# THE OBSERVATORY
## for the Protection of Human Rights Defenders

**L'OBSERVATOIRE**
pour la protection
des défenseurs des droits de l'Homme

**EL OBSERVATORIO**
para la Protección
de los Defensores de los Derechos Humanos

# MALAYSIA

# Mortgaging freedom for security: Arbitrary detention of five HINDRAF leaders

### International Mission of Judicial Observation


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# Contents

## Introduction

Very much concerned about the vulnerable situation of human rights defenders in Malaysia and committed to ensuring the protection of the rights of human rights defenders, the Observatory for the Protection of Human Rights Defenders, a joint programme of the International Federation of Human Rights (FIDH) and the World Organisation Against Torture (OMCT), gave mandate to Ms. Laurie Berg, a lawyer (Australia), to observe and report on the hearing concerning the detention of Hindu Rights Action Force (HINDRAF) leaders P. Uthayakumar, M. Manoharan, V. Ganabatirau, R. Kenghadharan and T. Vasanthakumar under Malaysia's Internal Security Act (ISA)[1].

The international mission of judicial observation was carried out in Kuala Lumpur by Ms. Laurie Berg from January 22 to February 1, 2008. The hearing of the detainees' *habeas corpus* application took place from January 24 to 28. Judgment denying the application and upholding the detention under Malaysian law was handed down on February 26, 2008.

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms - the "Declaration on Human Rights Defenders" - notably protects the rights of individuals and organisations to "participate in peaceful activities against violations of human rights and fundamental freedoms" (Article 12).

It is against the background of that Declaration and other international human rights obligations binding on Malaysia that the representative of the Observatory observed the hearings of January 24 and the subsequent days.

The Observatory extends its thanks to SUARAM, FIDH and OMCT member organisation in Malaysia, which facilitated the mission.

## Human rights defenders in Malaysia

In Malaysia, human rights defenders operate within the context of national security laws and government pressure, which seriously impede their work and constantly threaten their physical and psychological integrity. Despite these disincentives for political activism, Malaysia nonetheless boasts a large number of courageous activists campaigning on a broad range of social justice and community-based issues. In addition, opposition political parties continue to mobilise and criticise Government policies.

In July 1999, the National Human Rights Commission (SUHAKAM) was established, expressly mandated to have regard in the performance of its functions to the Universal Declaration of Human Rights[2].

Chief among the barriers facing human rights defenders is the curtailment of freedom of speech in Malaysia. Under domestic law, Ministry for Internal Security has indeed the discretion to grant and revoke newspaper's publishing licenses without judicial review[3]. Compounding such legal restrictions is the fact that all major mass media (print, television and radio) are controlled by interests linked to the ruling Barisan Nasional Government and are staunchly pro-Government in perspective.

On top of this, a noxious cocktail of laws further restrict the ability of activists freely to congregate, organise or protest. Despite the provision in Article 10 of the Constitution that Malaysians enjoy freedoms of assembly and association, laws such as the Trade Union Act 1959, the Societies Act 1966 and the Universities and University Colleges Act 1971 impose a straightjacket on the exercise of freedom of association and further undermine freedom of expression. The Police Act 1967 renders it compulsory to obtain a license for any public assembly, meeting or procession and confers wide discretion on the police to regulate such gatherings[4]. Licenses are granted only if the gathering is not likely to be "prejudicial to the interest of the security of Malaysia or any part thereof, or to excite a disturbance of

1. Act 82 of 1960, Statutes of Malaysia.
2. Human Rights Commission of Malaysia Act 597 of 1999. Universal Declaration of Human Rights, December 10, 1948, GA Resolution 217A, UN GAOR, 3rd Session, Pt I, Resolutions at 71, UN Document A/810.
3. See the *Printing Presses and Publications Act 1984*. The permit may be revoked at any time if the publication contains anything that is "prejudicial to public order or national security".
4. Sections 27, 27A, 27B, 27C.

the peace". The application for a license can be refused and, if issued, can be imposed with conditions or cancelled by the police at any time. Without such a license, or upon breach of stipulated conditions, the police can stop the assembly on the basis that it is illegal and order its dispersal. Moreover, police hold equally wide powers to stop and disperse activities in private places if the activity is "directed to, or is intended to be heard or participated in by persons outside the premises", "attract[s] the presence of 20 persons or more outside the premises" or is "prejudicial to the interest of the security of Malaysia or … excite[s] a disturbance of the peace". A ban on political gatherings has been imposed by the coalition Government since July 2001, on the pretext of "national security", after opposition parties expanded their influence following Mr. Anwar Ibrahim's detention (see below)[5].

## The Internal Security Act (ISA) as a tool of political oppression

As a final, chilling deterrent against opposition social activism, Malaysia's ISA, which permits indefinite detention without charge or trial, has long been used against peaceful political and rights activists. It is illuminating to trace the evolution of the ISA to understand its role in the contemporary political landscape in Malaysia.

In 1948, the British colonial authorities, responding to the perceived threat by the Communist Party of Malaya and its armed guerrilla force, enacted a State of Emergency in the British colony of Malaya[6]. With their defeat, this was lifted in 1960, three years after independence[7]. However, in the same year, the Malaysian Government enacted the ISA. Unlike the 1948 Emergency Regulations, a temporary measure to deal with extraordinary circumstances, the ISA was made permanent in law[8].

The ISA was initially justified by the authorities as necessary in order to counter what remained of the communist threat within the country. However, it almost immediately came to be used to suppress critics and political opponents. In the 1960s and 1970s the ISA was used as a tool against left-wing political parties such as the Labour Party of Malaysia and the Parti Sosialis Rakyat Malayisa. In October 1987, police arrested 107 people in "Operation Lalang", including prominent leaders and parliamentarians of opposition Parti Islam SeMalaysia (PAS), the Democratic Action Party (DAP) and the Barisan Nasional (BN) coalition.

It was later used against human rights defenders, students, teachers, journalists, religious clerics, union officials and political opponents. Indeed, it gained further international notoriety in the late 1990s when political differences led to the arrest of then-Deputy Prime Minister Anwar Ibrahim under the ISA, before he faced trumped up charges of sodomy and corruption. In April 2001, prior to a planned demonstration marking the second anniversary of Mr. Anwar's sentencing, Malaysian police detained ten of Mr. Anwar's political associates and other supporters of the *reformasi* movement under the ISA[9]. Seven were leaders of opposition Parti Keadilan Nasional (National Justice Party), a political party founded by Anwar's wife, Dr. Wan Azizah Wan Ismail. The remaining three were a leader of a prominent human rights NGO, a media columnist for alternative news source www.malaysiakini.com, and the Director of the Free Anwar campaign. Inspector-General of Police Tan Sri Norian Mai claimed the detainees were members of a "secret cell" that sought to violently overthrow the Government[10].

After September 11, 2001, the main justification for use of

5. SUARAM, *Malaysia: Human Rights Report 2005 – Civil and Political Rights*, SUARAM Kommunikasi 2007, p 80.
6. Section 4(1) of the Emergency Regulations Ordinance No 10/1948 empowered the colonial High Commissioner to make any regulations considered to be desirable for the public interest, including ones that altered ordinary criminal procedure; section 4(2) empowered the High Commissioner to modify, amend supersede or suspend any written law; section 4(2)(c) authorised curfews; section 4(2)(a) authorised censorship of media publications and regulation 20 authorised detention without trial.
7. SUHAKAM, *Review of the Internal Security Act 1960*, Human Rights Commission of Malaysia, 2003, p 3.
8. It was enacted under Article 149 of the Federal Constitution and can be repealed only by another act of Parliament. Article 149 provides that any law designed to stop or prevent "organised violence against person or property" or "promotion of feelings of ill-will and hostility between different races or other classes of the population likely to cause violence" is valid, notwithstanding that it is inconsistent with basic liberties (such as freedom of movement, assembly and speech) provided for by articles elsewhere in the Constitution. The preamble to the ISA states that the Act was intended to provide "for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia and for matters incidental thereto". Malaysian courts have dismissed arguments challenging the validity of the ISA on the basis that it is ultra vires, or exceeds the scope of Article 194: *Theresa Lim Chin Chin Ors v Inspector-General of Police (1988) 1 MLJ 293; Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* (2002) 4 MLJ 449.
9. US Department of State, *Country Reports on Human Rights Practices* 2001 (March 4, 2002).
10. Despite the serious nature of the charges, the Government produced no evidence to support its claims: Jasbat Singh, "Jailed Malaysia opposition activists await decision on renewal of detention orders" Associated Press, May 20, 2003. Indeed, the Federal Court found that

the ISA became terrorism'[11]. By June 2002, the Government had arrested around 62 persons under the ISA for alleged terrorist activity and ties to the 'KMM' militant group, alternatively referred to by Malaysian authorities as Kumpulan Mujahidin Malaysia or Kumpulan Militan Malaysia. Ten were arrested in sweeps before September 11, including Nik Adli, the son of PAS spiritual leader and Chief Minister of Kelantan Nik Aziz. Twenty-three were apprehended from December 2001 to January 2002 for alleged involvement in Jemaah Islamiah (JI). Another fourteen alleged KMM members were rounded up in April 2002. While not all affiliated with PAS, the Government has emphasised such links as there are in order to delegitimise PAS in the public's mind. In 2006, the Government continued to focus on religious groups and detained 16 members of Darul Islam (DI), said to be linked with JI[12]. Many JI detainees were initially arrested as KMM suspects, but their letters of arrest later accused them of being JI members[13]. Apparent arbitrariness in the framing of these charges and allegations puts seriously at issue the reliability of the evidence justifying the arrest and detention.

More recently, the ISA's net has widened further and has been used to combat criminal activities such as piracy, human smuggling, currency counterfeiting, and forgery of passports and identity cards[14].é Over time, the legislative arsenal authorising arbitrary detention has been supplemented by the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Preventive Measures) Act 1985, both of which allow for imprisonment without arrest warrant.

It is important to note the potent forces of race and politics that have shaped many of these past waves of ISA arrests. Clearly, the ISA has been repeatedly deployed to stifle opposition political movements. More specifically, political leaders who challenge the ruling coalition's sway within particular ethnic constituencies have most often been targets of ISA detentions. The ruling alliance, the Barisan Nasional (BN) (National Front) draws support from all three major ethnic groups in Malaysia but does so because it comprises parties that appeal to the separate ethnic groups individually: the United Malays National Organisation (UMNO), the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC). Groups that seek to appeal to the same constituencies on the basis that they are more authentic representatives, such as some Muslim movements, or attempt to mobilise across ethnic divides, such as the Keadlilan, appear very frequently to be subject to ISA arrests and detentions.

Individuals detained under the ISA have been regularly denied access to lawyers and their families. Some have been told their families would be harmed if they did not cooperate. They report having been held in solitary confinement, in dirty cells with no windows and poor ventilation, where they have no bedding and lights are left on 24 hours a day. Detainees further report having been, especially in the preliminary stages of investigation, physically assaulted, forced to strip naked, forced to imitate sexual acts, denied food, drink or sleep and subjected to intense psychological interrogation techniques in order to coerce a confession. In 2005, to mark the 45th year of ISA in operation, a group of former ISA detainees gathered at the SUHAKAM office to testify as to the torture they had suffered while detained. They alleged that they were stripped naked, beaten with broomsticks, sexually humiliated and threatened with rape[15]. SUHAKAM concluded in a report in 2003 that ISA detainees had been subjected to cruel, inhuman or degrading treatment[16].

Apparently 87 people were held under the ISA as of September 2007[17]. According to the Malaysian activist group Abolish ISA Movement, around twenty-two are currently approaching their sixth year in detention. Thousands more have been detained under the ISA since its inception in the 1960s[18].

their interrogations focused on their political beliefs and personal lives rather than any alleged violent criminal conduct and for this reason had been made ultra vires but stopped short of ordering release of the detainees because of its inability to exercise judicial review of section 8 detention orders: *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* (2002) 4 MLJ 449.

11. Then Deputy Prime Minister Abdullah Badawi announced soon after September 11 that the attacks demonstrated the value of the ISA as "an initial preventive measure before threats get beyond control": Human Rights Watch, *Opportunism in the Face of Tragedy*, at http://ww.hrw.org/campaigns/september11/opportunismwatch.htm#Malaysia.
12. SUARAM, *Malaysia: Human Rights Report 2006 – Civil and Political Rights, SUARAM Kommunikasi 2007.*
13. *Op. Cit., p 24.*
14. *Op. Cit., p 12.*
15. *Op. Cit., p 34.*
16. SUHAKAM, *Review of the Internal Security Act 1960, Human Rights Commission of Malaysia, 2003, p v.*
17. Human Rights Watch, "Malaysia: Hindu Rights Activists Detained", Press Statement, December 18, 2007.
18. It is estimated that 20,000 people have been arrested under section 73 in the first 30 years of the ISA: Rais Yatim, *Freedom under Executive Power in Malaysia* (Kuala Lumpur: Endowment, 1995) at 244. Further, a total of 4,350 had been detained under section 8 as of December 2006: SUARAM, *Malaysia: Human Rights Report 2006 – Civil and Political Rights,* SUARAM Kommunikasi 2007, p 13.

The executive detention powers of the ISA are set out in two provisions. Section 73(1) allows the police to arrest, without evidence or a warrant, any individual who "has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof"[19]. Nowhere in the legislation is this vague formula animated by specific indicators as to what constitutes a true security threat. The Federal Court has held that the Government alone must be the judge of the substance of national security[20]. Under this initial arrest provision, detainees can be held for up to 60 days for investigation.

Following this period, the Minister for Home Affairs can issue a two-year detention order under section 8 of the ISA[21]. This two year detention can be renewed indefinitely[22]. Although the ISA mandates an internal review process[23], detainees are deprived by statute of the opportunity to be charged with a crime or ever challenge the substantive basis for their detention in a court of law[24]. Further, the Home Minister has the authority to choose the place of detention and to dictate the conditions of detention, as he sees fit[25].

Malaysia's courts originally embraced their role providing independent oversight of the legality of Government actions under the ISA. However, after Operation Lalang[26], then Prime Minister Mahathir removed five High Court judges including the then-Lord President Tun Salleh Abbas and savagely attacked the reputation of the courts. In the aftermath, Malaysia's courts have been extremely conservative in protecting individual liberties against extensive executive powers. In adjudicating the legality of detention based on the Minister's satisfaction that a national security threat exists, the courts have customarily applied a subjective test of ministerial satisfaction[27]. In other words, courts are precluded from scrutinising the Minister's decision to detain according to any objective criteria of reasonableness.

19. Section 73 reads:
(1) Any police office 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 longer than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister".
20. *Mohamad Ezam Mohd. Noor v Ketua Polis Negara and Other Appeals* [2002] 4 CLJ 309 at 344.
21. Section 8(1) provides: "If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or 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".
22. Indeed, the grounds for extension do not have to be the same as the grounds cited in the original order. Section 8(7) of the ISA allows for extended two year detention periods 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".
23. Section 11(1) of the ISA reads:
A copy of every order made by the Minister under section 8(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every person shall be entitled to make representatives against the order to an Advisory Board.
24. Section 16 of the ISA reads:
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.
25. ISA sections 8(3) and (4).
26. In Operation Lalang, on October 27, 1987, Malaysian police targeted for arrest on opposition leaders and social activists.
27. First laid out in *Liversidge v Anderson* [1942] AC 206 and applied in *Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129, where the detention order was upheld notwithstanding that the detainee was given a written statement listing only one ground for detention, namely that the detainee had been involved in activities prejudicial to the security of Malaysia.

Even as the courts again began to exercise slightly more judicial scrutiny[28], section 8B of the ISA was introduced in 1989 to oust all substantive judicial review of ISA detentions[29]. Since this time, *habeas corpus* applications in relation to a two-year detention order under section 8 are restricted to matters of procedure only[30]. 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 of that of the Executive in matters concerning security of the country… 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[31].

The ambit of judicial review has been summarised thus by the Federal Court:

> As can be clearly seen, the term 'judicial review' as defined in section 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 section 8B together with section 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 of decision'. This means that one can only challenge the act done or decision made by the Yang di-Pertuan Agong [the King] or the Minister on a question of non-compliance with any procedural requirement governing such act or decision[32].

Further, what limited opportunities for redress do present themselves are rarely taken by a judiciary which tends to comply with ruling party policy and popular opinion. The Federal Court has proclaimed:

> whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and material in their possession upon which they based their decision[33].

An alternative review is provided in the ISA through the Advisory Board, authorised to conduct oversight of detentions effected under section 8[34]. However, the Board has power only to make recommendations as to which detainees should be released rather than to actually free those whom it determines have been wrongly detained. Reportedly, the Advisory Board puts capricious questions to detainees appearing before it and imposes arbitrary requirements on them[35]. In addition, the independence of the Advisory Bord may be questionable since its members are appointed by the King.

While the prospects for rigorous judicial scrutiny of section 8 detentions seem small, a number of habeas corpus applications in the Malaysian courts have met with some success when challenging the legality of arrest and the first 60 days of detention under section 73(1)(b). In this context, the courts have taken a more objective approach to judicial oversight requiring, for instance, that "some reasonable particulars not only for the purpose of satisfying the court that [there is] some basis for the arrest, but also to be fair to the

28. Justice Peh Swee Chin in *Karpal Singh v Menteri Hal Ehwal Dalam Negeri* [1988] 1 MLJ 468 overturned a detention order on the basis that one of charges alleged in the arrest order was not factually true and outside the scope of the ISA. See also a decision in Singapore, *Chng Suan Tze v The Minister for Home Affairs* [1989] 1 MLJ 69, advocating an objective test in interpreting similar security legislation.
29. On March 18, 1988, Parliament passed constitutional amendments to articles 121 and 145 which shifted questions of jurisdiction to the legislature and empowered parliament to make laws limiting or prohibiting judicial review.
30. With new constitutional authority, parliament passed the *Internal Security (Amendment) Act* 1989, Act A739 which abolished judicial review on all substantive matters: "There shall be no judicial review in any court, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong [the King] 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", s 8B(1) as amended.
31. Cited in SUHAKAM, p 81.
32. *Ng Boon Hock v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors* [1998] 2 MLJ 174 174 at 178.
33. *Theresa Lim Chin Chin v Inspector-General of Police* [1998] 1 MLJ 293.
34. The creation of the Advisory Board is mandated not by the ISA but by Article 151 of the Constitution.
35. Observatory interview with GMI representatives, January 23, 2008.

detainee"[36]. In addition, on one occasion, failure to inform the detainee of the grounds of the arrest and denial of access to counsel has been found to render the detention unlawful[37]. Yet such progressive decisions are scarce and subsequent judgments seem disinclined to follow this precedent[38]. Moreover, even when a detention under both sections 73(1)(b) and 8 of the ISA has been ruled unlawful by a court, police have resorted to immediately re-arresting the detainee and serving him with a fresh two-year detention order by the Home Minister[39].

*Local and International Responses to the ISA*

For decades Malaysia has received domestic and international criticism in relation to its security legislation and especially the ISA. In May 2001, local human rights groups formed a coalition of civil society groups to campaign for the abolition of the ISA[40]. Groups such as the Malaysian Bar Council have also called for its repeal[41]. In addition, in 2001 a High Court judge urged Parliament to review the ISA and minimise its abuses[42]. In May 2005, the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police described the preventive laws as undesirable and contrary to the right to due process as guaranteed by the Federal Constitution and the Universal Declaration of Human Rights. In its 607-page report, the Commission recommended that section 73 of the ISA be amended such that the detention period be reduced to 30 days and detainees be brought before a magistrate within 24 hours of arrest and given access to legal counsel[43]. The Commission refrained from critiquing section 8 of the ISA[44].

On the whole, and especially since September 11, Malaysians seem to have been more willing to give the Government the benefit of the doubt. Indeed, the state Human Rights Commission, SUHAKAM, published a critique of the ISA, calling for its repeal, while at the same time recommending the enactment of new anti-terrorism legislation, referencing similar laws passed in a number of countries in the final months of 2001, all of which raise grave human rights concerns[45]. The following passage from the report aptly summarises the Commission's muted approach to human rights protection:

National security laws, before September 11, 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[46].

Similarly, since 11 September 2001, Governments that were once critical of such legislation have suddenly fallen silent. Indeed, Malaysia's former Prime Minister Mahathir has publicly boasted of Malaysia's prescience in using the ISA, describing the USA PATRIOT Act[47] as an example of American reliance on Malaysian precedent[48]. Human rights in Malaysia are now newly jeopardised by an international community and Malaysian citizenry that has become complacent about overreaches of executive power and willing to defer to Government discretion in

36. *Abdul Ghani Haroon v Ketua Polis Negara [2001] 2 MLJ 689. See also Nasharuddin Nasir v Kerajaan Malaysia & Ors* (No 2) [2003] 1 CLJ 353 at 360-2 where the Court held that the relevant police officers failed to apply their minds when extending the detention of the detainee under section 73.
37. In *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689 Judge Hishamudin Mohamad Yunus applied Article 5(3) of the Constitution which reads: "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".
38. See for example *Noor Ashid bin Sakib v Ketua Polis Negara* [2002] 5 MLJ 22 at 34.
39. See *Karpal Singh v Menteri Hal Ehwal Dalam Negeri* [1988] 1 MLJ 468 and Nasharuddin Bin Nasir v Kerajaan Malaysia & Ors (No. 2) [2002] 4 MLJ 617.
40. The AIM (Abolish ISA Movement), or Gerakan Mansuhkan ISA, comprises 83 non-governmental organisations in Malaysia.
41. Malaysian Bar Council's Memorandum on the Repeal of Laws Relating to Detention Without Trial (1998) and at the Malaysian Bar Council's General Meeting of October 1998, attended by some 2,480 lawyers, a unanimous resolution was adopted calling for the repeal of the ISA as well as two other major laws in force in Malaysia that provide for detention without trial: the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Prevention Measures) Act 1985.
42. *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689.
43. SUARAM, *Malaysia: Human Rights Report 2005 – Civil and Political Rights*, SUARAM Kommunikasi 2007, p 24.
44. SUARAM, *Malaysia: Human Rights Report 2006 – Civil and Political Rights*, SUARAM Kommunikasi 2007, p 12.
45. SUHAKAM, *Review of the Internal Security Act 1960 April 2003*, p 89. For example, SUHAKAM recommends legislative reform which would allow for 29 days of detention without charge.
46. SUHAKAM, *Review of the Internal Security Act 1960*, Human Rights Commission of Malaysia, 2003, p 6-7.
47. The PATRIOT Act of 2001 (Provide Appropriate Tools Required to Intercept and Obstruct Terrorism) became Public Law 107-56 45 days after September 11, 2001.
48. "Malaysia minister says US endorses detention law" *Deutsche Press-Agentur* (May 12, 2002).

servicing national security interests. The ISA's potential for oppression in many ways has grown.

## The detention of the HINDRAF leaders

*HINDRAF advocacy*

HINDRAF protests what they believe are discriminatory government economic policies against Malaysia's Indian population. HINDRAF is a coalition-based organisation primarily directed by two brothers, Messrs. P. Waythamoorthy and P. Uthayakumar, and has very quickly developed a substantial grassroots presence. Making up some 8 percent of Malaysia's population (Malays comprise about 60 percent and ethnic Chinese about 25 percent), Indians are historically underprivileged compared to other ethnic groups and have long suffered discrimination, especially by the affirmative action in favour of Malays (also known as the bumiputeras) which was instituted in 1970[49]. The Indian population are mostly Tamils descended from indentured labourers brought to Malaysia by the British in the 1800s.

A number of incidents in Malaysia enlivened the HINDRAF campaign against the Government. In 2006, the widow of a well known mountaineer, Mr. M Moorthy, challenged the religious law on burial customs. She had sought a declaration that he remained a Hindu until his death while the Federal Territory Islamic Affairs Council insisted he had converted to Islam and must be buried a Muslim. After the Syariah Court ruled in favour of the Council, Mr. Moorthy's widow approached the High Court for relief. The High Court concluded that civil courts had no jurisdiction on questions pertaining to Islam when the Syariah Court had made a decision. Mr. Moorthy was buried in accordance with Islamic rites[50]. The controversy around this case flamed a debate over the rights of non-Muslims in Malaysia. The religious authorities had failed to inform the deceased's family of its application to the Syariah Court and Mr. Moorthy's widow was not granted an opportunity to testify at that forum. Furthermore, since non-Muslims have no standing to seek redress through Syariah courts, the civil courts' refusal to adjudicate matters related to Islam leave non-Muslims with disputes over domestic matters involving Muslims with no legal recourse.

HINDRAF advocacy was apparently initially motivated by the plight of Mr. Moorthy's widow which came to symbolise the influence of Sharia-based law over non-Muslim Malaysians[51]. Subsequently, HINDRAF highlighted what it saw as systematic demolition of Hindu temples on plantation lands which had been subject to Government re-zoning and development approval[52]. HINDRAF's advocacy on these issues culminated in the presentation of a written statement to the Prime Minister on 12 August 2007 demanding, inter alia, the end to racism, affirmative action for poor Malaysians and especially ethnic Indians (to balance the preferential treatment given to Malay citizens under Malaysian law), Government funding for Tamil schools, a Royal Commission into violence committed against 100 Indians in 2001, affordable housing and a minimum wage. On August 30, 2007, HINDRAF filed a class action in the UK Royal Courts of Justice against the British Secretary of State for Foreign and Commonwealth Affairs, seeking redress for the displacement and exploitation of hundreds of thousands of Indian labourers during the colonial administration of Malaysia, including compensation of £300,000 for every Indian in Malaysia[53].

Government harassment quickly ensued. Allegedly, the HINDRAF leaders' officers were raided. On November 23, 2007, Messrs. Waythamoorthy, Uthayakumar and VS Ganapathi Rao were arrested and charged under the Sedition Act 1948[54]. They were granted bail and charges were quickly dropped for lack of evidence[55]. A rally in Kuala Lumpur was organised for November 25, 2007, to deliver a petition with 100,000 signatures in support of the class action to the British High Commission. HINDRAF's efforts to obtain police permission for the rally were rebuffed by the Kuala Lumpur police, which refused to issue a permit and served a court order on HINDRAF supporters banning them from organising or participating in the planned gathering[56].

49. Baradan Kuppusamy, "Facing Malaysia's Racial Issues", *Time Magazine*, November 26, 2007.
50. SUARAM, *Malaysia: Human Rights Report 2006 – Civil and Political Rights,* SUARAM Kommunikasi 2007.
51. HINDRAF document "Kurang ajar punya polis lain kali jangan berani bunuh anak orang", on file with author;
52. Associated Press, "Hindu Group Protests 'Temple Cleansing' in Malaysia", *The Financial Express*, May 23 ,2006, at www.financialexpress.com/old/latest_full_story.php?content_id=128069.
53. Claim Form, No. HQ07X02977, High Court of Justice, Queen's Bench Division, filed August 30, 2007, on file with author.
54. Wani Muthiah, "Lawyers Charged with Sedition" *The Star,* November 24, 2007.
55. Soon Li Tsin "HINDRAF Trio Discharged from Sedition" Malaysiakini.com, November 26, 2007.
56. Andrew Sagayam, "Cops serve court order on rally organizers, warn public to stay away", *The Star* (Malaysia), November 24, 2007.

Asserting that Malaysia's constitution guaranteed freedom of assembly and expression[57], HINDRAF proceeded with the demonstration, which drew between 10,000 and 30,000 participants. Given the early morning march, some of those planning to participate gathered during the evening of November 24 at Batu Caves, a sacred Hindu site around seven miles from Kuala Lumpur, where they mingled with worshippers. At 4 am, police used tear gas and water cannons against those in the temple. Up to 190 people were detained[58]. Later that morning, a rally in Kuala Lumpur proceeded peacefully until police told demonstrators to disperse. When they refused, police used tear gas, chemically laced water, and batons to disperse them. Protestors lobbed the canisters back a police. A few hundred protesters and three police officers were injured.

It may be that the Government response to this incident was influenced in part by two other significant public protests occurring just previously. First, in September, 2,000 lawyers carried out a "Walk for Justice" in Malaysia's administrative capital Putrajaya protesting Government inaction in the face of allegations of judicial corruption. The lawyers called for an official investigation. Then, on November 10, a coalition of opposition parties and NGOs staged a rally under the campaign of 'Bersih' (meaning 'clean') demanding transparency and fairness in electoral process. With an estimated 30,000 it was the largest display of public activism since 1998 after the sacking of then-Deputy Prime Minister Anwar Ibrahim[59]. While these public gatherings were met with little reaction by Malaysian police, it may be that the HINDRAF rally was one expression of Government criticism too many, especially for a Government which was rumoured to be planning an election for the early months of 2008.

In the weeks since the HINDRAF protest, the Government charged 31 demonstrators with attempted murder of an injured policeman[60]. The murder charges were dropped on December 17. However 25 members of the group still faced charges for causing mischief and unlawful assembly under section 27 of the Police Act.

*HINDRAF activists detained*

Then, just over two weeks after the rally at Batu Caves, on December 13, five HINDRAF leaders were arrested. Messrs. P. Uthayakumar, M. Manoharan, V. Ganabatirau, R. Kenghadharan and T. Vasanthakumar were immediately taken 300 km outside of Kuala Lumpur to Kamunting Detention Camp. The other HINDRAF leader, Mr. Waythamoorthy, was in London at the time of the arrests and has remained there.

The asserted basis for the detention was expressed as follows in the Malaysian independent news website, *Malaysiakini.com*:

> Manoharan's detention order stated that he was arrested because 'there were reasons to believe' he is a threat to national security through his involvement in HINDRAF which has caused 'restlessness among the different races'. '(These activities) have led to racial and anti-Government sentiments among the Indians,' stated the detention order served on his wife, a copy of which was made available to *Malaysiakini*. 'To ensure the struggle's success, HINDRAF has tried to gain international recognition as well as seek help from the extremist group Liberation Tigers of Tamil Eelam to launch further riots of a bigger scale in this country,' it read further. The order also listed seven 'facts' to prove its claim, including details of Manoharan's activities in HINDRAF from Oct [sic] 6 at various events in Selangor, Perak, Kuala Lumpur and Negri Sembilan. Among others, he was accused to have questioned bumiputera privileges and urged the Indian community to be united in fighting against Malay and Umno leaders as their 'main enemy'[61].

On December 15, Inspector-General of Police Tan Sri Musa Hassan told the media, without elaboration, that the five detained activist leaders "clearly have links with international terrorist organisations and they are involved in activities that amount to inciting racial hatred"[62].

57. Constitution Article 10.
58. Baradan Kuppusamy, "Facing Malaysia's Racial Issues", *Time Magazine*, November 26, 2007.
59. *Ibid*.
60. *BBC News*, "Malaysia Charges Ethnic Indians" December 4, 2007, http://news.bbc.co.uk/2/hi/asia-pacific/7126804.stm
61. Beh Lih Yi, "Habeas Corpus Filed for Manoharan" *Malaysiakini*, December 14, 2007, accessed at www.malaysiakini.com/news/76085.
62. "HINDRAF has terror links, says Malaysian police chief", *Hindustan Times*, December 15, 2007.

## The hearing

The hearing of the five detainees' habeas corpus applications was conducted in the High Court of Malaya at Kuala Lumpur between January 24 and 28, 2008 before Judicial Commissioner Zainal Azman Ab Aziz[63]. The Observatory is greatly concerned that a hearing on such a politically sensitive matter was conducted by a Judicial Commissioner, a judicial officer who sits without tenure and who is therefore more vulnerable to the perception of bias.

During the course of proceedings, submissions were made by Messrs. Karpal Singh and Gobind Singh Deo, for the applicant detainees, and Attorney-General Tan Sri Abdul Gani Patail for the state respondents.

At the interim hearing in December, the detainees' lawyers had argued for the applicants to be produced from the detention centre to be present at the final hearing[64]. However, apparently, no formal application was pursued in order to ensure that the detainees were present in court. Perhaps such a request was considered futile in light of Federal Court precedent in similar cases that detainees have no right to attend habeas applications since "no oral evidence is required in the habeas corpus proceeding and the issue of the detainee being prejudiced [does] not arise [when the detainee has] the benefit of counsel"[65]. Indeed, in conversations with the Human Rights Commissioner, KC Vohrah, the Observatory was informed that it was quite proper for the detainees not to be produced unless and until the order is made granting the habeas application. Nevertheless, it is of great concern to the Observatory that the detainees were not present in a court hearing on the legality of their detention.

At the outset of this hearing, the court was informed that the Observatory and its partner human rights organisation in Malaysia, SUARAM, would be jointly observing the proceedings as a friend of the court by holding a 'watching brief', represented by Mr. Bernard Francis, as would the Malaysian Bar Council by Mr. Saha Deva Arunasalam. The Observatory and SUARAM had prepared written submissions in the form of an amicus curiae brief, highlighting some of the human rights obligations binding upon Malaysia which were relevant to issues before it and wished also to make oral submissions to assist the court in this regard[66]. Unfortunately, this opportunity did not eventuate; the Observatory understands that the Attorney General indicated to Mr. Francis that the respondents would object to submissions of any kind made on behalf of either Observatory and SUARAM or the Bar Council. The Observatory had the impression, as well, that the counsel for the applicants also did not wish for such an amicus brief to be put to the court.

As a result, and in accordance with the Malaysian statutory restriction on judicial review[67], the hearing was restricted to assessing the procedural compliance of the detention orders with the ISA[68]. Because the procedural burdens placed on the Government are so few, even this one avenue of review is of extremely limited scope.

*Submissions for the applicants*

Counsel for the applicants urged the court to construe the law of preventive detention strictly and, in case of doubt, to lean to the advantage of the subject. Relying solely on Malaysian domestic law, it was argued that a detention not in accordance with law is inconsistent with the fundamental right guaranteed by Article 5(1) of the Federal Constitution.

The key challenge raised by the applicants was that sections 73 and 8 of the ISA are interrelated, and any detention under section 8 must be instigated by an arrest under section 73. It was suggested that previously section 8 detentions have invariably been preceded by arrests under section 73. The failure to do so in this case, it was suggested, amounted to procedural non-compliance which infected the detention as a whole. Counsel made this argument using tools of statutory interpretation to assert

63. Article 5(2) of the Malaysian Constitution states: "Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him".
64. Syed Jaymal Zhaiid, "HINDRAF 5: Lawyers Want Them in Court" Malaysiakini December 26, 2007, accessed at http://www.malaysiakini.com/news/76402.
65. *Abdul Ghani Haroon v Ketua Polis Negara & Another Application* [2001] 4 MLJ 11.
66. See Observatory and SUARAM's submission in Annex.
67. Section 8B, ISA.
68. The applicants' counsel acknowledged that this has been recently affirmed by the Federal Court in *Abdul Razak bin Baharudin and others v Ketua Polis Negara and others [2006] 1 MLJ 320 and Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia and 2 others* [2005] 4 AMR 724.

that section 8 provides no powers of arrest and any apprehension of a person for the purpose of section 8 detention is authorised only by section 73. Furthermore, Counsel cited Federal Court authority to support this interpretation[69], and impugned contradictory authority on a technical point[70]. Counsel submitted as well that if the Court were to adopt the contradictory authority, the contention that section 8 and 73 operate independently should be limited to "special circumstances", an exception which was argued not to be relevant to the present detentions[71].

The applicants' urged interpretation would prevent the detaining authorities from avoiding the slightly more onerous evidentiary requirements attaching to section 73 arrests, as well as the opportunities for more substantive judicial review. As to the first, section 73 imports an additional requirement that the arresting officer have "reason to believe" that there exist grounds that would justify the detention under section 8, thereby narrowing the arresting authorities' discretion[72]. Regarding the second, unlike section 8, section 73 does not engage the section 8B ouster provision precluding judicial consideration of the substantive basis for detention. In the words of Mr Singh, counsel for four of the applicants, "this little mercy that was accorded to the detainee has now been taken away"[73].

In addition, the applicants' counsel argued that these detentions were made in bad faith in that the allegations against the detainees suggest that the Minister perceived their activities as a threat to the UMNO Government, rather than the security of Malaysia. In that the Minister acted to prevent any prejudice to his Government, the law was argued to be used for an ulterior purpose and the detentions were illegal.

In an effort to point to further technical matters of procedural non-compliance, the applicants also alleged that authorities failed to conform to mandatory requirements in the Internal Security (Advisory Board) Rules 1972 when their arrest orders advised them to forward any challenge to their detention to the Chairman and not the Secretary of the Advisory Board.

*Submissions for the respondents*

In reply, the Attorney General focused on the scope of review permitted to the court, arguing that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, which includes whether or not the facts on which the order of detention is based are sufficient or relevant[74]. It was argued that the Minister's discretion in this regard is completely unfettered and the Court can have no regard to the sufficiency or existence of police investigations leading to the detention nor whether any evidence whatsoever formed the basis for the Minister's decision to detain. Indeed, Counsel pointed out that even a positive showing of bad faith on the part of the Minister has been held not to amount to "procedural non-compliance"[75].

In short, the Court was urged to aver to judicial authority that "where matters of national security and public order are involved, the court should not intervene by way of judicial review, or [should at least] be hesitant [to do] so, as these are matters especially within the preserve of the executive, involving, as they inevitably do, policy considerations and the like"[76]. In the words of the Attorney General in oral submissions,

69. *Ketua Polis Negara v Abdul Ghani Haroon* [2001] 4 MLJ 11.
70. Counsel argued that the judgment in *Mohamad Ezam bin Mohamad Nor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449 is a nullity by virtue of the fact that one of the presiding judges died between the hearing and the delivery of the judgment. Counsel argued that the *Courts of Judicature Act* 1964 did not contemplate this eventuality or provide a legislative mechanism to correct for it.
71. Counsel noted that "there is a dire lack of material in the two affidavits filed by the minister to show certain circumstances for him to have acted directly under s.8(1)… Perhaps, had there been an uprising by force of arms which called for bypassing the provisions of s.73, resort directly to s.8(1) could be considered *certain circumstances*" (emphasis in original) Outline Submissions in Reply to Submissions of Attorney General, *Manoharan A/l Malayalam v Menteri Keselamatan Dalam Negeri and Anor*, High Court of Malaya at Kuala Lumpur, Criminal Application No 44-87-2007, p 3.
72. Note though that the Malaysian Government has previously threatened to introduce amendments to ensure that police are no longer required to defend detentions in court, that no negative inferences be drawn from their decision not to do so, and that detainees held under section 73 be prohibited from divulging any details of their interrogations to the courts. See Report by the Observatory for the Protection of Human Rights Defenders and SUARAM, *Malaysia: "The Boa Constrictor": Silencing Human Rights Defenders* 12, 2003.
73. Observatory trial notes, January 24, 2008.
74. Counsel cited *Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1984] 1 MLJ 67 and *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129.
75. *Abdul Razak bin Baharuddin & Ors v Ketua Polis Negara & Ors* [2006] 1 MLJ 320 at 328.
76. Respondent's submissions p 34, citing *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 at 97.

> There is the doctrine of separation of powers and this power to detain lies with the executive, not the court. The right to detain is a matter of policy, a matter of opinion, which must lie with the executive[77].

As to the procedural complaints raised by the applicants, the Attorney General submitted that the logic of statutory construction as well as case law precedent direct that sections 8 and 73 operate quite distinctly. The source of power to arrest an individual for the purpose of a section 8 detention can be found either implicitly in section 8, in other sections of the ISA or in the more general powers of apprehension in the Police Act 1967. Further, any misstatement in the arrest order as to the addressing of a legal challenge did not prejudice the detainees and was a matter of form not amounting to "procedural non-compliance" with the Advisory Board Rules or the ISA[78].

*The judgment*

At the hearing on January 28, 2008, judgment was reserved until February 26. It should be noted at the outset that, where the liberty of a person is involved, it is imperative to ensure that there is no delay in the administration of justice. The Observatory is concerned that the applicants continued to be detained for over four weeks awaiting judgment on a matter that appeared not to raise any complex question of law. The right to personal liberty is a fundamental human right. In all cases, and especially where a person is detained without charge or trial, the determination of the lawfulness of her detention must be made promptly. Indeed, the need to dispose of applications such as habeas corpus applications speedily is provided for under article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) and principles 32 and 37 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

On February 26, 2008, the Court delivered judgment denying all five applications for release. The Court decided that Sections 73 and 8 are not dependent on each other, based on a 1988 ruling of the Federal Court: under this interpretation, Section 8 authorizes the Minister of Internal Security to issue a Detention Order without investigation under section 73 of the ISA. The Court also considered that the Minister of Internal Security's decision to detain the HIDRAF leaders was based on the case file investigation, and not made mala fide: the Minister decided that the applicant was involved in activities which threaten the public peace and jeopardised the safety of Malaysia. The Court therefore decided that the detention under section 8(1) of the ISA was lawful.

The Court also rejected the argument based on a procedural flaw. According to the Court, the fact that the arrest orders advised the applicants to forward any challenge to their detention to the Chairman and not the Secretary of the Advisory Board does not vitiate the procedure because the applicants were informed of their right to make a representation to the Advisory Board. The Court considered that the flaw is directorial, and not mandatory.

As a consequence, the Court dismissed the habeas corpus applications of the five detainees and considered their detention at the Taiping Security Detention Centre in Perak as valid and in accordance to the law.

## International human rights norms

The Observatory recalls that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), adopted by the General Assembly on December 9, 1998, affirms the right to promote and to strive for the protection and realisation of human rights. Article 12 of the Declaration protects the rights of individuals and organisations to "participate in peaceful activities against violations of human rights and fundamental freedoms". Furthermore, it reiterates the obligation of the State to adopt all necessary measures to ensure that human rights defenders are fully protected against attacks, violence, threats, and discrimination, both by law and in practice[79].

77. Observatory trial notes, January 24, 2008.
78. Counsel cited *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* (1991) 2 CLJ 1199 and *Timbalan Menteri Keselamatan Dalam Nergeri, Malaysia & Others v Ong Beng Chuan* (2006) 2 MLJ 374.
79. In his 1998 report, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Commission on Human Rights explained the content of this obligation in the following terms: "In circumstances where certain State authorities or sectors of the civil society perceive political dissent, social protest or the defence of human rights as a threat to their authority, the central Government authorities should take action to create a climate more favourable to the exercise of those rights and thus reduce the risk of violations on the right to life. The Special Rapporteur encourages Governments to recognise publicly the legitimacy of and contribution made by human rights defenders" (E/CN.4/1998/68, Section D).

Notwithstanding the Malaysian Government's frequent expressions of scepticism towards human rights, as a member of the United Nations, it is bound to commit to the UN Charter's stated purpose of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion"[80]. In addition, as a founding member of the Association of Southeast Asian Nations (ASEAN), Malaysia signed the ASEAN Charter on November 21, 2007, under which Malaysia has pledged to "promote and protect" human rights. These human rights are elaborated in the Universal Declaration on Human Rights (UDHR), where protections include the individual's rights against arbitrary arrest and detention (Article 2), to liberty (Article 3), to effective remedy for acts violating fundamental rights (Article 8), and 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 10). Section 4(4) of the Human Rights Commission of Malaysia Act 1999 specifically provides for SUHAKAM to have regard to the provisions of the UDHR when carrying out its functions.

Intended as an elaboration of the rights inscribed in the UDHR, the ICCPR[81] has met with such consistent endorsement and compliance that many of its provisions are now said to reflect customary international law[82]. Importantly, Article 9 provides

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the charges 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 authorised by law to exercise judicial power and shall be entitled to trial within 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 the 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.

The Observatory underscores the strength of this prohibition against arbitrary detention.

It should be noted that this standard is met not simply by avoiding detentions other than in accordance with domestic law. Non-arbitrary arrest and detention require that there be reasonable grounds to trigger the workings of the law and definite periods of incarceration for offences committed. The UN General Assembly has articulated the worldwide consensus on core, non-derogable protections held by persons under any form of detention in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[83]. Principle 10 guarantees that persons arrested shall be informed at the time of their arrest of the reasons for their arrest and shall be promptly informed of any charges against them. Principle 11 provides that "a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority" and that a "judicial or other authority shall be empowered to review as appropriate the continuance of detention". The Standard Minimum Rules for the Treatment of Prisoners similarly reflect a concern that all persons arrested and detained shall have the reasons for their detention and the authority therefore publicly recorded[84].

Certainly, the UDHR countenances circumstances in which rights might be abrogated, in Article 29(2) which provides that "[i]n 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

80. UN Charter, articles 1(3), 55 and 56.
81. International Covenant on Civil and Political Rights, UNGA Res 2200 A (xxi), 999 UNTS at 171 & 1057 UNTS at 407 (December 16, 1966).
82. General Comment No 24, UN GAOR Human Rights Committee, 52nd Sess., UN Doc CCPR/C/21/Rev1/Add 6 (1994).
83. Adopted by GA Res 43/173 of December 9, 1988.
84. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/Conf 6/1 at 67 (1956).

and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in the democratic society". Article 4 of the ICCPR also provides for derogation in times of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed".

International law therefore entitles States to derogate from their human rights obligations in periods of national emergency. However, even in periods of emergency, the State must make a case for the necessity of these measures and ensure that they are strictly tailored to the exigencies of the situation. Such measures must be "strictly required by the exigencies of the situation", not prove "inconsistent with other obligations under international law" and must "not involve discrimination solely on the ground of race, colour, sex, language religion or social origin". Further, any restrictions on rights must be absolutely necessary and proportional to the crisis at hand[85]. These exacting demands are intended to guard against disingenuous suspensions of rights.

Malaysia has failed to point to any identifiable emergency. It has further failed to demonstrate, if exceptional security circumstances were to exist, why so invasive an instrument as the ISA is required. Indeed, Malaysia's record of spurious and changing justifications over the years detracts from Malaysia's credibility with respect to more recent explanations of any security threats.

This is the case even though Malaysia has been a member of the UN Human Rights Council since 2006. In this capacity, Malaysia has the responsibility to uphold the highest standards in the promotion and protection of human rights[86]. In announcing its candidacy, Malaysia made a pledge noting that it upholds that the provision and protection of all human rights as an indispensable aspect in the process of nation building. Consistent with the Universal Declaration of Human Rights, successive Malaysian Governments have made the guarantee of the individual's fundamental rights and liberties, as enshrined in the Constitution, the cornerstone of its policies and programmes[87].

Nevertheless, the Malaysian Government denied the request made in 2003 for a country visit by the UN Special Representative of the Secretary General on the Situation of Human Rights Defenders, Ms. Hina Jilani, and another request in 2005 by the UN Special Rapporteur on Promoting and Protecting Human Rights while Countering Terrorism, Mr. Martin Scheinin.

85. *In the case of Ireland v United Kingdom*, HUDOC, Application NO 5310/71, European Court of Human Rights.
86. General Assembly Resolution, "Human Rights Council", A/RES/60/251, adopted on April 3, 2006.
87. Malaysia's Candidature to the United Nations Human Rights Council, Aide-Memoire, submitted to by the Permanent Mission of Malaysia to the UN to the secretariat of the UN, April 26, 2006.

## Conclusions

The Observatory recognises the obligations of the Malaysian Government to protect its population from terrorist attack and to bring those responsible for engaging in violence to justice. But the Malaysian Government has yet to demonstrate that any of the individuals it has detained have actually engaged in any illegal or physically dangerous activity.

More importantly, it has not shown that the investigation, arrest and detention of alleged militants could not be handled through normal criminal procedures that include proper procedural safeguards to protect the rights of the accused. If authorities truly considered the public disclosure of evidence supporting a detention to be prejudicial to national security, it should be possible for an independent judge to scrutinise such evidence. Instead, the ISA relieves the Government of defending ISA detentions in court in any way. In short, the absence of judicial review of the substantive grounds for detention eliminates a significant safeguard against the abuse of executive power without any demonstrable benefit for the personal security of Malaysians. Indeed, the arbitrary detention of the HINDRAF leaders suggests that the security of Malaysians continue to be seriously threatened.

Human rights protections can be harmonised with national security, but there is no indication that Malaysia has made any efforts to do so. Instead, the ISA demonstrates what can happen when states promote security at the expense of human rights. It shows how temporary measures implemented as a reaction to a perceived threat to a nation's security can become permanent, and through incremental changes, become more restrictive over time, undermining fundamental institutions like the judiciary. The threat of terrorism is simply the latest cloak beneath which the tactics inimical to civil liberties are exercised in Malaysia. However, the potential for a sharp decline of the protection of human rights is greater now that there is less scrutiny from the international community and more complacency by Malaysians willing to mortgage freedom as part of the war on terror.

Under the ISA, individuals are deprived of many of their fundamental human rights enshrined in the Universal Declaration of Human Rights. They are deprived of their rights to a fair and public trial, to be presumed innocent until proven guilty according to law, to answer the charges against them and not to be arbitrarily detained. Malaysia is a modern country in which detention by executive fiat has no place.

## Recommendations

**To the Malaysian authorities:**

1. The ISA should be repealed in its entirety and all persons in Malaysia should be tried in conformity with international fair trial standards. Indefinite detention without trial can never be in conformity with international human rights standards.

2. The Malaysian Government should immediately release all ISA detainees in the absence of valid legal charges that are consistent with international law and standards, or if such charges exist, bring them before an impartial and competent tribunal and guarantee their procedural rights at all times. In particular, Messrs. P. Uthayakumar, M. Manoharan, R. Kenghadharan, V. Ganabatirau and T. Vasanthakumar should be released immediately and unconditionally, as their detention is arbitrary.

3. All persons arrested in Malaysia should be promptly brought before a judge, informed of the charges against them and have access to legal counsel, medical assistance and family members.

4. The physical and psychological integrity of Messrs. P. Uthayakumar, M. Manoharan, R. Kenghadharan, V. Ganabatirau and T. Vasanthakumar should be guaranteed in all circumstances as well as their right to receive visits and communicate with their lawyers and relatives.

5. Malaysia should conform with the provisions of the UN Declaration on Human Rights Defenders in all circumstances, especially its Article 1, which states that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels", as well as Article 12.2, which provides that "the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration".

6. Malaysia should address a standing invitation to all UN human rights special procedures, including the Special Rapporteur on human rights defenders, the Special

Rapporteur on the promotion and protection of human rights while countering terrorism and the Working Group on Arbitrary Detention.

7. Malaysia should ratify the ICCPR and the International Covenant on Economic, Social and Cultural Rights, without delay, as well as the UN Convention Against Torture and its Optional Protocol.

8. Malaysia should include in its reports to the UN Security Council Committee Against Terrorism a description of the mechanisms it has established to guarantee the respect for human rights in the framework of its counter-terrorism policies.

9. More generally, ensure in all circumstances the respect for human rights and fundamental freedoms in accordance with international and regional human rights instruments ratified by Malaysia.

**To the international community:**

1. To address the situation of human rights defenders in the framework of the political dialogue between third states and Malaysia; the European Union should in particular base such demarches on the EU Guidelines on human rights defenders of 2004.

2. The states parties to the UN Committee against Terrorism should address the issue of human rights violations in the framework of the fight against terrorism, on the occasion of the next examination of Malaysia's report.

3. The human rights body to be established in the framework of the ASEAN should address the issue of respect for human rights in the framework of the fight against terrorism as a major concern.

## Annex – details of mission

Ms Laurie Berg attended the High Court of Malaysia from January 24 to 28, 2008.

While in Kuala Lumpur, Ms. Berg had formal meetings with:

• Spouses of the HINDRAF detainees: Mrs. S. Pushpaneela (wife of Mr. M. Manoharan), Mrs. B. Buvaneswary (wife of Mr. V. Ganabatirau), Mrs. Vickneswary (wife of Mr. Vasanthakumar), Mrs. Kalaivani (wife of Mr. R. Kengadharan).

• Ms. Enalini Elumalai, Coordinator, SUARAM

• Mr. Yap Swee Seng, Executive Director, SUARAM

• Mr. Bernard Francis, barrister

• Mr. Edmund Bon, Chair, Human Rights Committee, Bar Council of Malaysia

• Mr. Saha Deva Arunasalam, barrister

• Mr. RS Thanenthirran, Acting National Coordinator, HINDRAF and other HINDRAF supporters

• Ms. Cynthia Gabriel, SUARAM Secretariat

• Mr. S Arutchelvan, SUARAM Secretariat and Secretary-General, Parti Sosialis Malaysia

• Mr. KC Vohrah, Commissioner, SUHAKAM, Malaysian Human Rights Commission and Mr. A Izyanif, SUHAKAM officer

• Abolish ISA Movement members including Aliza binti Jaffar, Norlaila Othman, Syed Ibrahim, Animah Ferrar, Latheefa Koya, Nashitah Mohd Noor, Lin Sing Yee

# THE OBSERVATORY

**For the Protection of Human Rights Defenders**

## L'OBSERVATOIRE

pour la protection
des défenseurs des droits de l'Homme

## EL OBSERVATORIO

para la Protección
de los Defensores de los Derechos Humanos


The Emergency Line
La Ligne d'Urgence
La Línea de Urgencia

e-mail
Appeals@fidh-omct.org

FIDH
tel: 33 (0) 1 43 55 55 05
fax: 33 (0) 1 43 55 18 80

OMCT
tel: 41 (0) 22 809 49 39
fax: 41 (0) 22 809 49 29


### Activities of the Observatory

The Observatory is an action programme, based on the conviction that strenghtened cooperation and solidarity among defenders and their orga-nisations will contribute to break the isolation of the victims of violations. It is also based on the necessity to establish a systematic response from NGOs and the international community to the repression against defenders.

With this aim, the priorities of the Observatory are:
a) a system of systematic alert on violations of rights and freedoms of human rights defenders, particularly when they require an urgent intervention;
b) the observation of judicial proceedings, and whenever necessary, direct legal assistance;
c) personalised and direct assistance, including material support, with the aim of ensuring the security of the defenders victims of serious violations;
d) the preparation, publication and diffusion of a world-wide level of reports on violations of human rights and of individuals, or their organisations, that work for human rights around the world;
e) sustained lobby with different regional and international intergovern-mental institutions, particularly the United Nations, the Organisation of American States, the African Union, the Council of Europe, the European Union, the Organisation for Security and Cooperation in Europe (OSCE), the International Organisation of the Francophonie, the Commonwealth and the International Labour Organisation (ILO).

The activities of the Observatory are based on the consultation and the cooperation with national, regional and international non-governmental organisations.

With efficiency as its primary objective, the Observatory has adopted flexible criteria to examine the admissibility of cases that are communicated to it, based on the "operational definition" of human rights defenders adopted by OMCT and FIDH: "Each person victim or at risk of being the victim of reprisals, harassment or violations, due to his compromise exercised individually or in association with others, in conformity with international instruments of protection of human rights, in favour of the promotion and realisation of the rights recognised by the Universal Declaration of Human Rights and guaranteed by several international instruments.


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