charge may punish any prisoner found guilty of an offence specified in Rule 29 by ordering him to undergo confinement in a punishment cell on restricted diet for a period not exceeding three days and may, if necessary for this purpose, transfer any prisoner to any other lockup within his district.
31. Every prisoner ordered to undergo dietary punishment shall be examined by the Medical Officer before the order is implemented, and the Medical Officer shall certify as to the fitness of the prisoner to undergo such punishment.
32. The Officer-in-Charge shall maintain a Punishment Book for the purpose of recording offences against discipline committed by prisoners and the punishments ordered under these Rules and shall enter in such book the name of any prisoner concerned, the date and nature of the offence, the punishment ordered, the authority for awarding such punishment and any directions by the Medical Officer.
33. No prisoner shall be placed in mechanical restraint as a punishment.

Although rules 42 to 47 and rules 30 to 33 of the Lockup Rules 1953 do deal with issues relating to torture or other cruel, inhuman or degrading treatment or punishment by the Police, they fall short of the requirements of international human rights standards, which include the standards provided for by article 10 of the ICCPR, principles 1, 6 and 21 to 23 of the BOP and rules 27 to 34 of the SMR. These provisions expressly provide that persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. They prescribe the manner in which a detainee

must be treated, particularly during interrogations and list the types of punishment that must not be used against a detainee for disciplinary offences, including expressly prohibiting the use of corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments.

Nevertheless, despite the fact that the provisions of the Lockup Rules 1953 fall short of international human rights standards, there have been instances where even the provisions of the Lockup Rules 1953 do not appear to have been adhered to. For example:

**Case 1** The Inquiry Panel of the SUHAKAM Open Inquiry on the ISA found that although there appeared to be insufficient evidence to justify a finding of torture of the detainees who testified before the Inquiry Panel:

... there appears to be sufficient evidence to justify a finding of cruel, inhuman or degrading treatment of some of the detainees who testified before the Inquiry Panel. Slapping of detainees, forcible stripping of detainees for non-medical purposes, intimidation, night interrogations, and deprivation of awareness of place and the passage of time, would certainly fall within the ambit of cruel, inhuman and degrading treatment by virtue of the need to interpret this term so as to extend the widest possible protection to persons in detention. Nevertheless, since not all of the detainees complained of such treatment, the Inquiry Panel therefore concludes that such treatment does not appear to be part of a systematic and endemic routine in relation to persons detained under section 73 of the ISA.<sup>40</sup>

**Case 2** In the case of *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals*, a detainee averred that he was being interrogated continuously by a group of seven interrogating officers, beginning about eight until four to five in the morning for two days running and they would begin again about ten a.m. until three the next day.<sup>41</sup>

It is therefore noteworthy that the current Minister in Charge of Legal Affairs in the Prime

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<sup>40</sup> SUHAKAM (2003), p. 16 (paragraphs 6.2.10 and 6.2.11)  
<sup>41</sup> [2002] 4 CLJ 309, p. 330

Minister's Department is reportedly of the view that one of the areas in which the ISA could be improved is in relation to incarceration by the Police.<sup>42</sup>

## 2.7 Living Conditions whilst in Detention

In order to avoid duplication of work, suffice it to say that in relation to the living conditions of detention, the Inquiry Panel of the SUHAKAM Open Inquiry on the ISA found the living conditions of detainees during their detention under section 73 to be incompatible with the Lockup Rules 1953 and the SMR. For example, detainees are deprived of clean bedding and adequate access to sunlight to enable the differentiation between day and night. The Inquiry Panel in its report made recommendations with the aim of rectifying the said non-compliance.<sup>43</sup>

## 2.8 Judicial Review

The Federal Court in the case of *Mohamad Ezam Mohd. Noor v Ketua Polis Negara and Other Appeals*,<sup>44</sup> has substantially clarified the law on judicial review of arrest and detention made under section 73 of the ISA. It held that the Government, by virtue of its responsibilities, has to be the sole judge of what the national security requires. However, although a Court will not question the Government's decision as to what national security requires, the Court will nevertheless examine whether the Government's decision is in fact based on national security considerations. It follows therefore that the Court is entitled to review the sufficiency and reasonableness of the reasons given by the Police for believing that there are grounds to justify the detention of a person under section 8 of the ISA and that the person has acted or is likely to act in a manner prejudicial to the security of Malaysia.

After the Federal Court decision, there have been reports of a proposal to amend the ISA to eliminate the risk of evidence being revealed in Court that could compromise national security in order to ensure that the Police are not compelled to reveal details of controversial arrest and detention made in relation to safeguarding internal security.<sup>45</sup>

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<sup>42</sup> Cruetz, A.F. (21.4.2001)

<sup>43</sup> SUHAKAM (2003), pp. 17 – 18 (paragraph 6.3)

<sup>44</sup> [2002] 4 CLJ 309

<sup>45</sup> Utusan Malaysia (4.10.2002); Aziz, A.A. (8.10.2002); Pooaparajah, S. and Hong, C. (10.11.2002)

Judicial review of the grounds of arrest and detention is a very important safeguard to check against arbitrary detention, a risk that is inherent in the power to detain a person without trial. Therefore, the proposal to amend the ISA in the manner as reported, if true and if implemented, will reduce this built in safeguard that the present law provides against abuse of the ISA for the following two principal reasons:

First, restricting the Court's powers to review all evidence that are necessary to determine the merit or otherwise of a detention inevitably reduces the effectiveness of judicial review in this area. As illustrated in the cases in Section 2.1 of this Part, it is very important to have checks and balances on the power to detain a person without trial in order to ensure that the detention is strictly within the framework of the ISA and is strictly within the ambit of the phrase "public emergency which threatens the life of a nation".

Second, restricting the Court's power to review all evidence that are necessary to determine the merit or otherwise of a detention made under section 73 of the ISA bears the danger of the Court being left to "grope around for the correct decision"<sup>46</sup> as it does not have all the necessary facts before it. As the matter at hand relates to two very important public interests – genuine national security considerations and the rights and freedoms of a person – this danger must be avoided as far as possible.

Given the far-reaching adverse consequences of the proposed amendment, SUHAKAM is of the opinion that the possible detriments that may arise out of the amendment is not proportional to the aim of the proposed amendment – which is to reduce the risk of national security matters being leaked to the public – for the following two principal reasons:

First, the Police, being a component within the Executive, is not accountable to any other independent and responsible body within the three-principal-body check and balance system embodied in the Constitution (i.e. the Executive, the Legislature and the Judiciary). Therefore, if the powers of the Court to review the grounds of arrest and detention made by the Police pursuant to section 73 of the ISA were to be restricted, there would be no other effective, responsible and independent check on the actions of

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<sup>46</sup> *B.A. Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146, p. 148

the Police under the ISA.<sup>47</sup>

Second, the risk of evidence being revealed in Court in a manner that would compromise national security is, at most, minimal for the following four main reasons: First, Courts around the world – whether they are from reportedly liberal jurisdictions or otherwise – rarely intervene to curb Government authority during periods of genuine emergency. For example, following the bombing of Pearl Harbour during World War II, the Supreme Court of the USA in the case of *Korematsu v United States*, upheld an Executive Order mandating the preventive detention of more than 100,000 Japanese-Americans and Japanese immigrants.<sup>48</sup>

In the United Kingdom, the decision of the House of Lords in the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* amply illustrates the general reluctance by the Courts to interfere with matters of national security when it opined that:

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.<sup>49</sup>

Closer to home, in the Singapore case of *Ch'ng Suan Tze v The Minister of Home Affairs & Ors and other appeals*, the Court held as follows:

It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security *requires* is to be left solely to those who are responsible for national security: *The Zamora* and *GCHQ* case.<sup>50</sup>

Finally, in Malaysia, in the case of *Mohamad Ezam Mohd. Noor v Ketua Polis Negara and Other Appeals*, the Federal Court held that:

The executive, by virtue of its responsibilities, has to be the sole judge of what the national

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<sup>47</sup> See also *Liversidge v Sir John Anderson & Anor* [1942] AC 206, p. 222 and *Mohamed Ezam Mohd. Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309, p. 339

<sup>48</sup> 323 U.S. 214 (1944) as referred to in Chang, N. (2001)

<sup>49</sup> [1985] AC 374

<sup>50</sup> [1989] 1 MLJ 69, p. 83

security requires.<sup>51</sup>

Second, in view of the Judiciary recognising the Executive to be the judge of national security requirements, the Malaysian Courts generally only request for the minimum necessary information from the Police in order to determine the issue of the legality of the arrest and detention of a person under section 73 of the ISA. For example, in the High Court case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, it was held as follows:

... The court is not interested in detailed information (least of all confidential or secret information), nor is the court, at this initial stage, interested in whatever evidence the arresting officer has; but the court has to know the basic particulars of what the applicant is alleged to have done, and considering that the phrase 'prejudicial to the security of Malaysia' is too general or vague in nature (so too are the phrases 'prejudicial to the maintenance of essential services of Malaysia' and 'prejudicial to the economic life of Malaysia') the arresting officer must, in his affidavit, furnish, not necessarily detailed particulars, but *some* reasonable particulars not only for the purpose of satisfying the court that he has some basis for the arrest, but also to be fair to the detainee – to enable the detainee, who believes that he is innocent, to defend himself. (Emphasis added)<sup>52</sup>

In the case of *Re Tan Sri Raja Khalid bin Raja Harun; Inspector-General of Police v Tan Sri Raja Khalid Bin Raja Harun*, the High Court said:

... It may well be that there is such evidence but it must be disclosed to the court, albeit confidentially even on a need-to-know basis, to enable the court to be satisfied that the arrest and detention of the applicant under section 73 is justified in the circumstances. It is not necessary to disclose the sources of the information which the police have. It will be sufficient to disclose the nature of the information.<sup>53</sup>

Third, article 151(3) of the Constitution<sup>54</sup> as interpreted by the Federal Court in the case of *Mohamad Ezam Mohd. Noor v Ketua Polis Negara and Other Appeals* adequately deals with the concern that evidence being produced in Court may be produced in a

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<sup>51</sup> [2002] 2 CLJ 309, p. 344

<sup>52</sup> [2001] 2 MLJ 689, p. 699 – 700

<sup>53</sup> [1988] 1 MLJ 182, p. 184

<sup>54</sup> Article 151(3) of the Constitution states:

This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

manner in which national security could be jeopardised. The Federal Court in this case held that article 151(3) of the Constitution bars detainees from information concerning matters of national security, but not the Courts.<sup>55</sup> In this regard, the observations made by the Federal Court in the case of *B.A. Rao & Ors v Sapuran Kaur & Anor* when construing sections 123 and 162 of the Evidence Act 1950 (Act 56)<sup>56</sup> are particularly instructive when it held:

In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that “affairs of State is involved”, before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining “affairs of State”. In my opinion, “affairs of State”, like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case”.<sup>57</sup>

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<sup>55</sup> [2002] 4 CLJ 309, p. 342

<sup>56</sup> Section 123 of the Evidence Act 1950 (Act 56) states:

No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government.

Section 162 of the Evidence Act 1950 (Act 56) states:

- (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.
- (2) The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility.
- (3) If for such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret unless the document is to be given in evidence, and if the translator disobeys the direction, he shall be held to have committed an offence under section 166 of the Penal Code.

From the provision above, it could be argued that the intent and purpose of sections 123 and 162 of the Evidence Act 1950 (Act 56) is similar to that of article 151(3) of the Constitution and as such, may be referred to as a persuasive guide in relation to article 151(3) of the Constitution in practice.

<sup>57</sup> [1978] 2 MLJ 146, p. 150

Fourth, section 15 of the Courts of Judicature Act 1964 (Act 91) allows for Court proceedings to be held in private where there are genuine national security concerns, thereby yet again, minimising the risk of information which genuinely relates to national security matters becoming public.<sup>58</sup>

Therefore, from the above analysis, it would appear that the proposal to amend the ISA in the manner as reported is not only disproportional to the benefits that may be derived from the proposal, it is also not absolutely necessary as a result of the self imposed constraint by the Judiciary in matters pertaining to national security.

As such, baring the comments made below on the apparent lack of urgency in which applications for *habeas corpus* are disposed off, the law in relation to judicial review of arrest and detention made pursuant to section 73 of the ISA, as it stands to date, appears to seek a fine balance between genuine national security concerns on the one hand and the rights and freedoms of a person on the other. Therefore, the necessity of any proposal to restrict judicial review of arrest and detention made by the Police under section 73 of the ISA ought to be considered very carefully.

As indicated above, there appears to be instances where the applications for *habeas corpus* have not been disposed off speedily. For example:

**Case 1** In the case of *Mohamad Ezam Mohd. Noor v Ketua Polis Negara and Other Appeals*, by the time the case came before the Federal Court for hearing, the 60-day detention period under section 73 of the ISA had passed. The detainees in this case were also, by that time, detained

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Section 15 of the Courts of Judicature Act 1964 (Act 91) states:

- (1) The place in which any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access:  
Provided that the Court shall have power to hear any cause or matter or any part thereof in camera if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.
- (2) A Court may at any time order that no person shall publish the name, address or photograph of any witness in any cause or matter or any part thereof tried or held or to be tried or held before it, or any evidence or any other thing likely to lead to the identification of any such witness; and any person who acts in contravention of any such order shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

under section 8 of the ISA.<sup>59</sup>

**Case 2** In the case of *Nasharuddin Nasir v Kerajaan Malaysia & Ors (No. 2)*, by the time the hearing proper of the application for *habeas corpus* of the detainee began, he was already detained under section 8 of the ISA.<sup>60</sup>

**Case 3** In the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, it would appear that it took approximately 29 days for the Court to dispose off the hearing of the application of *habeas corpus* of the detainees.<sup>61</sup>

**Case 4** In the High Court case of *Badrulamin bin Bahron, Lokman Noor bin Adam & Badaruddin bin Ismail v Ketua Polis Negara*, the hearing of the application for *habeas corpus* of the detainees was held 41 days after the application was filed. On the day of the hearing, counsel for the detainees were informed that their clients were already detained under section 8 of the ISA.<sup>62</sup>

Where the liberty of a person is involved, it is necessary to ensure that there is no delay in the administration of justice. The right to personal liberty is a fundamental human right of a person. As such, where a person is detained without charge or trial, the determination of the lawfulness or otherwise of his or her detention must be made promptly. The need to dispose off applications such as *habeas corpus* applications speedily is provided for under article 9(4) of the ICCPR and principles 32 and 37 of the BOP.

The reason that is often cited for the delay in the disposal of *habeas corpus* applications is the slow and painstaking process of the exchange of affidavits between parties concerned for the purposes of the *habeas corpus* applications. This process is made more difficult because counsel for persons detained under section 73 of the ISA do not

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<sup>59</sup> [2002] 4 CLJ 309, p. 346

<sup>60</sup> [2003] 1 CLJ 353, p. 355

<sup>61</sup> [2001] 2 MLJ 689, p. 695

<sup>62</sup> In the High Court of Shah Alam, State of Selangor, Criminal Application No: 44-13 of 2001

usually have access to their clients in order to obtain precise instructions. Counsel therefore have to resort to relying on their clients' family members to affirm the affidavits in support of their clients' *habeas corpus* applications. Usually family members do not have the information that counsel require as they themselves are denied access to detainees.

A perusal of Chapter XXXVI of the Criminal Procedure Code (the Chapter in the Code which deals with *habeas corpus* applications), shows that there is in fact no time limit set for the exchange of affidavits. Such time limits may speed up the process of exchange of affidavits and consequently lead to earlier hearing dates of *habeas corpus* applications.

In relation to the difficulty of counsel to obtain precise instructions from their clients, in addition to comments made in Section 2.4 of this part, it is noted that it is not the practice to allow detainees to be present at their *habeas corpus* proceedings and this is because a detainee is only required to be produced in Court and released *after* the Court is satisfied that the detention is unlawful.<sup>63</sup> However, notwithstanding that it is not legally required for a detainee to be present during his or her *habeas corpus* application, this general practice ought to be reconsidered on two main grounds: First, the presence of detainees held under section 73 of the ISA in Court would allow counsel to have access to their clients. This would enable them to obtain precise and speedy instructions from their clients and to present their clients' cases before the Court as fully as possible. Consequently, it would increase the level of access to justice by detainees held pursuant to section 73 of the ISA. Second, the physical presence of detainees before the Court and the public could act as a safeguard against torture or other cruel, inhuman or degrading treatment or punishment.

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<sup>63</sup> See *Ketua Polis Negara v Abdul Ghani Haroon & Another Application* [2001] 3 CLJ 853, p. 859

# PART THREE

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## Preventive Detention Under Section 8 of the Internal Security Act 1960

### 1. The Law

#### 1.1 Chapter II of the Internal Security Act 1960

Chapter II of the ISA entitled “Powers of Preventive Detention” provides for Ministerial preventive detention of a person. For ease of reference, provisions of Chapter II referred to in this report (namely sections 8 – 16) are reproduced herein.

#### 8. Power to order detention or restriction of persons

- (1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof, he may make an order (hereinafter referred to as “a detention order”) directing that that person be detained for any period not exceeding two years.
- (2) In subsection (1) “essential services” means any service, business, trade, undertaking, manufacture or occupation included in the Third Schedule.
- (3) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as “a place of detention”) as the Minister may direct and in accordance with any instructions issued by the Minister and any rules made under subsection (4).
- (4) The Minister may by rules provide for the maintenance and management of places of detention and for the discipline and treatment of persons detained therein, and may make different rules for different places of detention.
- (5) If the Minister is satisfied that for any of the purposes mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as “a restriction order”) imposing upon that person all or any of the following restrictions and conditions:
  - (a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;
  - (b) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;
  - (c) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;

- (d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organisation or association, or from taking part in any political activities; and
  - (e) for prohibiting him from travelling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order.
- (6) Every restriction order shall continue in force for such period, not exceeding two years, as may be specified therein, and may include a direction by the Minister that the person in respect of whom it is made shall enter into a bond with or without sureties and in such sum as may be specified for his due compliance with the restrictions and conditions imposed upon him.
- (7) The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either –
- (a) on the same grounds as those on which the order was originally made;
  - (b) on grounds different from those on which the order was originally made; or
  - (c) partly on the same grounds and partly on different grounds:
- Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12 shall apply accordingly.
- (8) The Minister may from time to time by notice in writing served on a person who is the subject of a restriction order vary, cancel or add to any restrictions or conditions imposed upon that person by that order, and the restrictions or conditions so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the unexpired portion of the period specified under subsection (6) or (7).

**8A. Detention order not to be invalid or inoperative on certain grounds**

No detention order shall be invalid or inoperative by reason –

- (a) that the person to whom it relates –
  - (i) was immediately after the making of the detention order detained in any place other than a place of detention referred to in section 8(3);
  - (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under section 73 before his removal to a place of detention referred to in section 8(3), notwithstanding that the maximum period of such detention under section 73(3) had expired; or
  - (iii) was during the duration of the detention order on journey in police custody or any other custody to a place of detention referred to in section 8(3); or
- (b) that the detention order was served on him at any place other than the place of detention referred to in section 8(3), or that there was any defect relating to its service upon him.

**8B. Judicial review of act or decision of Yang di-Pertuan Agong and Minister**

- (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
- (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.

**8C. Interpretation of “judicial review”**

In this Act, “judicial review” includes proceedings instituted by way of –

- (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
- (b) an application for a declaration or an injunction;
- (c) a writ of *habeas corpus*; and
- (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

**8D. Commencement of sections 8B and 8C**

- (1) Sections 8B and 8C shall apply to any proceedings instituted by way of judicial review of any act done or decision made by the Yang di-Pertuan Agong or the Minister under this Act, whether such proceedings were instituted before or after the coming into force of the Internal Security (Amendment) Act 1989 [Act A739].
- (2) A reference to proceedings in subsection (1) shall not include a reference to proceedings which had concluded and in respect of which final decision of the court had been given before the coming into force of the Internal Security (Amendment) Act 1989, or to any appeal or application to appeal against such final decision.

**9. (Repealed)**

**10. Suspension of detention orders**

- (1) The Minister may at any time direct that the operation of any detention order be suspended subject to all or any of the restrictions and conditions which he is empowered by section 8(5) to impose by a restriction order, and subject, if the Minister so directs, to the requirement that the person against whom the detention order was made shall enter into a bond as provided in section 8(6).
- (2) Where a detention order is suspended as aforesaid section 8(8) shall have effect as if the restrictions and conditions on which the detention order is suspended were restrictions and conditions imposed by a restriction order.
- (3) Where a detention order is suspended as aforesaid the Minister may permit the person against whom the detention order was made to return to the country to which he belongs

or to go to any other country of his choice provided that the Government of that other country consents to receive him.

- (4) The Minister may revoke the suspension of any detention order if he is satisfied that the person against whom the detention order was made has failed to observe any restriction or condition imposed upon him or that it is necessary in the interests of security that the suspension should be revoked, and in any such case the revocation of the suspension shall be sufficient authority to any police officer to re-arrest without warrant the person against whom the detention order was made, and that person shall as soon as practicable be returned to his former place of detention or, if the Minister so directs, sent to another place of detention.
- (5) The suspension of any detention order as aforesaid shall, subject to section 8(8) as applied by subsection (2) and subject also to subsection (4), continue in force for the unexpired portion of the period of the detention order specified under section 8(6) or (7).

#### **11. Representations against detention order**

- (1) A copy of every order made by the Minister under section 8(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations against the order to an Advisory Board.
- (2) For the purpose of enabling a person to make representations under subsection (1) he shall, at the time of service on him of the order –
  - (a) be informed of his right to make representations to an Advisory Board under subsection (1); and
  - (b) be furnished by the Minister with a statement in writing –
    - (i) of the grounds on which the order is made;
    - (ii) of the allegations of fact on which the order is based; and
    - (iii) of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations against the order to the Advisory Board.
- (3) The Yang di-Pertuan Agong may make rules as to the manner in which representations may be made under this section and for regulating the procedure of Advisory Boards.

#### **12. Report of Advisory Board**

- (1) Whenever any person has made any representations under section 11(1) to an Advisory Board, the Advisory Board shall, within three months of the date on which the representations are received by it, or within such longer period as the Yang di-Pertuan Agong may allow, consider the representations and make recommendations thereon to the Yang di-Pertuan Agong.
- (2) Upon considering the recommendations of the Advisory Board under this section, the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to section 13, be final, and shall not be called into question in any court.

**13. Review**

- (1) Every order or direction made or given by the Minister under section 8(1), (5) or (7) or under section 10 shall, so long as it remains in force, be reviewed not less often than once in every six months by an Advisory Board;

Provided that in the case of a detention order against which representations have been made the first of such reviews, whether of a detention order made under section 8(1) or of a detention order extended under section 8(7) to which the proviso to the last mentioned subsection applies, shall be held not later than six months after the completion of the hearing of the representations by the Advisory Board to which they were made.

- (2) The Advisory Board shall on completing every review under subsection (1) forthwith submit to the Minister a written report of every such review, and may make therein such recommendations as it shall think fit.

**14. Power to summon witnesses**

Every Advisory Board shall, for the purpose of this Act, but subject to section 16, have all the powers of a court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.

**15. Member of Advisory Board deemed to be a public servant**

Every member of an Advisory Board shall be deemed to be a public servant within the meaning of the Penal Code [Act 574], and shall have in case of any action or suit brought against him for any act done or omitted to be done in the execution of his duty under this Chapter the like protection and privileges as are by law given to a Judge in the execution of his office.

**16. Disclosure of Information**

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

**1.2 The Internal Security (Detained Persons) Rules 1960**

During the period of detention authorised by section 8 of the ISA, the detention of the detainees are regulated by rules and regulations made under the ISA. Of particular importance for the purposes of this report are the Internal Security (Detained Persons) Rules 1960 and the Internal Security (Advisory Board Procedure) Rules 1972.

## 2. The Issues

### 2.1 Grounds for detention

Under section 8(1) of the ISA, a person may be detained without trial if the Minister is satisfied that the detention is necessary to prevent him or her from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

As with the grounds of detention under section 73 of the ISA, although the preamble to the ISA is clear as to the precise circumstance in which the provisions of the ISA ought to be invoked, the precise grounds on which persons may be detained under section 8 of the ISA are, at best, very vague. As with section 73 of the ISA, questions abound as to the exact meaning of the phrases “prejudicial to the security of Malaysia”, “prejudicial to the maintenance of essential services of Malaysia” or “prejudicial to the economic life of Malaysia”.

Further, as with section 73 of the ISA, this lack of clear criteria in the law as to the grounds on which a person may be detained without trial gives rise to the possibility of persons being detained way beyond the contemplated framework of the ISA and outside the ambit of a “public emergency which threatens the life of a nation”. Consequently, this lack of clear criteria gives rise to the danger of violation of the right of a person not to be arbitrarily detained.

In fact, there have been instances where the detention of a person under section 8(1) of the ISA either did not or do not appear to fall within the contemplated framework of the ISA or the ambit of “public emergency which threatens the life of a nation”. Some of these instances also appear to fall within the ambit of cases that could be administered under the normal penal system and not using the extraordinary preventive detention powers of the ISA. For example:

**Case 1** At the SUHAKAM Open Inquiry on the ISA, the Inquiry Panel found that Ng Chooi Chun was detained for her alleged connection with a document falsification syndicate and Tan Hock Lee was detained in

connection with a coin falsification syndicate.<sup>1</sup>

**Case 2** In accordance with the statistics provided to SUHAKAM by the relevant authority, as of 28 November 2002, a total number of eight persons were detained for allegedly counterfeiting coins, a total number of six persons were detained for allegedly falsifying documents (including two foreign nationals) and a total number of 18 persons (including seven foreign nationals) were detained for alleged human trafficking.

**Case 3** In the case of *Minister for Home Affairs, Malaysia & Anor v Jamaluddin bin Othman*, Jamaluddin bin Othman was detained under section 8(1) of the ISA on the basis that he participated in a work camp and seminar which allegedly had the aim of spreading Christianity among Malays. There was also an allegation that he converted six Malays to Christianity. The Court held that the mere participation in meetings and seminars could not make a person a threat to the security of the country. As regards the alleged conversion of the six Malays, even if it is true, the Court held that it could not by itself be regarded as a threat to national security of the country. The Court affirmed that the guarantee provided by article 11 of the Constitution, that is, the freedom to profess and practise one's religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion.<sup>2</sup>

**Case 4** In 1987, a number of prominent opposition leaders and academics were arrested and detained pursuant to section 73 of the ISA and some of these persons were subsequently detained under section 8 of the ISA. The exercise, popularly known as "*Operation Lalang*" has been alleged to be an exercise that is aimed at undermining legitimate political dissent.<sup>3</sup>

As with the ambiguity in the grounds on which a person may be detained under section

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<sup>1</sup> SUHAKAM (2003), pp. 14 and 21 – 22 (paragraphs 6.2.2 and 6.5.4)

<sup>2</sup> [1989] 1 MLJ 418, p. 420

<sup>3</sup> See for example, Yatim, R. (1995), pp. 240 – 243

73 of the ISA, the ambiguity in the grounds on which a person may be detained under section 8(1) of the ISA was compounded by the Internal Security (Amendment) Act 1971. This amending Act extended the grounds on which a person may be detained under section 8(1) of the ISA to include actions which are alleged to be “prejudicial to the maintenance of essential services” or “prejudicial to the economic life of Malaysia”. Again, intriguingly no amendments were made to the preamble of the ISA to recite the relevant provision under article 149 of the Constitution – article 149(1)(e) – which would allow section 8(1) of the ISA to be invoked to detain a person whose activities are allegedly “prejudicial to the maintenance of essential services of Malaysia. Further, as with section 73 of the ISA, there does not appear to be any provision in article 149 of the Constitution which would allow for a person to be detained for an act which is allegedly “prejudicial to the economic life of Malaysia”.<sup>4</sup>

Therefore, as with section 73 of the ISA, it would appear that the extension of the grounds on which a person may be detained under section 8(1) of the ISA as a result of the Internal Security (Amendment) Act 1971 has two adverse consequences: First, the extension adds to the ambiguity of the grounds of detention on which a person may be detained without trial under the ISA. Second, the manner in which the extension was made also appear to disregard the safeguards provided for by the Constitution in relation to the enactment of legislation that infringes upon the rights of a person such as the ISA.

Finally, although detentions made under sections 8 and 73 of the ISA are independent of one another,<sup>5</sup> there is a general perception that in practice, the Minister relies on the findings of the Police during the investigations made under section 73 of the ISA when deciding whether a person ought to be detained under section 8(1).<sup>6</sup> As such, so as to avoid public misconception as to the actual purpose of the detention of a person in instances where the Court has held that his or her arrest or detention under section 73 of the ISA is unlawful, the power to detain a person without trial under section 8(1) of the

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<sup>4</sup> It is noted again, however, that in the Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1971, it was stated that the enlargement of the purposes of detention is made pursuant to article 149(1)(a) of the Constitution, which speaks of organised violence against persons or property. According to the Explanatory Statement, “Organised violence is prejudicial to essential services and economic life”.

<sup>5</sup> See *Mohamad Ezam Mohd. Noor v Ketua Polis Negara and Other Appeals* [2002] 4 CLJ 309, pp. 336 – 337

<sup>6</sup> See for example *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293, p. 295

ISA in these instances ought to be exercised with extreme caution. Examples of such instances include:

**Case 1** It was reported in the *New Straits Times* on 10.11.2002<sup>7</sup> that Nasharuddin Nasir, who was initially arrested and detained under section 73 of the ISA and subsequently detained under section 8 of the ISA, was re-arrested and served with a new two-year detention order after the High Court ordered his release in the case of *Nasharuddin Nasir v Kerajaan Malaysia & Ors (No. 2)* on the basis that the first two-year detention order was unlawful because the arrest and detention of the detainee by the Police under section 73 of the ISA was unlawful.<sup>8</sup>

**Case 2** It was reported in *Malaysiakini* on 1.10.2002<sup>9</sup> that the Reformasi activists whose detention under section 73 of the ISA was held by the Federal Court in the case of *Mohamad Ezam Mohd. Noor v Ketua Polis Negara & Other Appeals*<sup>10</sup> to be unlawful and made in bad faith, will continue to be detained under section 8 of the ISA.

## 2.2 Period of Detention

Under section 8(1) of the ISA, the Minister may authorise any person to be detained for a period not exceeding two years. Nevertheless, it is noted that the period of detention is not static.

On the one hand, the period of detention may be reduced to less than two years, depending on the recommendations made by the Advisory Board in relation to the detention of the detainee concerned under sections 12 and 13 of the ISA<sup>11</sup> and also on the exercise by the Minister of his power to suspend the detention order under section 10 of the ISA.

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<sup>7</sup> Poosparajah, S. and Hong, C. (10.11.2002)

<sup>8</sup> [2003] 1 CLJ 353, p. 364

<sup>9</sup> Yap, M.C. (1.10.2002)

<sup>10</sup> [2002] 4 CLJ 309

<sup>11</sup> See Section 2.8 of this Part for a more detailed study on the powers of the Advisory Board.

On the other hand, the period of detention may also be extended for indefinite two-year periods by virtue of section 8(7) of the ISA that allows for such extensions on the following grounds:

- (a) on the same grounds as those on which the order was originally made;
- (b) on grounds different from those on which the order was originally made; or
- (c) partly on the same grounds and partly on different grounds.

The power to deprive a person who has not been convicted of any offence of his or her liberty for two years appears to be disproportional to the aim of the power – which is a temporary measure to prevent a person from acting in any manner prejudicial to the security of Malaysia. As such, the power to detain a person without trial for up to two years appears to be unreasonable, excessive and ought to be reduced for the following two principal reasons:

First, preventive detention, being an extreme form of detention, may only be used (if at all) as a *temporary* measure to avert a crisis. As such, the maximum period of detention of six months prescribed by Harding and Hatchard who derived the model code for preventive detention legislation based on a comparative survey on preventive detention laws in numerous countries, including Bangladesh, India, Kenya, Malawi, Malaysia, Pakistan and Tanzania, appears to be a more reasonable period.<sup>12</sup>

Second, laws in other jurisdictions that provide for detention for similar purposes, only apply in respect of foreign nationals. For example:

- (a) Section 236A of the United States Immigration and Nationality Act as inserted by section 412 of the USA PATRIOT Act, provides that a foreign national who is suspected of being a threat to the national security of the USA and who has not been removed or whose removal is unlikely in the reasonably foreseeable future, may be detained by the Attorney General for additional periods of up to six months if the release of the foreign national is likely to threaten the national

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<sup>12</sup> See Section 4 of Part One.

security of the USA or the safety of the community or any person; and

- (b) Section 23 of the UK Anti-terrorism, Crime and Security Act 2001 provides that a suspected international terrorist may be detained under the relevant provisions of the UK Immigration Act 1971 despite the fact that his removal or departure from the UK is prevented (whether temporarily or indefinitely) by a point of law which wholly or partly relates to an international agreement, or a practical consideration.

In addition, the power to extend the detention period of a person for indefinite two-year periods goes beyond any scale of proportionality under any circumstance, particularly where it is extended on the same grounds because of two principal reasons: First, it is unlikely that law enforcement agencies require an indefinite amount of time to eliminate threats to national security and to gather sufficient evidence to charge the persons detained pursuant to preventive detention powers in Court.

Second, the power to extend the detention period of a person for an indefinite number of times is tantamount to an indeterminate term of imprisonment of a person without being convicted of any offence – major or minor. This in turn falls within the ambit of inhuman or degrading treatment as detainees held under section 8 of the ISA are likely to be constantly concerned and disconcerted about the actual length of time they are to be detained. In fact during a visit by SUHAKAM on 3 July 2001 to KEMTA, SUHAKAM found that the actual length of detention was one of the main anxieties of detainees held under section 8 of the ISA.<sup>13</sup>

The apparent unduly long (both in terms of the initial two year period and in terms of the subsequent extension of the period of detention for additional periods of up to two years) and the fact that the period of detention under section 8 of the ISA may be extended indefinitely not only carry with it the danger of complacency within the law enforcement agencies, it also bears the inherent danger of persons being deprived of his or her liberty beyond what is strictly necessary.

In fact, there have been instances where the total number of years in which a person

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<sup>13</sup> SUHAKAM (2001), Paragraph 1.2

has been detained under section 8 of the ISA does not appear to be strictly necessary. For example:

**Case 1** In the case of *Mohd. Amin Bin Mohd. Yusof v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*, the Court held that the extension order made under section 8(7) of the ISA was made “without the care and consideration normally associated with the concept and the spirit of good faith”.<sup>14</sup>

**Case 2** In the case of *Re R. Gunaratnam*, the detainee was detained for 11 years eight months (1970 – 1982). He was detained at the age of 24 and released at the age of 36 on the allegation that he was involved in communist activities. He was, prior to detention, an ordinary member of *Parti Rakyat Malaya* (The People’s Party of Malaya), an influential party in the 1960s. In the case of *Re S.N. Rajah*, the detainee was detained for 11 years two months (1970 – 1981). The detainee was the executive secretary to the United Malayan Estate Workers. He was detained for behaviour “prejudicial to the security of the Federation”.<sup>15</sup>

**Case 3** Tan Hock Hin was detained for 15 years (1967 – 1982). He was a former Socialist Front legislator for the constituency of Jelutong, Penang. Loo Ming Liong was detained for 16 years (1972 – 1988). The detainee was suspected of being a communist. Dr Syed Husin Ali was detained for almost six years (1974 – 1980). He was detained for “being involved willingly and knowingly in an attempt to overthrow the government by force and for cooperating with the communists”. He was a professor of sociology at the University of Malaya.<sup>16</sup>

### 2.3 Place of Detention

Section 8(3) of the ISA provides that any person detained pursuant to a detention order

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<sup>14</sup> [1995] 1 CLJ 94, p. 96

<sup>15</sup> Yatim, R. (1995), p. 259

<sup>16</sup> McCoy, R. (2002)

made under section 8 of the ISA is to be detained in a place of detention as the Minister may direct. In practice, persons detained under section 8 of the ISA are held at KEMTA.

At first sight, therefore it would appear that this provision is in line with international human rights principles because, at first sight, the law provides that the place of detention of a person detained under section 8 of the ISA must be a designated one.<sup>17</sup>

However, as a result of amendments made to the ISA pursuant to the Internal Security (Amendment) Act 1988, section 8A of the ISA allows for the detention of a person in a place of detention other than the one designated under section 8(3). In addition, as a result of amendments made to the ISA pursuant to the Internal Security (Amendment) Act 1989, section 8B(2) of the ISA excludes judicial review of any procedural defects relating to grounds described in section 8A.

According to the Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1988, the aims of the amending Act include the following:<sup>18</sup>

- (a) to validate any detention order which had been made pursuant to section 8(1) of the ISA [including those made during the period between the date of the commencement of the ISA and the commencement of the Internal Security (Amendment) Act 1988], notwithstanding that a person was detained in a place of detention other than the one designated under section 8(3) of the ISA; and
- (b) to prohibit any legal action which relates to the detentions which are validated in accordance with the provisions of the Internal Security (Amendment) Act 1988.

These aims of the Internal Security (Amendment) Act 1988 do not appear to be proportional to the detriment that may be caused to detainees as a result of the validation of their detention although they were not in fact detained in the place of detention designated under section 8(3) of the ISA. Such a validation increases the possibility of incommunicado detention (as the precise place of detention where the detainee is held may not be known to the outside world) and consequently increases the

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<sup>17</sup> See Section 4 of the Part One

<sup>18</sup> See also Parliamentary Debates, *Dewan Rakyat* (8.7.1988), p. 4537.

inherent risk of ill treatment of detainees.

It is therefore noteworthy that the necessity of the amendments made to the ISA as a result of the Internal Security (Amendment) Act 1988 appears to have been questioned by respected bodies and individuals such as the Judiciary and Parliamentarians.<sup>19</sup>

## **2.4 Access to the Outside World**

Access to the outside world by persons detained under section 8 of the ISA is governed primarily by rules 81 and 82 of the Internal Security (Detained Persons) Rules 1960. They state:

### Rule 81

- (1)
  - (a) A detained person shall, consistent with the proper discipline of the place of detention and subject as hereinafter provided, be entitled to visits from his relatives and legal adviser.
  - (b) A detained person may, consistent with the proper discipline of the place of detention and subject as hereinafter provided, with the express permission of the Superintendent whose decision shall, subject to an appeal to the Officer-in-Charge, be final, receive visits from persons other than his relatives and legal adviser.
- (2) No detained person shall, except with the express permission of the Superintendent, receive more than one visit a week.
- (3) Not more than two persons shall be admitted to visit a detained person at any one time.
- (4) No visit shall last more than 30 minutes.
- (5) A Superintendent or an officer, or in the case of a visit to a female, a wardress, shall, together with an interpreter in any case where such officer does not understand the language spoken, be in sight and hearing during the whole of any visit to a detained person, unless the Superintendent by an order in writing sees fit to dispense with any of the above requirements.
- (6) A Superintendent may remove from a place of detention any visitor to a detained person if the conduct of such visitor or detained person is improper.

### Rule 82

- (1) Every visitor to a detained person shall furnish the Superintendent or an officer authorised by the Superintendent with his name and address and, if the

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See *Tuang Pik King v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 301, p. 303; Yatim, R. (1995), p. 283 – 285; Parliamentary Debates, *Dewan Rakyat* (8.7.1988), pp. 4538 – 4552

Superintendent or such officer has any ground for suspicion, he may search or cause to be searched male visitors and may direct a female officer to search female visitors, but such search shall not take place in the presence of any detained person or of another visitor.

- (2) If any visitor refuses to be searched or if a Superintendent or such authorised officer is of the opinion that the admission of such visitor would be prejudicial to security or good order in the place of detention, the Superintendent or such officer may deny him admission, recording the grounds of his refusal in the journal.
- (3) If any article is found as the result of a search which, in the opinion of a Superintendent or such authorised officer, is prohibited by the rules of the place of detention or likely to be dangerous to the health or life of any detained person or likely to facilitate escape from the place of detention, he may impound such article.

Further, there are a number of provisions in the Internal Security (Detained Persons) Rules 1960 that provide detainees access to a medical officer. The most notable of these rules are rules 52 and 58, which state:

Rule 52

The Medical Officer shall, if necessary, attend at the place of detention daily.

Rule 58

At least once in every month the Medical Officer shall inspect every part of the place of detention with special reference to the sanitary state of the place of detention, the health of the detained persons and adequacy and proper cooking of the diets; and he shall ensure that the body weights of detained persons are properly recorded and shall periodically review them.

Thus, clearly there are legislative provisions that allow detainees some access to the outside world, in particular access to family members, counsel and a medical officer. Further, it is noted that unlike the provisions of the Lockup Rules 1953 relating to access to a medical officer by detainees, the provisions of the Internal Security (Detained Persons) Rules 1960 relating to such access is more in line with international human rights standards.

However, as with the Lockup Rules 1953, the law is not entirely clear as to the exact time in which detainees may be allowed access to family members and counsel. As with

the similar provision of the Lockup Rules 1953, relating to access to family members and counsel, rule 81(2) of the Internal Security (Detained Persons) Rules 1960 appears to merely implicitly provide that detainees should be allowed access to family members and counsel within seven days of their detention as it provides for one visit “a week”. Whilst SUHAKAM is not aware of persons detained under section 8 of the ISA being denied access to the outside world, the lack of express provision in the law as to the exact time in which detainees are allowed access to the outside world, nevertheless bears the danger of detainees being detained incommunicado for an unduly long period of time.

In addition, the following observations are made with regard to access to the outside world by persons detained under section 8 of the ISA:

- (a) The time limit of 30 minutes imposed by rule 81(4) of the Internal Security (Detained Persons) Rules 1960 is too short for family and counsel visits. This is because detainees are only entitled one visit per week. In addition, in contrast with principle 20 of the BOP, which provides that, if requested, detainees should be detained in a place of detention reasonably near to their habitual residence, there is only one detention centre which serves as a place of detention of persons detained under section 8 of the ISA.

As such, family members – particularly family members living outside Kamunting – will have to travel long distances and make whatever necessary arrangements normally required for outstation travel to visit the relevant detainee. For example, working adults and school-going children may have to take leave from work or school, respectively. Further, if the child of the detainee is unable to join in the visit for whatever reason (for example, the child is sick or is in the process of taking his or her school examinations), arrangements for a baby-sitter or such similar arrangements have to be made prior to the visit.

Similarly, counsel from outside Kamunting engaged by detainees will have to travel long distances and make whatever necessary arrangements, such as postponing appointments with other clients, in order to visit the relevant detainee.

Therefore, the time limit for family and counsel visits ought to be extended on humanitarian grounds.<sup>20</sup>

- (b) In relation to access to counsel, unlike rule 22(8) of the Lockup Rules 1953, which allows detainees arrested and detained under section 73 of the ISA to have interviews with their counsel within sight but not hearing of the Police, rule 81(5) of the Internal Security (Detained Persons) Rules 1960 requires a prison officer to be in sight and within hearing during the whole of any visit, unless the Superintendent by an order in writing sees fit to dispense with any of these requirements. Thus, there appears to be a lack of confidentiality in the communications between detainees and their counsel.

This lack of confidentiality in the communications between the detainee and his or her legal adviser is against international human rights principles. For example, principles 18(3) and 18(4) of the BOP state:

- (3) The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
- (4) Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

In addition, rule 93 of the SMR, which is made applicable to detainees arrested or detained without charge by virtue of rule 95, states:

For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institutional official.

Further, unlike rule 23 of the Lockup Rules 1953 which allows detainees arrested

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<sup>20</sup> See also SUHAKAM (2003), pp. 37 – 38 (paragraph 5.7.3)

and detained under section 73 of the ISA to have as many visits from his counsel as considered necessary for the preparation of his defence or appeal, rule 81(2) of the Internal Security (Detained Persons) Rules 1960 does not allow detained persons to receive more than one visit per week, except with the express permission of the Superintendent.

This restriction of one visit per week unless express permission of the Superintendent is obtained to increase the number of visits, particularly, in relation to counsel may result in the lack of ability of counsel for the detainee to fully prepare the detainee's case that is to be presented in Court. This in turn inevitably denies the detainee access to justice.

## **2.5 Rights of Detainees**

As stated in Section 2.5 of Part Two, the Constitution confers upon a detainee certain fundamental rights which include the right to be informed of the grounds of his or her detention. This right to be informed of the grounds of detention under section 8(1) of the ISA and further detention under section 8(7) of the ISA is in fact reflected in section 11 of the ISA and the proviso to section 8(7) of the ISA.

However, the Federal Court case of *Gurcharan Singh a/l Bachittar Singh @ Guru v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors*<sup>21</sup> brought to light a peculiarity in the law as it would appear from the decision of the Court that only detainees who are further detained on grounds different from those on which the detention order was originally made or are further detained partly on the same grounds and partly on different grounds are entitled to a statement made under section 11(2)(b)(i) of the ISA. Detainees who are further detained on the same grounds as the initial order, however, are not entitled to such statement. A statement made under section 11(2)(b)(i) of the ISA contains the grounds on which a detention order is made.

By not being informed of the grounds for further detention (where the detainee is being further detained on the same grounds as the initial order) the detainee will not know the exact grounds on which he or she is being further detained except through speculation.

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<sup>21</sup> [2002] 4 MLJ 255, pp. 264 – 265

Therefore, the detainee will not be in a proper position to challenge his or her further detention, thereby increasing the risk of arbitrary detention, which is already inherent in the power to detain a person without trial.

In addition, although international human rights principles, such as rule 42 of the SMR, confer upon detainees the right to satisfy the needs of their religious life, there appears to be instances where detainees are denied this right. For example:

**Case 1** During a visit by SUHAKAM to KEMTA on 3 July 2001, it was brought to its attention that all male Muslim members amongst the ISA detainees were not allowed to perform the congregational Friday prayers. The authorities explained that this course of action was taken to ensure the separation between those who have gone through substantial rehabilitation process under the ISA and those who have not.<sup>22</sup>

**Case 2** During a follow-up visit by SUHAKAM to KEMTA on 26 November 2001, it was found that the situation as described in **Case 1** above had not improved.<sup>23</sup> SUHAKAM has been informed that on 4 June 1996, the Perak Syariah Committee decided that performing congregational Friday prayers is not obligatory for individuals who are detained in Taiping Prison.

Rule 42 of the SMR states:

So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

## 2.6 Treatment of Detainees

The treatment of a person who is detained under section 8 of the ISA and the types of punishment that may be used against such a person are governed primarily by the

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<sup>22</sup> SUHAKAM (2001), Paragraph 1.4  
<sup>23</sup> SUHAKAM (26.11.2001)

Internal Security (Detained Persons) Rules 1960. For example, rule 42(i) of the Internal Security (Detained Persons) Rules 1960 prohibits prison officials from using personal violence on any detained person save in the case of repeated refusal to obey a lawful order or in self defence or in defence of any other officer, person or detained person. Further, rule 71 of the Internal Security (Detained Persons) Rules 1960 provides that a detainee may only be punished if found to be guilty of a disciplinary offence as specified in the said Rules after due enquiry.

However, as with the Lockup Rules 1953, although the provisions of the Internal Security (Detained Persons) Rules 1960 do deal with issues relating to torture or other cruel, inhuman or degrading treatment or punishment, they fall short of the requirements of international human rights standards in almost the same manner as the Lockup Rules 1953. The provisions of the Internal Security (Detained Persons) Rules 1960 are not broad enough to extend to detainees the widest possible protection against “cruel, inhuman or degrading treatment or punishment” as required by, amongst others, article 1 of the CAT and principle 6 of the BOP.

Consequently, although SUHAKAM is not aware of cases of serious violations of the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment at KEMTA,<sup>24</sup> there have been instances where detainees under the custody of KEMTA authorities either had been or appear to have been subjected to some form of inhuman or degrading treatment or punishment. For example:

**Case 1** At the SUHAKAM Open Inquiry on the ISA, Othman bin Mohd. Ali asserted that he resented the fact that his children had to see him behind a wire mesh, as it made him feel like a criminal. The Inquiry Panel was of the opinion that detainees should not be physically separated from their families with a wire mesh in view of the fact that the detainees are not convicted criminals and should not, therefore, be treated as such.<sup>25</sup>

**Case 2** At the SUHAKAM Open Inquiry on the ISA, the Inquiry Panel found that during the first three months in KEMTA, detainees are held in

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<sup>24</sup> See SUHAKAM (2003), p. 41

<sup>25</sup> *Ibid.*, pp. 36 – 37 (paragraphs 5.7.2 and 5.7.3)

spartan cells, sometimes with two or three other detainees if there were to be a sudden arrival of detainees, before being transferred to dormitory style blocks, where they will be accommodated with other persons who have had similar allegations made against them. A number of detainees specifically pointed out the humiliation and degradation of having to use a “cesspot” in the orientation cell, particularly since there could be up to two other persons in the cell. The Inquiry Panel found, upon reviewing article 5 of the UDHR and the relevant principles of the BOP, that “deprivation of proper toilet facilities and the humiliation involved in the use of the cesspot would bring such acts within the ambit of ‘cruel, inhuman and degrading treatment or punishment’”. Nevertheless, the Inquiry Panel noted the documentary evidence submitted by KEMTA authorities to show that they had recently been awarded the necessary financial allocation to enable them to install proper toilet facilities in the orientation cell.<sup>26</sup>

**Case 3** At the SUHAKAM Open Inquiry on the ISA, the Inquiry Panel was informed by KEMTA officials, that the objective of the two-year period in detention is to separate the detainees from the rest of the community. The controlled environment of the detention centre is thought to inculcate a greater sense of discipline amongst the detainees. This is accomplished by way of a three-month long “orientation period” upon the arrival of the detainee at KEMTA. Furthermore, by giving the detainees time to reflect, it is thought that the detainees might be able to gain greater love for their country, and to have respect for the rights of other members of society.<sup>27</sup>

The testimony provided to SUHAKAM by KEMTA appears to leave an impression that the “orientation programme” is to “rehabilitate” individuals who are detained under section 8 of the ISA – although it is unclear whether “rehabilitation” is in fact the intended aim of the “orientation period”.

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<sup>26</sup> *Op. cit.*, pp. 25 – 26 and 31 – 32 (paragraphs 4.1, 4.2, 5.3.2 & 5.3.3)  
<sup>27</sup> SUHAKAM (2003), p. 24 (paragraph 2.1)

It is to be reiterated that the power of preventive detention, if at all it is required as a tool to preserve national security of the country, should not be used to "rehabilitate" individuals who are detained pursuant to the said power. Persons detained pursuant to preventive detention powers, by definition, have not in fact been convicted of any offence. Instead, as is very clearly indicated by section 8(1) of the ISA, the detention of a person under the said section is made "with a view of **preventing** him from acting in any manner prejudicial to the security of Malaysia". (emphasis added)

Thus, if the three-month long "orientation period" that detainees have to undergo upon entering KEMTA is for rehabilitation purposes, then the purpose of the "orientation period" does not conform with international human rights principles in relation to the treatment of detainees who have not been convicted of any offence. Rule 95 of the SMR expressly prohibits any measures taken by a detaining institution from giving the impression that re-education or rehabilitation is in any way appropriate to such persons. Rule 95 of the SMR states:

Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C. Relevant provisions of part II, section A, shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, **provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.** (emphasis added)

Further, if the "orientation period" is for the purpose of enabling the detainees to be acquainted with the rules of discipline pertinent to KEMTA (and not for "rehabilitation"),<sup>28</sup> then it would appear that an orientation period of three months is too long and ought to be reduced to a shorter period of not more than one week. In addition, detainees should not be placed in "orientation cells" during the orientation period but instead be placed in regular accommodation because placing a person in an "orientation cell" – whereby the lifestyle of detainees detained therein

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<sup>28</sup> *Ibid.*, p. 25 – 26 (paragraph 4.1)

defers from the lifestyle of detainees detained in regular accommodation – defeats the purpose of an “orientation period”, which is to acquaint the persons in question to the life at KEMTA.<sup>29</sup>

**Case 4** In the case of *Karpal Singh & Ors v Penguasa Tempat Tahanan Perlindungan Taiping and another application*, the detainees were purportedly found guilty of a charge under rule 73(h) of the Internal Security (Detained Persons) Rules 1960 for refusing without reasonable excuse to eat the food provided in the place of detention, and sentenced to punishment of seven days of deprivation of the privilege of seeing their respective families and legal advisers. There was an absence of due enquiry in the matter as provided for under rule 71 of the Internal Security (Detained Persons) Rules 1960 and the punishment had been imposed on the detainees before the enquiry.<sup>30</sup>

## 2.7 Living Conditions whilst in Detention

In order to avoid duplication of work, suffice it to say that in relation to the living conditions of detention, the Inquiry Panel of the SUHAKAM Open Inquiry on the ISA found that generally, barring minor problems, the living conditions of detainees during their detention under section 8 of the ISA are satisfactory and meet the basic minimum requirements for ensuring the well being of detainees. The Inquiry Panel in its report made recommendations to deal with the minor problems.<sup>31</sup>

## 2.8 The Advisory Board and Judicial Review

Under the framework of the ISA, there is in fact no independent body that is adequately effective in checking and balancing the powers of the Minister to detain a person without trial under section 8 of the ISA. Consequently, under the framework of the ISA, there is a lack of adequate safeguard to check against arbitrary detention under section 8 of the ISA.

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<sup>29</sup> See also *Op. Cit.*, p. 32 (paragraph 5.3.4)

<sup>30</sup> [1989] 3 MLJ 47

<sup>31</sup> SUHAKAM (2003), pp. 32 – 33 (paragraph 5.4)

The reasons for this lack of adequate safeguard are as follows: First, it is to be noted that under the framework of the ISA, detention orders made pursuant to section 8 of the ISA may be reviewed by an Advisory Board. The powers of the Advisory Board to review the decisions of the Minister in this area is provided for by Article 151 of the Constitution which states:

- (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention –
  - (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
  - (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.
- (2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members who shall be appointed by the Yang di-Pertuan Agong.
- (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

The powers of the Advisory Board to review detention orders made under section 8 of the ISA are also found in sections 11 to 16 of the ISA. Therefore, at first sight, it would appear that the provisions of the ISA in relation to review of detention orders made pursuant to preventive detention powers conform with international human rights principles.

However, upon a closer reading of the relevant provisions, major flaws in the law in relation to the review of detention orders by the Advisory Board may be found. For example, as a result of amendments made to the ISA by the Internal Security

(Amendment) Act 1988, where a detainee detained under section 8 of the ISA has made representations to the Advisory Board, it is possible for the Advisory Board not to consider the representations and make the necessary recommendations to the *Yang di-Pertuan Agong* as a matter of urgency. This is because the amendment made to the ISA by the amending Act has the effect of discontinuing the original practice of requiring the Advisory Board to consider the representations of the detainee and make the necessary recommendations to the *Yang di-Pertuan Agong* “within three months of the date on which such person was detained”. Instead, the Advisory Board may now consider the representations of the detainee and make the necessary recommendations to the *Yang di-Pertuan Agong* “within three months from the date on which representations are received by it, or within such longer period as the *Yang di-Pertuan Agong* may allow”.<sup>32</sup> In addition, as the recommendations of the Advisory Board are not binding, there is a danger that any review of detention orders by the Advisory Board may be ineffective. In this regard, one writer has claimed that, generally, detainees do not find making representations to the Advisory Board a useful exercise to challenge the grounds of their detention.<sup>33</sup>

Second, the ambit of judicial review of the exercise of the powers by the Minister under section 8 of the ISA is unduly restrictive. The Court in the case of *Ng Boon Hock v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors* succinctly summarised the ambit of judicial review of the exercise of powers under section 8 of the ISA by the Minister when it said:

As can be clearly seen, the term “judicial review” as defined in s 8C encompasses almost every action that can be taken to court. The usage of the word “includes” clearly indicates that the list of items of “judicial review” in the said section is not exhaustive. Hence, reading s 8B together with s 8C of the said Act, the only action anyone can take to court for any offence under the said Act is ‘in regard to any question on compliance with any procedural requirement in this Act governing such act or decision’. This means that one can only challenge the act done or decision made by the *Yang di-Pertuan Agong* or the Minister on a question of non-compliance with any procedural requirement governing such act or decision. And such claim should not exceed more than that.<sup>34</sup>

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<sup>32</sup> See also Yatim, R. (1995), p. 265

<sup>33</sup> *Ibid.*, p. 266

<sup>34</sup> [1998] 2 MLJ 174, p. 178

When the ISA was originally enacted, persons detained under section 8 of the ISA were entitled to judicial review of their detention under the said provision. This fundamental safeguard was, however, lifted as a result of the amendments made to the ISA pursuant to the Internal Security (Amendment) Act 1989, which have the effect of unduly restricting the ambit of judicial review of Ministerial detention orders under section 8 of the ISA.

The Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1989, explained the rationale of the amendment as follows:

... This provision is necessary to avoid any possibility of the courts substituting their judgment for that of the Executive in matters concerning security of the country as has been done by courts in certain foreign countries which base their decisions on conditions totally different from Malaysia's. In matters of national security and public order, it is clearly the Executive which is the best authority to make evaluations of available information in order to decide on precautionary measures to be taken and to have a final say in such matters; not the courts which have to depend on proof of evidence.

Whilst it is appreciated that by reason of their direct and continuous contact with the pressing needs of the moment, the Executive ought to be given a wide latitude to decide, both on the presence of an emergency and on the necessary measures that ought to be taken to avert it, two main observations need to be made in this regard: First, such decisions made by the Executive must not be made arbitrarily and there must be some form of independent check and balance on the exercise of the powers of the Executive. In relation to the exercise of the power to detain a person without trial, judicial review of detention orders is one such fundamental safeguard. As such, it should not be removed or watered down. This is because independent judicial supervision is essential to ensure that the detention of any person is at any particular time premised on facts that justify the use of preventive detention according to law, thereby reducing the risk of arbitrary detention. Second, the Judiciary generally recognises the Executive to be the judge of national security requirements.<sup>35</sup>

Therefore, judicial review of detention orders made under section 8 of the ISA ought not

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<sup>35</sup> See Section 2.8 of Part Two

be ousted or restricted.<sup>36</sup> Further, as with judicial review of arrest and detention made under section 73 of the ISA, notwithstanding article 151(3) of the Constitution<sup>37</sup> and section 16 of the ISA, the Courts should be allowed to scrutinise whatever evidence which is in the possession of the Minister to come to a fair and just decision on the lawfulness of the detention order.

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<sup>36</sup> See Section 4 of Part One

<sup>37</sup> In the case of *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309, the Federal Court at page 342 held:

I think there is merit in the proposition that art 151(3) merely bars information concerning matters of national security from being disclosed to the detainee and not to the court as such. Indeed, there is nothing to indicate or suggest any such prohibition from disclosure to the courts for the purpose of judicial review.

# PART FOUR

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## Conclusion and Recommendations

### 1. Internal Security Act 1960 and Human Rights

On 21 June 1960, when the then Deputy Prime Minister, the late Tun Abdul Razak presented the Bill for the ISA in Parliament for its second reading, he said:

Let me make it quite clear that it is no pleasure for the Government to order the detention of any person. **Nor will these powers be abused.**<sup>1</sup> (emphasis added)

Subsequently in ending his reply on 22 June 1960 to the numerous questions and issues posed in Parliament during the debate on the second reading of the Bill, the late Tun Abdul Razak said:

We have, Sir, as has been said, to defend our independence and to defend democracy which we intend to establish. The Honourable Member for Ipoh suggests that if we pass this Bill today, our children will have cause to regret for what we have done. Sir, no one can predict the future, history alone can tell; but I am of the firm conviction that if we pass this Bill today our children and grand-children will be very thankful for our foresight, our forethought (*Applause*), for taking measures to protect our young nation and our new State, and for taking measures to make democracy safe in this country, and for taking measures to make this country a healthy place for them to live in the years to come. I do hope in that spirit Honourable Members of this House will now give this Bill a second reading.<sup>2</sup>

History, however, has shown that the law and practice in relation to the ISA have adversely effected the status of human rights in Malaysia.

The concerns in relation to the ISA from the human rights perspective may be divided into two categories: First, there is concern in relation to the provisions of the ISA. It is alleged that they infringe the principles of human rights. Second, there is concern in relation to the application of the provisions of the ISA. It is alleged that under the ISA,

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<sup>1</sup> Parliamentary Debates, *Dewan Rakyat* (21.6.1960), p. 1189

<sup>2</sup> Parliamentary Debates, *Dewan Rakyat* (22.6.1960), p. 1354

citizens and non-citizens alike have been subjected to arbitrary detention and inhuman or degrading treatment whilst in detention. There is merit in both these categories of concerns.

With regard to the provisions of the ISA, the majority of the provisions that are contained in the ISA create criminal offences that are to be administered under the normal penal system and do not thus necessarily infringe human rights principles *per se*. However, there are two main provisions of the ISA that do contravene human rights principles. They are sections 8 and 73. They confer upon the Minister and the Police, respectively, the power to detain a person without trial.

The power to detain a person without trial goes against human rights principles in that the person detained, is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proved guilty. These rights are enshrined in articles 3, 10 and 11(1) of the UDHR.

With regard to the application of the provisions of the ISA, the manner in which sections 8 and 73 of the ISA have been applied to date have led to infringements of human rights in two main ways: First, some individuals have been arrested and detained on grounds which do not satisfy the criteria of being prejudicial to the national security of the country and the detentions as such were contrary to the purpose of the ISA. For example, individuals have been detained under the ISA for allegedly counterfeiting coins, falsifying documents and human trafficking. These situations could have been dealt with under the relevant laws creating the relevant criminal offences.<sup>3</sup> Other examples of arbitrary detention include the arrest and detention of individuals for the collateral or ulterior purpose of gathering of intelligence that were wholly unconnected with national security issues and the arrest and detention of a director of a bank who was believed to have caused the bank to suffer substantial losses.<sup>4</sup> The right of a person not to be subjected to arbitrary arrest or detention is enshrined in article 9 of the UDHR.

Second, although such treatment or punishment does not appear to be part of a systemic or endemic routine, there have been individuals who have been subjected to

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<sup>3</sup> See Section 2.1 of Part Three

<sup>4</sup> See Section 2.1 of Part Two

some form of inhuman or degrading treatment or punishment whilst in detention. Examples include the punishment of detainees for allegedly committing a disciplinary offence under the relevant rules governing the place of detention in which the detainees were held without due enquiry as required by the relevant rules and the detention of detainees in an orientation cell without proper toilet facilities.<sup>5</sup> Further, the Inquiry Panel of the SUHAKAM Open Inquiry on the ISA made the following finding in relation to detainees detained under section 73 of the ISA:

... there appears to be sufficient evidence to justify a finding of cruel, inhuman or degrading treatment of some of the detainees who testified before the Inquiry Panel. Slapping of detainees, forcible stripping of detainees for non-medical purposes, intimidation, night interrogations, and deprivation of awareness of place and the passage of time, would certainly fall within the ambit of cruel, inhuman and degrading treatment, by virtue of the need to interpret this term so as to extend the widest possible protection to persons in detention.<sup>6</sup>

The right of a person not to be subjected to inhuman or degrading treatment or punishment is enshrined in article 5 of the UDHR.

The infringements of the right of a person not to be arbitrarily arrested or detained and the right of a person not to be subjected to inhuman or degrading treatment arise out of three root causes: First, where the power to detain an individual is not accompanied by the right of the detainee to a fair and public trial, there is no accountability for the exercise of the power by the relevant detaining authority to an independent and impartial body. This absence of accountability gives rise to the possibility of abuse in the form of arbitrary arrest or detention and imposition of inhuman or degrading treatment or punishment.<sup>7</sup>

Second, there are inadequate safeguards in the law (either the ISA or the rules and regulations governing the places of detention in which detainees detained under the ISA are held) to check possible abuse of the power to detain without trial. For example:

(a) Although the preamble to the ISA is very clear as to the precise circumstance in

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<sup>5</sup> See Section 2.6 of Part Three

<sup>6</sup> SUHAKAM (2003), p. 16 (paragraph 6.2.11). See also Section 2.6 of Part Two

<sup>7</sup> See Section 3 of Part One

which the provisions of the ISA ought to be invoked (if at all), the precise grounds on which persons may be detained under sections 8 and 73 are, at best, very vague. Questions abound as to the exact meaning of the phrases “prejudicial to the security of Malaysia”, “prejudicial to the maintenance of essential services of Malaysia” or “prejudicial to the economic life of Malaysia”. This lack of clear criteria on the grounds on which an individual may be detained without trial gives rise to the possibility of persons being detained way beyond the framework of the ISA;<sup>8</sup>

- (b) There are inadequate safeguards in the law to guard against incommunicado detention (where detainees are denied total access to the outside world). For example, whilst detainees under the custody of the Police are held in undisclosed places of detention, there is a lack of provision in the Lockup Rules 1953 specifically providing for unhampered regular visits by independent, qualified and responsible persons to supervise the strict observance of the relevant laws and regulations by the relevant authorities in charge of the administration of such undisclosed places of detention.<sup>9</sup> Further, although the Lockup Rules 1953 and the Internal Security (Detained Persons) Rules 1960 do in fact allow detainees some access to the outside world which include access to family members, legal counsel or to a medical officer, it is not entirely clear as to the exact time in which detainees may be allowed such access.<sup>10</sup> Therefore, there have been detainees who have been denied access to counsel for up to 60 days and detainees who have been denied access to family members for up to 40 days whilst in police custody.<sup>11</sup>

The lack of access to the outside world for a prolonged period of time coupled with the detention of persons in undisclosed places of detention without independent supervision pose an inherent danger of abuse of power, particularly in terms of torture or other cruel, inhuman or degrading treatment during interrogations. The relevant detaining authorities, being beyond outside scrutiny for their actions, may believe that they can act with impunity and without restraint

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<sup>8</sup> See Section 2.1 of Parts Two and Three

<sup>9</sup> See Section 2.3 of Part Two

<sup>10</sup> See Section 2.4 of Parts Two and Three

<sup>11</sup> See Section 2.4 of Part Two

as it is often difficult to mount an effective prosecution without independent witnesses;

- (c) The ISA does not contain a provision limiting the life of the legislation.<sup>12</sup> The Parliamentary Debates on the Bill for the ISA show that when the matter regarding the length of the life of the ISA was discussed, it was concluded that a provision limiting its life was unnecessary because:

This Bill is moved under Article 149 of the Constitution and clause 2 provides for the continuance of the Bill until repealed or annulled by Parliament. So, this is really a matter which has already been decided in the Constitution. However, Sir, I suggest that apart from being a matter of convenience not only for this House but also for the Opposition, **this Bill is terminable at any time** by resolution of both Houses of Parliament as set out in our Constitution, and the question of the termination of this Bill can be raised at any time on a motion whenever it is considered necessary. So the question of the length of its life is, to my mind, not a very material question.<sup>13</sup> (emphasis added).

However, since the enactment of the ISA, article 149(2) of the Constitution has not been successfully invoked to annul the Act;

- (d) The ISA does not contain an express provision which specifically requires the relevant detaining authority to be accountable to Parliament for its actions under the Act.<sup>14</sup>

The original provisions of the ISA did in fact contain some very important safeguards against abuse of the power to detain without trial. However, over the years they have been gradually eroded.

For example, in 1971, the grounds on which a person may be detained under sections 8 and 73 of the ISA were extended to include actions which are alleged to be prejudicial to the maintenance of essential services of Malaysia and prejudicial to the economic life of Malaysia. This extension added to the ambiguity of the exact grounds on which a person

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<sup>12</sup> See Section 4 of Part One

<sup>13</sup> Parliamentary Debates, *Dewan Rakyat*, (21.6.1960), p. 1190

<sup>14</sup> *Op. cit.*

may be detained without trial under the ISA. This extension also appears to have been done without first meeting the requirements of article 149 of the Constitution.<sup>15</sup>

In the same year (1971), the maximum number of days in which the Police could detain a person under section 73 of the ISA was increased from 30 days to the present 60 days. Deprivation of a person's liberty for such an extended period (although the person has not been convicted for any offence) appears to have been made based on the apparent insufficiency of 30 days for the files of a person detained under section 73 of the ISA to be brought from the Police at contingent level to the headquarters of the Police and subsequently to the Ministry of Home Affairs. This amendment bears the inherent danger of detainees being detained under section 73 of the ISA for a period of time that is beyond what is "strictly necessary".<sup>16</sup>

In 1988, the ISA was amended in order to validate detentions made under section 8(1) of the ISA although the relevant detainees are detained in a place of detention that is different from the one as directed by the Minister. This amendment increases the possibility of incommunicado detention and consequently, the inherent danger of inhuman or degrading treatment.<sup>17</sup>

In 1989, the ISA was amended to exclude any judicial review of the grounds of detention made under section 8 of the ISA. Thus detainees held under this section are not only denied a fair and public trial, they are also denied their minimum right to an effective opportunity to be heard promptly by an independent Judiciary which may decide on the lawfulness of their detention and may order their release if their detention were to be found unlawful. This increases the risk of individuals being detained beyond the framework of the ISA, thereby resulting in the increased danger of individuals being subjected to arbitrary detention.<sup>18</sup>

Third, there have been occasions where detainees have not been conferred the basic fundamental rights that are contained within the framework of the Constitution which include the non-conferment of the fundamental right to be informed of grounds of arrest

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<sup>15</sup> See Section 2.1 of Parts Two and Three

<sup>16</sup> See Section 2.2 of Part Two

<sup>17</sup> See Section 2.3 of Part Three

<sup>18</sup> See Section 2.8 of Part Three

and the right to be produced promptly before a Magistrate.<sup>19</sup> This appears to be either because of a legal provision which specifically oust such right or the different interpretations of the law or as a result of the occasional imperfect implementation of the law by the detaining authorities.

Therefore, by considering the law and practice in relation to the ISA to date from the human rights perspective and in light of the four human rights principles on the limitation of the rights of a person (legitimate aim, absolute necessity, proportionality and adequate safeguards), it is clear that the balance between national security and human rights under the ISA is currently disproportionately weighted in favour of national security. Therefore the time has come for this issue to be reconsidered constructively and rationally with the view to redressing this imbalance.

## **2. Repeal and Replacement of the Internal Security Act 1960**

It is recommended that, through a consultation process, all laws in relation to national security, including the ISA, ought to be reviewed, with the aim of consolidating the laws into one statute which, whilst on the one hand takes a tough stand on threats to national security (including terrorism), on the other hand, conforms with international human rights principles. It is proposed that the ISA be repealed and in its place, a new comprehensive legislation that has the following characteristics should be enacted:

- (a) The legislation contains a schedule which prescribes a list of specific offences which relate to threats to national security (including terrorist offences). This list may include some of the offences contained in the ISA, the Penal Code, and all other relevant legislation that are currently in force in Malaysia. New offences which relate to national security may need to be enacted. Reference may be made to the national security legislation of other countries such as the USA (USA PATRIOT Act 2001), Canada (Anti-Terrorism Act 2001) and the UK (Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001);
- (b) Since the legislation relates to issues of national security, the criminal procedure, inquiry and facts relating to the cases arising under the legislation should be

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<sup>19</sup> See Section 2.5 Parts Two and Three

dealt with by learned and experienced Judges and therefore the designated offences contained in the Schedule should be wholly dealt with and triable in the High Court;

- (c) The legislation contains provisions which reflect the following:
- (i) The Police may detain a person for the purposes of investigations on the basis that there are reasonable grounds to believe that the person in question has committed, abetted, conspired, or has attempted to commit one or more of the designated offences contained in the Schedule of the new legislation;
  - (ii) The detention of the person by the Police may be for a maximum period of 24 hours, after which the person must be produced before a High Court Judge;
  - (iii) If more time is required for investigations and there is an absolute need to detain the person for more than 24 hours, an order by a High Court Judge must be sought;
  - (iv) The High Court Judge may order the further detention of the person for maximum periods of seven days each time provided that the person in question is not detained for more than 29 days in total from the date of his or her arrest. The High Court Judge in determining whether to extend or not to extend the detention of a person will have to look at the investigations diary of the Police. This provision is similar to section 119 of the Criminal Procedure Code;
  - (v) Upon the expiration of the 29 days in total from the date of his or her arrest, the person in question must either be released or charged with one of the designated offences in the Schedule of the new legislation under regular criminal procedure; and
  - (vi) Individuals arrested, detained or charged for one of the designated

offences in the Schedule should not be allowed bail;

- (d) Apart from the above procedure, a person arrested and detained pursuant to the new legislation must be accorded the same rights (for example, access to the outside world) that are accorded to a remand prisoner under ordinary criminal law;
- (e) Apart from the circumstances set out in the preceding paragraphs, a person may not be arrested and detained under any other circumstances pursuant to this new legislation;
- (f) The legislation shall only be in force for a period of one year. Any further renewal of one year each can only be effected by authority of Parliament.

### **3. Interim Recommendations**

In light of the possibility that the enactment of such a comprehensive legislation will take time, it is recommended that in the interim, any further application of the ISA should only be done with adequate safeguards in place.

#### **3.1 Legislative Reform**

In relation to legislative reform, it is recommended that:

##### **(a) Internal Security Act 1960**

- (i) Criteria for the ambit of “prejudicial to the security of Malaysia”, “prejudicial to the maintenance of essential services of Malaysia” and “prejudicial to the economic life of Malaysia” be determined;
- (ii) Section 8(1) be amended to reduce the initial period of detention from two years to three months;
- (iii) Section 8(7) be amended to reflect the fact that a person may be further

detained for a maximum period of three months after which he or she must be charged in court or be released;

- (iv) Sections 8A – 8D be deleted in order to allow judicial review of detention orders made under section 8;
- (v) Section 11 be amended to accord a detainee whose detention order is extended under section 8(7) with the same rights that was accorded to the detainee under section 11 when he or she was initially detained. This includes requiring the Minister to furnish a detainee, whose detention has been further extended under section 8(7) on the same grounds as the initial order, with a statement made pursuant to section 11(2)(b);
- (vi) Section 12(1) be amended to require the Advisory Board to review detention orders made under section 8 within three months of a person's detention;
- (vii) Section 73(3) be amended to reduce the maximum period of detention under section 73. It is recommended that the maximum period of detention should not exceed 14 days. This period is equivalent to the maximum period which is available to the Police to detain a person for the purposes of further investigations under section 117 of the Criminal Procedure Code;
- (viii) Any proposal to restrict the powers of the Court in any manner whatsoever to review the lawfulness or otherwise of arrest and detention made pursuant to section 73 be considered very carefully;
- (ix) The ISA be amended to insert new provisions relating to the following matters:
  - the relevant detaining authority shall be required to report to Parliament annually on the use of sections 8 and 73. Such reporting should include matters relating to the total number of

persons arrested, detained and released under sections 8 and 73 of the ISA respectively;

- the ISA shall only be in force for a period of one year unless renewed in Parliament on an annual basis.

**(b) Lockup Rules 1953**

- (i) A detainee be given information as to the procedure he or she will be subjected to and his rights whilst in detention, which include the right to counsel whilst in custody and the right to appear before a Magistrate within 24 hours of his or her arrest (excluding the time of necessary journey). This may involve the amendment of rule 14 or the insertion of a new provision;
- (ii) Rule 22 be amended to expressly allow family members and counsel access to detainees as soon as possible and in any event within seven days of their arrest and detention;
- (iii) Rule 22(4) be amended to extend family visits from 15 minutes to at least 30 minutes;
- (iv) Rule 22(8) be reviewed on compassionate grounds. It is suggested that it be required that an officer be present only within sight but not within hearing during family visits to ensure privacy between detainees and members of their families;
- (v) A new provision be inserted whereby the Police shall inform family members of detainees of their arrest within 24 hours;
- (vi) A new provision be inserted whereby a detainee shall be informed of the grounds for his or her arrest and detention, the allegations of fact on which the arrest and detention are based and of such other particulars as the detainee may reasonably require in order to prepare for his or her

defence;

- (vii) A new provision be inserted whereby a detainee shall be brought before a Magistrate within 24 hours of arrest (excluding the time of necessary journey);
- (viii) The Lockup Rules 1953 be amended generally to comply with international human rights standards, including those in relation to the safeguards against all forms of torture or other cruel, inhuman or degrading treatment or punishment. The amendments should include rules on interrogation which the Police have to adhere to.

**(c) Internal Security (Detained Persons) Rules 1960**

- (i) Rule 81(4) be amended in order to provide for a longer period of time for family visits. It is suggested that the period of time be extended from 30 minutes to at least 60 minutes;
- (ii) Rule 81(5) be amended in order to expressly provide for interviews between a detainee and his or her legal adviser to be held within sight but not within hearing of an officer, thereby bringing this provision in line with rule 22(8) of the Lockup Rules 1953, which governs interviews between a detainee and his or her legal adviser whilst the detainee is in police custody;
- (iii) A new provision be inserted to provide that detainees shall be entitled to as many visits as their legal advisers consider necessary for the preparation of their defence or appeal, thereby bringing this provision in line with rule 23 of the Lockup Rules 1953, which governs the frequency of visits by a detainee's legal counsel whilst the detainee is in police custody;
- (iv) The Internal Security (Detained Persons) Rules 1960 be amended generally to comply with international human rights standards.

### **3.2 Administrative Directives and Procedures**

In relation to administrative directives and procedures, it is recommended that:

#### **(a) Detention under Section 8 of the ISA**

- (i) The power to detain without trial under section 8 of the ISA be exercised with utmost care and in good faith so as to avoid the possibility of arbitrary detention of a person;
- (ii) The detention orders made under section 8 of the ISA of persons whose arrest and detention under section 73 of the ISA have been declared unlawful by the Judiciary be reviewed without delay with the view of releasing such persons where it is justiciable to do so;
- (iii) The power to detain under section 8 of the ISA be used as a last resort;
- (iv) Notwithstanding section 12 of the ISA, the Advisory Board make every effort to consider representations made by detainees as a matter of urgency. Consequently, if necessary, the Board should be provided with sufficient resources to ensure that it is able to cope with its workload;
- (v) During family visits, detainees detained under section 8 of the ISA should not be physically separated from their families with any type of barrier;
- (vi) Detainees detained under section 8 of the ISA be allowed to exercise their right to satisfy the needs of their religious life unless the actions of such persons go well beyond what can normally be regarded as professing and practising one's religion;
- (vii) Measures which may be taken to imply that re-education or rehabilitation is in any way appropriate for persons not convicted of any criminal offence should not be implemented;

- (viii) The orientation programme that is currently being conducted for persons detained under section 8 of the ISA, which appears to imply some form of rehabilitative measure, be reviewed. The aim of the orientation programme ought to be solely for the purpose of acquainting ISA detainees to a restrictive lifestyle. The programme therefore ought to be for a short period of not more than one week and the ISA detainees who are undergoing the orientation programme should be placed in regular accommodation;
- (ix) Duties be carried out in compliance with the rules and regulations of the Internal Security (Detained Persons) Rules 1960 at all times so as to ensure that detainees detained under section 8 of the ISA are not ill-treated and so as to avoid causing any injustice to detainees;
- (x) Detainees detained under section 8 of the ISA be allowed visits by and to consult and communicate, without delay or censorship and in full confidentiality, with their legal counsel. This means that interviews between detainees and their legal counsel ought to be held within sight but not within hearing of authorities and that all legal documents exchanged between detainees and their legal counsel ought not be vetted by the prison officers.

**(b) Detention under Section 73 of the ISA**

- (i) The power to arrest and detain under section 73 of the ISA be exercised with utmost care and in good faith so as to avoid the possibility of arbitrary arrest and detention;
- (ii) Persons whose alleged acts constitute commission, abetment, conspiracy or attempts of offences which fall under normal criminal law and as such may properly be considered by a criminal court should be arrested and detained using mainstream provisions of the Criminal Procedure Code and not the provisions of the ISA;

- (iii) Investigations be conducted effectively, expeditiously and in good faith so that a person is not detained for a period longer than absolutely necessary;
- (iv) The further detention of an individual under section 73(3) provisos (a), (b) and (c) be authorised by the relevant ranking officers only after due consideration and only if justified on the following grounds:
  - to obtain relevant evidence whether by questioning or otherwise;  
or
  - to preserve relevant evidence; or
  - pending a decision from the Minister as to whether to detain the individual under section 8; or
  - pending a decision as to whether the detained person should be charged with an offence;
- (v) All necessary reports be forwarded to the Minister for his or her further direction immediately upon completion of the required further investigations in order not to arbitrarily prolong the period of detention of a person arrested and detained under section 73 of the ISA;
- (vi) Persons arrested and detained under section 73 of the ISA should not be detained together with other categories of detainees in the police lockup;
- (vii) SUHAKAM be allowed to conduct surprise visits to any place of detention where detainees arrested and detained under section 73 of the ISA are held (including Police Remand Centres) in order to facilitate the inspection of the conditions of such place of detention and the interviews, in private, of such detainees regarding their treatment whilst in detention pursuant to principle 29 of the BOP;

- (viii) Family members of detainees arrested and detained under section 73 of the ISA be informed of their arrest within 24 hours;
- (ix) Detainees arrested under section 73 of the ISA be produced before a Magistrate within 24 hours of arrest in accordance with article 5 of the Constitution and be allowed access to counsel during their production before the Magistrate;
- (x) If for good reason(s) the detainee is not allowed access to counsel during the aforesaid production before a Magistrate, detainees arrested and detained under section 73 of the ISA be allowed access to family members and counsel as soon as possible and in any event within seven days of their arrest;
- (xi) Detainees arrested and detained under section 73 of the ISA be provided with a written document containing a simple explanation of the rights of detainees whilst in custody. Detainees who are illiterate be orally informed of their rights in a language that they understand;
- (xii) Appropriate training be conducted for all law enforcement personnel in order to create greater awareness of their obligation to absolutely refrain from exercising any form of torture or other cruel, inhuman or degrading treatment or punishment against detainees;
- (xiii) All law enforcement officers should be made aware of the fact that as agents of the State, they are required to conduct themselves in a manner which evinces understanding of and absolute respect for the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

**(c) Judicial Review of Detention under Sections 8 and 73 of the ISA**

- (i) *Habeas corpus* applications be disposed off expeditiously. This includes

expedient exchange of affidavits between the parties;

(ii) Notwithstanding that detainees are not legally required to be present at their *habeas corpus* proceedings, provision be made to require the physical presence of detainees before the Court during *habeas corpus* applications as this could act as a safeguard against torture or other cruel, inhuman or degrading treatment and also allow counsel to have ready access to their clients;

(iii) Notwithstanding article 151(3) of the Constitution and/or section 16 of the ISA, where it is claimed that a particular piece of evidence cannot be disclosed because such disclosure would not be in the national interest, the matter be dealt with in the following manner:

- upon being informed that a particular piece of evidence cannot be disclosed because such disclosure would not be in the national interest, the presiding Judge immediately hold the *habeas corpus* proceedings in chambers;
- upon convening the Court in chambers, the presiding Judge, on his or her own, determine whether the disclosure of the piece of evidence in question will in fact go against the national interest;
- if the presiding Judge decides that the disclosure of the piece of evidence does in fact go against the national interest, the evidence need not be disclosed in Court;
- if the presiding Judge decides that the disclosure of the piece of evidence does not in fact go against the national interest, the evidence must be disclosed in Court.

#### **4. Conclusion**

This review of the ISA is made pursuant to section 4(1)(b) of the Human Rights

Commission of Malaysia Act 1999 (Act 597) which provides that one of the functions of SUHAKAM is to “advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken”. SUHAKAM therefore hopes that the relevant authorities will consider its recommendations contained in this report with the view to adopting them.

# APPENDICES



# APPENDIX 1

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## Universal Declaration of Human Rights

*Adopted and proclaimed by General Assembly resolution 217A(III) of 10 December 1948*

### **Preamble**

*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Whereas* disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

*Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

*Whereas* it is essential to promote the development of friendly relations between nations,

*Whereas* the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

*Whereas* Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

*Whereas* a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

*Now, therefore,*

*The General Assembly,*

*Proclaims* this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

### **Article 1**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

### **Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or

international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

**Article 3**

Everyone has the right to life, liberty and security of person.

**Article 4**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 5**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**Article 6**

Everyone has the right to recognition everywhere as a person before the law.

**Article 7**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 8**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Article 9**

No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

**Article 11**

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

**Article 12**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

**Article 13**

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

**Article 14**

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

**Article 15**

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

**Article 16**

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**Article 17**

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

**Article 18**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

**Article 19**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**Article 20**

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

**Article 21**

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 23**

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

**Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

**Article 25**

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Article 26**

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

**Article 27**

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**Article 28**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29**

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

# APPENDIX 2

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## International Covenant on Civil and Political Rights

*Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966*

ENTRY INTO FORCE: 23 March 1976, in accordance with article 49

### Preamble

*The States Parties to the present Covenant,*

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that these rights derive from the inherent dignity of the human person,

*Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

### PART I

#### Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

### PART II

#### Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

### **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### **Article 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

### **Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## **PART III**

### **Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This

- penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
  4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
  5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
  6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### **Article 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3.
  - (a) No one shall be required to perform forced or compulsory labour;
  - (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
  - (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
    - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
    - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
    - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
    - (iv) Any work or service which forms part of normal civil obligations.

#### **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

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

#### **Article 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### **Article 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

#### **Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

#### **Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

#### **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
  5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
  6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### **Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

#### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### **Article 21**

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 22**

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

#### **Article 23**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

**Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

**Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

**Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

**PART IV****Article 28**

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

**Article 29**

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.
2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

**Article 30**

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of

- the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
  4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### **Article 31**

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

#### **Article 32**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

#### **Article 33**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

#### **Article 34**

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

#### **Article 35**

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the

General Assembly may decide, having regard to the importance of the Committee's responsibilities.

#### **Article 36**

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

#### **Article 37**

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

#### **Article 38**

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

#### **Article 39**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
  - (a) Twelve members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.

#### **Article 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
  - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
  - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

#### **Article 41**

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

Communications received under this article shall be dealt with in accordance with the following procedure:

- (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;
- (d) The Committee shall hold closed meetings when examining communications under this article;
- (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;
- (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
  - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
  - (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

#### **Article 42**

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the

- Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
- (b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.
  3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
  4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
  5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.
  6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.
  7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:
    - (a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;
    - (b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;
    - (c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;
    - (d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.
  8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.
  9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
  10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

### **Article 43**

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

**Article 44**

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

**Article 45**

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

**PART V****Article 46**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

**Article 47**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

**PART VI****Article 48**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

**Article 49**

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

**Article 50**

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

**Article 51**

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

#### **Article 52**

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 48;
- (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

#### **Article 53**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

# APPENDIX 3

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## Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

*Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984*

ENTRY INTO FORCE: 26 June 1987, in accordance with article 27(1)

*The States Parties to this Convention,*

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing* that those rights derive from the inherent dignity of the human person,

*Considering* the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having regard* to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

*Having regard also* to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

*Desiring* to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

*Have agreed* as follows:

### **PART I**

#### **Article 1**

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

#### **Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

#### **Article 3**

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

#### **Article 4**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

#### **Article 5**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
  - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
  - (b) When the alleged offender is a national of that State;
  - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

#### **Article 6**

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

#### **Article 7**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

#### **Article 8**

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

#### **Article 9**

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

#### **Article 10**

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

#### **Article 11**

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

#### **Article 12**

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

### **Article 13**

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

### **Article 14**

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

### **Article 15**

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

### **Article 16**

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

## **PART II**

### **Article 17**

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General

- shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.
  6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
  7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

#### **Article 18**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
  - (a) Six members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

#### **Article 19**

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

## **Article 20**

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

## **Article 21**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
  - (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
  - (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
  - (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
  - (d) The Committee shall hold closed meetings when examining communications under this article;
  - (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in

- this Convention. For this purpose, the Committee may, when appropriate, set up an *ad hoc* conciliation commission;
- (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
  - (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
  - (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
    - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
    - (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.
2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## **Article 22**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
  - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
  - (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is

unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

#### **Article 23**

The members of the Committee and of the *ad hoc* conciliation commissions which may be appointed under article 21, paragraph 1(e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### **Article 24**

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

### **PART III**

#### **Article 25**

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 26**

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### **Article 27**

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

#### **Article 28**

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

#### **Article 29**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon

- communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
  3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

#### **Article 30**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

#### **Article 31**

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General .
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

#### **Article 32**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

#### **Article 33**

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

# APPENDIX 4

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## Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11

Rome, 4.XI.1950

*The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45) which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose.*

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The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

### **Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

### **Section I – Rights and freedoms**

#### **Article 2 – Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### **Article 3 – Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### **Article 4 – Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term “forced or compulsory labour” shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

### **Article 5 – Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

### **Article 6 – Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the

- extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
  3. Everyone charged with a criminal offence has the following minimum rights:
    - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    - (b) to have adequate time and facilities for the preparation of his defence;
    - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
    - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **Article 7 – No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 9 – Freedom of thought, conscience and religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### **Article 10 – Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and

impartiality of the judiciary.

**Article 11 – Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

**Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

**Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

**Article 15 – Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

**Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

**Article 17 – Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

**Article 18 – Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## **Section II – European Court of Human Rights**

### **Article 19 – Establishment of the Court**

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

### **Article 20 – Number of judges**

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

### **Article 21 – Criteria for office**

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

### **Article 22 – Election of judges**

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

### **Article 23 – Terms of office**

1. The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
6. The terms of office of judges shall expire when they reach the age of 70.
7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

### **Article 24 – Dismissal**

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

### **Article 25 – Registry and legal secretaries**

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

### **Article 26 – Plenary Court**

The plenary Court shall

- (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- (b) set up Chambers, constituted for a fixed period of time;
- (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
- (d) adopt the rules of the Court, and
- (e) elect the Registrar and one or more Deputy Registrars.

### **Article 27 – Committees, Chambers and Grand Chamber**

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

### **Article 28 – Declarations of inadmissibility by committees**

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

### **Article 29 – Decisions by Chambers on admissibility and merits**

1. If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.
3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

### **Article 30 – Relinquishment of jurisdiction to the Grand Chamber**

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

### **Article 31 – Powers of the Grand Chamber**

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and
- (b) consider requests for advisory opinions submitted under Article 47.

### **Article 32 – Jurisdiction of the Court**

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

### **Article 33 – Inter-State cases**

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

### **Article 34 – Individual applications**

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

### **Article 35 – Admissibility criteria**

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that:
  - (a) is anonymous; or
  - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

### **Article 36 – Third party intervention**

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

### **Article 37 – Striking out applications**

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:
  - (a) the applicant does not intend to pursue his application; or
  - (b) the matter has been resolved; or
  - (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

### **Article 38 – Examination of the case and friendly settlement proceedings**

1. If the Court declares the application admissible, it shall:
  - (a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

- (b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
2. Proceedings conducted under paragraph 1.b shall be confidential.

#### **Article 39 – Finding of a friendly settlement**

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

#### **Article 40 – Public hearings and access to documents**

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

#### **Article 41 – Just satisfaction**

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

#### **Article 42 – Judgments of Chambers**

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

#### **Article 43 – Referral to the Grand Chamber**

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

#### **Article 44 – Final judgments**

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final:
  - (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
  - (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
  - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

#### **Article 45 – Reasons for judgments and decisions**

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

#### **Article 46 – Binding force and execution of judgments**

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

#### **Article 47 – Advisory opinions**

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

#### **Article 48 – Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

#### **Article 49 – Reasons for advisory opinions**

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

#### **Article 50 – Expenditure on the Court**

The expenditure on the Court shall be borne by the Council of Europe.

#### **Article 51 – Privileges and immunities of judges**

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

### **Section III – Miscellaneous provisions**

#### **Article 52 – Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

#### **Article 53 – Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

#### **Article 54 – Powers of the Committee of Ministers**

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

#### **Article 55 – Exclusion of other means of dispute settlement**

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

#### **Article 56 – Territorial application**

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose

- international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
  3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
  4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

#### **Article 57 – Reservations**

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

#### **Article 58 – Denunciation**

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

#### **Article 59 – Signature and ratification**

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
4. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.  
Done at Rome this 4<sup>th</sup> day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

# APPENDIX 5

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## Standard Minimum Rules for the Treatment of Prisoners

*Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977*

### Preliminary Observations

1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.
2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.
3. On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.
4.
  - (1) Part I of the rules covers the general management of institutions, and is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge.
  - (2) Part II contains rules applicable only to the special categories dealt with in each section. Nevertheless, the rules under section A, applicable to prisoners under sentence, shall be equally applicable to categories of prisoners dealt with in sections B, C and D, provided they do not conflict with the rules governing those categories and are for their benefit.
5.
  - (1) The rules do not seek to regulate the management of institutions set aside for young persons such as Borstal institutions or correctional schools, but in general part I would be equally applicable in such institutions.
  - (2) The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment.

### PART I RULES OF GENERAL APPLICATION

#### Basic principle

6.
  - (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
  - (2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

### **Register**

7. (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
  - (a) Information concerning his identity;
  - (b) The reasons for his commitment and the authority therefor;
  - (c) The day and hour of his admission and release.
- (2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.

### **Separation of categories**

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,
  - (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;
  - (b) Untried prisoners shall be kept separate from convicted prisoners;
  - (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;
  - (d) Young prisoners shall be kept separate from adults.

### **Accommodation**

9. (1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.
  - (2) Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.
10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
  11. In all places where prisoners are required to live or work,
    - (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;
    - (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
  12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
  13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.
  14. All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.

### **Personal hygiene**

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.
16. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.

### **Clothing and bedding**

17.
  - (1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.
  - (2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.
  - (3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.
18. If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the institution to ensure that it shall be clean and fit for use.
19. Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

### **Food**

20.
  - (1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.
  - (2) Drinking water shall be available to every prisoner whenever he needs it.

### **Exercise and sport**

21.
  - (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
  - (2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

### **Medical services**

22.
  - (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
  - (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
  - (3) The services of a qualified dental officer shall be available to every prisoner.
23.
  - (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made

wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

- (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.
24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.
  25.
    - (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
    - (2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
  26.
    - (1) The medical officer shall regularly inspect and advise the director upon:
      - (a) The quantity, quality, preparation and service of food;
      - (b) The hygiene and cleanliness of the institution and the prisoners;
      - (c) The sanitation, heating, lighting and ventilation of the institution;
      - (d) The suitability and cleanliness of the prisoners' clothing and bedding;
      - (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.
    - (2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25(2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

#### **Discipline and punishment**

27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.
28.
  - (1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.
  - (2) This rule shall not, however, impede the proper functioning of systems based on self-government, under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment.
29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
  - (a) Conduct constituting a disciplinary offence;
  - (b) The types and duration of punishment which may be inflicted;
  - (c) The authority competent to impose such punishment.
30.
  - (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.
  - (2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.

- (3) Where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.
31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.
32.
  - (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.
  - (2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.
  - (3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.

#### **Instruments of restraint**

33. Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
  - (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
  - (b) On medical grounds by direction of the medical officer;
  - (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.
34. The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

#### **Information to and complaints by prisoners**

35.
  - (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.
  - (2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.
36.
  - (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.
  - (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.
  - (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.
  - (4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

### **Contact with the outside world**

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.
38. (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.
- (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.
39. Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.

### **Books**

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

### **Religion**

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.
- (2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.
- (3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.
42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

### **Retention of prisoners' property**

43. (1) All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition.
- (2) On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him.
- (3) Any money or effects received for a prisoner from outside shall be treated in the same way.
- (4) If a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.

**Notification of death, illness, transfer, etc.**

44. (1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.
- (2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.
- (3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.

**Removal of prisoners**

45. (1) When the prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.
- (2) The transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited.
- (3) The transport of prisoners shall be carried out at the expense of the administration and equal conditions shall obtain for all of them.

**Institutional personnel**

46. (1) The prison administration, shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.
- (2) The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and of the public the conviction that this work is a social service of great importance, and to this end all appropriate means of informing the public should be used.
- (3) To secure the foregoing ends, personnel shall be appointed on a full-time basis as professional prison officers and have civil service status with security of tenure subject only to good conduct, efficiency and physical fitness. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.
47. (1) The personnel shall possess an adequate standard of education and intelligence.
- (2) Before entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests.
- (3) After entering on duty and during their career, the personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized at suitable intervals.
48. All members of the personnel shall at all times so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.
49. (1) So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors.
- (2) The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers.

50. (1) The director of an institution should be adequately qualified for his task by character, administrative ability, suitable training and experience.  
(2) He shall devote his entire time to his official duties and shall not be appointed on a part-time basis.  
(3) He shall reside on the premises of the institution or in its immediate vicinity.  
(4) When two or more institutions are under the authority of one director, he shall visit each of them at frequent intervals. A responsible resident official shall be in charge of each of these institutions.
51. (1) The director, his deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.  
(2) Whenever necessary, the services of an interpreter shall be used.
52. (1) In institutions which are large enough to require the services of one or more full-time medical officers, at least one of them shall reside on the premises of the institution or in its immediate vicinity.  
(2) In other institutions the medical officer shall visit daily and shall reside near enough to be able to attend without delay in cases of urgency.
53. (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.  
(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.  
(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.
54. (1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.  
(2) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.  
(3) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

### **Inspection**

55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

## **PART II RULES APPLICABLE TO SPECIAL CATEGORIES**

### **A. PRISONERS UNDER SENTENCE**

#### **Guiding principles**

56. The guiding principles hereafter are intended to show the spirit in which penal institutions should be administered and the purposes at which they should aim, in accordance with

the declaration made under Preliminary Observation 1 of the present text.

57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.
60.
  - (1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.
  - (2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.
61. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.
62. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.
63.
  - (1) The fulfilment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; it is therefore desirable that such groups should be distributed in separate institutions suitable for the treatment of each group.
  - (2) These institutions need not provide the same degree of security for every group. It is desirable to provide varying degrees of security according to the needs of different groups. Open institutions, by the very fact that they provide no physical security against escape but rely on the self-discipline of the inmates, provide the conditions most favourable to rehabilitation for carefully selected prisoners.
  - (3) It is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered. In some countries it is considered that the population of such institutions should not exceed five hundred. In open institutions the population should be as small as possible.
  - (4) On the other hand, it is undesirable to maintain prisons which are so small that proper facilities cannot be provided.

64. The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

#### **Treatment**

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.
66. (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.
- (2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner.
- (3) The reports and other relevant documents shall be placed in an individual file. This file shall be kept up to date and classified in such a way that it can be consulted by the responsible personnel whenever the need arises.

#### **Classification and individualization**

67. The purposes of classification shall be:
- (a) To separate from others those prisoners who, by reason of their criminal records or bad characters, are likely to exercise a bad influence;
- (b) To divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.
68. So far as possible separate institutions or separate sections of an institution shall be used for the treatment of the different classes of prisoners.
69. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him in the light of the knowledge obtained about his individual needs, his capacities and dispositions.

#### **Privileges**

70. Systems of privileges appropriate for the different classes of prisoners and the different methods of treatment shall be established at every institution, in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment.

#### **Work**

71. (1) Prison labour must not be of an afflictive nature.
- (2) All prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.
- (3) Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.

- (4) So far as possible the work provided shall be such as will maintain or increase the prisoners' ability to earn an honest living after release.
  - (5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.
  - (6) Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.
72. (1) The organization and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.
- (2) The interests of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making a financial profit from an industry in the institution.
73. (1) Preferably institutional industries and farms should be operated directly by the administration and not by private contractors.
- (2) Where prisoners are employed in work not controlled by the administration, they shall always be under the supervision of the institution's personnel. Unless the work is for other departments of the government the full normal wages for such work shall be paid to the administration by the persons to whom the labour is supplied, account being taken of the output of the prisoners.
74. (1) The precautions laid down to protect the safety and health of free workmen shall be equally observed in institutions.
- (2) Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workmen.
75. (1) The maximum daily and weekly working hours of the prisoners shall be fixed by law or by administrative regulation, taking into account local rules or custom in regard to the employment of free workmen.
- (2) The hours so fixed shall leave one rest day a week and sufficient time for education and other activities required as part of the treatment and rehabilitation of the prisoners.
76. (1) There shall be a system of equitable remuneration of the work of prisoners.
- (2) Under the system prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.
- (3) The system should also provide that a part of the earnings should be set aside by the administration so as to constitute a savings fund to be handed over to the prisoner on his release.

#### **Education and recreation**

77. (1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.
- (2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.
78. Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners.

### **Social relations and after-care**

79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.
80. From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.
81. (1) Services and agencies, governmental or otherwise, which assist released prisoners to re-establish themselves in society shall ensure, so far as is possible and necessary, that released prisoners be provided with appropriate documents and identification papers, have suitable homes and work to go to, are suitably and adequately clothed having regard to the climate and season, and have sufficient means to reach their destination and maintain themselves in the period immediately following their release.
- (2) The approved representatives of such agencies shall have all necessary access to the institution and to prisoners and shall be taken into consultation as to the future of a prisoner from the beginning of his sentence.
- (3) It is desirable that the activities of such agencies shall be centralized or coordinated as far as possible in order to secure the best use of their efforts.

### **B. INSANE AND MENTALLY ABNORMAL PRISONERS**

82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
- (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.
- (3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.
- (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

### **C. PRISONERS UNDER ARREST OR AWAITING TRIAL**

84. (1) Persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, will be referred to as "untried prisoners," hereinafter in these rules.
- (2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.
- (3) Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit by a special regime which is described in the following rules in its essential requirements only.
85. (1) Untried prisoners shall be kept separate from convicted prisoners.
- (2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.
86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

87. Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.
88. (1) An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.  
(2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.
89. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.
90. An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.
91. An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.
92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.
93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

#### **D. CIVIL PRISONERS**

94. In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work.

#### **E. PERSONS ARRESTED OR DETAINED WITHOUT CHARGE**

95. Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C. Relevant provisions of part II, section A, shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.

# APPENDIX 6

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## Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

*Adopted by General Assembly resolution 43/173 of 9 December 1988*

### Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.

### Use of Terms

For the purposes of the Body of Principles:

- (a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;
- (b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;
- (c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;
- (d) "Detention" means the condition of detained persons as defined above;
- (e) "Imprisonment" means the condition of imprisoned persons as defined above;
- (f) The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

### Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

### Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

### Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

### Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

### Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.
2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

**Principle 6**

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.\* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

\* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

**Principle 7**

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.
3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

**Principle 8**

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

**Principle 9**

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

**Principle 10**

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

**Principle 11**

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

**Principle 12**

1. There shall be duly recorded:
  - (a) The reasons for the arrest;
  - (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
  - (c) The identity of the law enforcement officials concerned;
  - (d) Precise information concerning the place of custody.
2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

**Principle 13**

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

**Principle 14**

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

**Principle 15**

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

**Principle 16**

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.
3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.
4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

**Principle 17**

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

**Principle 18**

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by

- law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
  5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

**Principle 19**

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

**Principle 20**

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

**Principle 21**

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

**Principle 22**

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

**Principle 23**

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

**Principle 24**

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

**Principle 25**

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

**Principle 26**

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

**Principle 27**

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

**Principle 28**

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

**Principle 29**

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

**Principle 30**

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

**Principle 31**

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

**Principle 32**

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

**Principle 33**

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.
2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.
3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the

detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

**Principle 34**

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

**Principle 35**

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

**Principle 36**

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

**Principle 37**

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

**Principle 38**

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

**Principle 39**

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

**General clause**

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

# APPENDIX 7

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