

**Opinion No. 32/2008 (Malaysia)****Communication addressed to the Government on 10 June 2008****Concerning Mr. Mat Sah Bin Mohammad Satray****The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. In the light of the allegations made, the Working Group conveys its appreciation to the Government for having forwarded the requisite information. The Working Group transmitted the reply provided by the Government to the source which has not provided its comments.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The Working Group considers that it is in a position to render an Opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. According to the source, Mr. Mat Sah bin Mohammad Satray, aged 39, a Malaysian national, technician at a semi-governmental institution called Dewan Bahasa dan Pustaka, a company producing school books, and who was usually residing in Kuala Lumpur, was arrested on 17 April 2002 at his home by three police officers and 15 plainclothes officials on the orders of the Ministry of Home Affairs and Internal Security. No arrest warrant was shown to him during his arrest. For 55 days, Mr. Satray was detained at the Police Remand Centre at Kampung Batu.
6. After his transferral on 12 June 2002, Mr. Satray was detained in solitary confinement without charge or trial at Kamunting Detention Camp in Taiping, Perak State, by a Special Branch of the Police. The detention order for an initial period of two years was issued by the Minister of Home Affairs invoking the provisions of the Internal Security Act (ISA) and has been extended twice since then.
7. The Government initially alleged that Mr. Satray was a member of the “Kumpulan Militan Malaysia”. Thereafter, it accused him of being a member of the “Jemaah Islamiyyah” (JI), which is reportedly dedicated to establishing a pan-Islamic State in South-East Asia and has been added to the United Nations Committee’s list of terrorist organisations linked to Al-Qaida or the Taliban on 25 October 2002, pursuant to Security Council resolution 1267 (1999).

8. Mr. Abu Bakr Bashir, an Indonesian national who is alleged to be the spiritual leader of “JI”, used to deliver lectures during Islamic classes which were organized at Mr. Satray’s workplace, where 90 per cent of the staff are reportedly Muslim. Mr. Satray had joined this study group.

9. In September 2003, a habeas corpus petition was filed on behalf of Mr. Satray. It was rejected by the Kuala Lumpur High Court in February 2004 and on appeal by the Federal Court in July 2004. The remedy of habeas corpus as being the only avenue under the ISA only refers to the technicalities of the arrest. The Government is under no obligation to produce any substantial evidence justifying the detention.

10. In a press statement issued by Mr. Satray and 30 other detainees in preventive detention, in September 2003, he denied any involvement in any purported secret organization such as the “JI” and stated he had merely engaged in Islamic activities as a devout Muslim, in compliance with the constitutional provisions on freedom of religion.

11. On 11 June 2004, Mr. Satray, together with seven other ISA detainees, was taken to the Police Remand Centre in Kuala Lumpur and interrogated by agents of a Special Branch of the Police about their alleged links with militant Islamic organizations. The following day their detention was extended for two more years.

12. Mr. Satray is allowed limited access to his family and lawyers. While in detention, on 9 December 2004, Mr. Satray, together with more than 25 other detainees, was ill-treated by prison officials following an unannounced security check in cell blocks T2B and T4, where alleged members of the “JI” were being held. The prison guards flung Mr. Satray hard on the cement floor and put their knees on his neck. He was also forced to sit cross-legged in the prayer hall of the detention centre facing the wall and prison officials hit his head against it. Mr. Satray sustained a fractured rib, but was denied medical treatment until 13 December 2004 when he was taken to the hospital.

13. It is reported that the Government justified the actions since weapon-like items were discovered and, hence, coercion had to be used to overcome violent and threatening detainees. The detainees, however, claim that the items had been approved by authorities and were being used as tools to make handicrafts.

14. The source argues that the detention of Mr. Satray is arbitrary, since the legal basis invoked for his continued detention without charge or trial, namely the ISA, is an arbitrary piece of preventive detention legislation. The ISA was enacted in the 1960s during the fight against communist guerrillas as counterterrorism legislation and has been in force ever since. Pursuant to its Section 73 (1), the Police is competent to detain any person for up to 60 days, without warrant or trial and without access to legal counsel, on suspicion that the person “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 maintenance of essential services therein or to the economic life thereof”. Under Section 8, after 60 days, the Minister of Home Affairs is competent to extend the period of detention without trial for up to two years, without submitting any evidence for review by the courts, by issuing a detention order, which is renewable indefinitely.

15. The Government, in its reply, reported that Mr. Satray (“the subject”) was arrested on 18 April 2002, and not 17 April 2002, pursuant to Section 73 (1) of the Internal Security Act 1960 (Act 82). The arrest was made due to the subject’s involvement in activities which are prejudicial to the security of Malaysia

16. Section 73 of Act 82 makes provision for the power of any police officer to detain suspected persons. The provisions are as follows:

*“(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 Tank 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 Tank 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) (Deleted by Act A61.)

(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 authorized 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 authorized generally or specially by the Minister.”

17. Mr. Satray was detained in Taiping Protection Detention Centre, Perak for a two-year period commencing on 13 June 2002 under a Ministerial detention order issued pursuant to Section 8 (1) of Internal Security Act 82. The detention order was issued as the Minister considered that the detention was necessary to prevent the subject from pursuing with his involvement in activities which are prejudicial to the security of Malaysia.

18. Section 8 of Internal Security Act 82 makes provisions for the power to order detention or restriction of persons. The provisions are as follows:

“(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 to 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 ail 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 organization or association, or from taking part in any political activities; and*

(e) *for prohibiting him from traveling 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)."*

19. The detention order dated 13 June 2002 was subsequently extended for three times on 13 June 2004, 13 June 2006 and 13 June 2008, respectively, for a period of two years for each extension, pursuant to Section 8 (7) of Act 82, as quoted above. The orders for extension were made as the subject had been found to be continuously adamant that his actions were not prejudicial to the security of Malaysia.

20. The Government pointed out that the arrest and detention of Mr. Satray was not because of his involvement with *Kumpulan Militan Malaysia*, as alleged in the communication. The involvement of the subject with a dissident group which is prejudicial to the security of Malaysia was proven through his confession during the interrogations as well as the disclosure by the other detainees, and therefore his detention under Internal Security Act 82 is legitimate and valid. The bases of the subject's detention are abundant and justifiable under the laws of Malaysia.

21. The habeas corpus application filed by the subject was rejected by the High Court of Malaya in Kuala Lumpur on 17 May 2004. The subject filed an appeal against the said decision but was also dismissed on 10 October 2005 by the Federal Court, which is the Malaysian apex court.

22. As in the case of other detainees, subject is entitled to right of visitation once a week, whereby the time allocated for such visit is 30 minutes for each visit. This right is statutorily provided under Regulation 81 (4), Internal Security (Detained Persons) Rules 1960. In the event there is a need for the right of visitation of more than once a week, subject may make such an application to that effect to the officer in charge of the detention centre.

23. The Government expresses the view that the allegation with regard to the ill-treatment suffered on 9 December 2004 is not accurate. The allegation, which states that the subject, together with more than 25 other detainees, was ill-treated by prison officials, is unsubstantiated, as on that day, those 25 detainees had committed commotion in the detention centre which threatened the security of the institution. During the commotion, a deputy commissioner of the prison and a prison corporal were injured, after being hit with stones thrown and sprayed by a fire extinguisher.

24. In order to contain the commotion, a team of officers from the prison security unit was deployed. They exercised reasonable use of force for the purpose of restraining and controlling the violent behavior of the detainees. All those who were injured were afforded necessary treatment at Taiping Hospital. The alleged use of handicraft tools during the commotion is also not at all accurate. The confiscated items were badminton rackets, steel, a fire extinguisher and stones.

25. Internal Security Act 82 is a law passed by the Parliament which makes provisions for the internal security of Malaysia, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto. The application of Act 82 is provided under article 149 of the Federal Constitution. Act 82 authorizes the Minister of Home Affairs and Internal Security to order preventive detention (Section 8) and the police (Section 73).

26. The Malaysian courts may exercise judicial review in respect of detention orders issued under sections 73 and 8 of Act 82. In the case of *Mohamed Ezam bin Mohd Noor v. The Inspector General of Police, Malaysia & Others Appeals* [20021 4 MLJ 449], the Federal Court (apex court in Malaysia) decided as follows:

“The elements of s. 73(1) ISA are objective. (*Chng Suan Tze v. The Minister of Home Affairs & Ors* (19881 1 LNS 162 followed.) Consequently, the court is entitled to review the sufficiency and reasonableness of the respondent’s reasons for believing that there were grounds to justify the appellants’ detention under s. 8 ISA and that the appellants had acted or was about or likely to act in a manner prejudicial to the security of Malaysia.”

27. According to the above case, the discretion of the police in issuing detention orders under Section 73 of Act 82 can be subject to judicial review by the court. In this regard, the burden of proof is on the police to prove, to the satisfaction of the court, that the requirements of the existence of the reasons justifying the detention of a person under Section 73 have been fulfilled. In respect of detention order issued by the Minister pursuant to Section 8 of Act 82, Section 8B provides that the procedural matters of the detention orders shall be subject to judicial review.

28. In the case of *Abd Malek Hussin v. Borhan Hi Daud & Ors* [200811 CLJ 264], the High Court of Malaya in Kuala Lumpur held that the arrest and detention of the plaintiff was unlawful for reasons that: (a) the plaintiff was never properly informed of the grounds of his arrest as required by article 5 (3) of the Federal Constitution; (b) the first Defendant failed to satisfy the court with sufficient particulars and material evidence of the plaintiff’s activities to justify the arrest and detention of the plaintiff under Section 73 (1) of the ISA; and (c) the arrest and detention was *mala fide*. It was also held that the first defendant has to provide sufficient material evidence and particulars to show the basis of his reason to believe that the detention of the plaintiff was necessary to prevent him from acting in a manner prejudicial to the security of Malaysia and further that the plaintiff had acted (or was likely to act or was about to act) in a manner prejudicial to the security of the country.

29. Various safeguards under the Malaysian law are available to the persons detained under Act 82, including the detainee’s right to be informed of the reasons and grounds for his detention, his right to make representations and his right to counsel. The Government mentions the existence of the mechanism of the Advisory Board which comprises a Chairman and two members whose appointments are made by the *Yang di-Pertuan Agong* (the King of Malaysia) by virtue of article 151 clause (2) of the Federal Constitution. In this regard, the Chairman of the Advisory Board 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.

30. Section 11 of Act 82 provides for representations against detention orders. Subsection (1) provides that a copy of every order made by the Minister under subsection 8 (1) shall be served to the person to whom it relates. Such person shall be entitled to make representations against the order to an Advisory Board. For the purpose of enabling a person to make representations under subsection (1) the detainee shall, at the time of the service on him of the order, be informed of his right to make representations to an Advisory Board under subsection and be furnished by the Minister with a statement in writing of the grounds on which the order is made; of the allegations of fact on which the order is based; and 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.

31. The detainees are also granted the rights of visit of family members and legal counsels, as well as the rights in law to file for a writ of habeas corpus at any time following his detention. Under Section 365 of the Criminal Procedure Code, the High Court

may, upon the application by the detained person, whenever it thinks that any person is illegally or improperly detained, order that be set at liberty.

32. The detainees who are subject to detention orders are not detained incommunicado. Section 81 (1) of Act 82 makes provisions for publicity of orders, where any order or regulation is made under the Act, including detention orders, the Minister or other authority making such order or regulation, shall cause notice of its effect. Such order, regulation, direction or instruction shall have effect as soon as notice as aforesaid has been given, without publication in the *Gazette*.

33. Sections 73 and 8 of Act 82 makes sufficient provisions to ensure that the basic rights of persons is not infringed in the application of the Act. In this regard, for instance, Section 73 (1) provides that the power of the police to arrest without warrant and detain any person is subject to its reasonable belief that there are grounds that would justify the detention under Section 8 of the Act and the act of the arrested person is prejudicial to the security of Malaysia. Likewise, Section 8 (1) of Act 82 provides that prior to issuing a detention order, the Minister must be satisfied that the detention is necessary to prevent the detainee from acting in any manner prejudicial to Malaysia. In this regard, the Government contends that Act 82 provides reasonable and/or acceptable justification as well as adequate safeguards and stringent process with regard to the power of arrest and the issuance of detention orders.

34. Internal Security Act 82 is a law to provide for the internal security of Malaysia, the prevention of subversion, the suppression of organized violence against persons and property in specified area of Malaysia, and for matters incidental thereto. It authorizes preventive detention.

35. Although the Government reaffirms its commitments with regard to the principles contained in various international human rights treaties on this matter, including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which was adopted by General Assembly resolution 43/173 of 9 December 1988, it recalls that the Body of Principles is a non-binding text. Further, the Government reiterates its adherence to article 9 of the Universal Declaration of Human Rights and article 9 of the International Convention on Civil and Political Rights. These rights are not absolute, by virtue of the restrictions as outlined in article 29, paragraph 2, of the Universal Declaration and the exercise of derogatory measures by the State as provided under article 4, paragraph 1, of the International Covenant. Thus, article 9 of the International Covenant on Civil and Political Rights permits some form of restrictions or limitations, whereby if a State party chooses to limit or restrict this right within the limits prescribed, this is permissible and does not amount to a violation of the right in question. It should be highlighted, nonetheless, that in terms of Malaysia's commitment in respect of this matter, it has no obligation under article 9 of the Covenant as Malaysia is yet to be a State party to the treaty. While the Universal Declaration on Human Rights is not a legally binding international instrument, Malaysia, as a Member State of the United Nations, adheres to its norms and principles.

36. The Government considers that a State must be able to justify that certain limitation satisfies the test of legality, necessity, reasonableness and legitimate purpose. The promulgation of Act 82 was justified in the light of the test of legality, necessity, reasonableness and legitimate purpose, and does not therefore constitute an infringement on human rights.

37. Lastly, the Government points out that the summary of the case contained in the Communication of the Working Group was not entirely accurate and does not reflect the reliable and credible information as envisaged by the mandate of the Working Group. The arrest and detention of the subject were carried out in accordance with the applicable

Malaysian law and taking into account the statutory requirements, that aims to contain subversive elements and to guarantee public safety and order, stability and security in the country. Subject is not held incommunicado, as is normal in other jurisdictions but not in Malaysia, and has had available all the recourse accessible to persons who are subject to detention orders. The application of Act 82 is therefore valid and defensible in light of the Government's responsibility in the prevention of subversion and protection of the security of the nation and its people. During the period of detention, subject, as other detainees, shall undergo rehabilitation programmes for the sole purpose that he will no longer be regarded as a threat to the security of the country.

38. The Working Group notes that both the source and the Government have provided the same information regarding the fact that Mr. Mat Sah bin Mat Satray was arrested in April 2002, and has since then been deprived of his liberty. Charges have not been brought against him and he has not had the possibility of a fair and public hearing by an independent and impartial tribunal.

39. The Working Group considers that no one should be detained without trial. Article 10 of the Universal Declaration on Human Rights establishes that "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". Therefore, an arrest carried out in virtue of the sole decision of police officers and a detention stemming from an order issued by an Executive authority, like the Minister of Home Affairs and Internal Security, and not by a judge or magistrate, is not in conformity with the Universal Declaration on Human Rights.

40. The Working Group thanks the Government for having provided, in its response, detailed information on the legal norms and proceedings under which detentions under application of Internal Security Act 82 occur in practice. According to the Government, the discretion of the Minister in issuing detention orders under Section 73 of Act 82 can be subject to judicial review by a court. In this regard, the burden of proof is on the Executive authorities to demonstrate, to satisfaction of the court, that the requirements about the existence of enough reasons justifying the detention had been fulfilled. According to the source, Act 82 detainees have no effective recourse to challenge their detention because the law prevents the courts from reviewing the merits of Act 82 detentions.

41. The Working Group considers that a simply formal judicial control of the procedural requirements for detention cannot substitute the universal right of any person to a fair and public hearing by an independent and impartial tribunal.

42. The Working Group notes that under Act 82, a person can be held for up to 60 days without an arrest warrant and without the possibility to be brought before a judge; without access to legal counsel or recourse to trial, merely on the basis of a suspicion. After the 60-day period ends, the detainee's case is referred to the Minister of Home Affairs and Internal Security who can extend the detention period for two more years, which is then renewable indefinitely. Mr. Satray has spent more than six and half years in detention without being charged or brought before a judge to be tried.

43. Mr. Satray has been accused of being a member of Jemaah Islamiyyah (JI). However, during the six and a half years he has already spent in prison, no evidence has been produced to substantiate this accusation. Instead, he is being required to attend counselling programmes in which he is being encouraged to admit to the allegations against him.

44. In this context, the Working Group recalls the universal validity of the fundamental principle of presumption of innocence. Mr. Satray has already spent several years in prison and the authorities have not yet demonstrated that he has actually engaged in any illegal activity.



45. Both the source and the Government report that Mr. Satray's lawyer filed a habeas corpus petition on his behalf, which was rejected by the Kuala Lumpur High Court in February 2004, and on appeal by the Federal Court in July 2004. The Working Group considers that the remedy of habeas corpus is not an effective resource for a detention of such characteristics as described, since it cannot substitute the universal right of any person suspected of the commission of an offence or crime to a fair and public hearing by an independent and impartial tribunal.

46. The Working Group considers that Mr. Satray must be given recourse to a fair trial in conformity with international standards of due process as well as access to full legal representation.

47. In the light of the foregoing, the Working Group expresses the following Opinion:

The detention of Mr. Mat Sah bin Mohammad Satray is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

48. Consequent upon this Opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of this person in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights.

49. The Working Group further recommends the Government to consider the possibility of study the compatibility of the Internal Security Act 82 with the international human rights principles and norms as well as to consider acceding to the International Covenant on Civil and Political Rights.

Adopted on 20 November 2008