Individual Stakeholder Report to the United Nations Universal Periodic Review for the 45th Session of the UPR Working Group 2018 - 2023

Submitted by:



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A. Executive Summary

- Within the reporting period, Malaysia underwent frequent political leadership changes on top of pandemic challenges, before having the 15th General Election in November 2022. The Anwar Ibrahim-led unity government not only barely survived through the uncertain election outcome of hung Parliament, but also inherited a political climate rife with Malay nationalism and Islamic conservatism.
- 2. In this context, progress in promoting and protecting the right to fair trial, freedom of expression and freedom of public assembly has been limited, pendulating between remaining and regressing past the pre-pandemic status quo. Whilst numbers of custodial deaths seemed to have reduced since the last UPR, the Government of Malaysia (GoM) demonstrated lacklustre efforts to address root causes of these deaths. Transparency and accountability on cases of torture of detainees remained inconsistent.
- 3. The Human Rights Commission of Malaysia (SUHAKAM) saw 2 batches of Commissioners within the reporting period. A deterioration in human rights competency of the overall Commissioner lineup was observed. SUHAKAM also has longstanding gaps in some of its key processes, which if not addressed, can negatively impact the institution's independence and effectiveness in implementing its human rights mandate.

B. Right to Fair Trial

- 4. Security laws that permit arbitrary detention continue to be implemented, namely the Security Offences (Special Measures) Act 2012 (SOSMA)¹, the Prevention of Crime Act 1959 (POCA)², Prevention of Terrorism Act 2015 (POTA), and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DDA85). POCA, POTA and DDA85 greatly resemble the 2012-abolished Internal Security Act 1960 (upwards of 60-day detention orders by police and the 2-year detention order by government-appointed Board).
- 5. In the last UPR, GoM partially accepted 2 recommendations³ to amend and/or repeal security laws. Whilst consultations on SOSMA/POCA/POTA done in 2018/2019⁴ and those on SOSMA in 2023 should be acknowledged, there are no concrete timelines to table amendments. It is noteworthy that SOSMA was extended in July 2022 in a manner that contravened the spirit of parliamentary democracy the motion to extend the procedural law was re-tabled and passed in Parliament four months after it was defeated⁵.
- 6. Based on data from parliamentary question replies by GoM, a total of at least 14,085 were arrested under security laws from 2015 to 2022, with a breakdown of: 2683 (SOSMA), 11,366 (POCA) and 36 (POTA)⁶. For DDA85, case numbers from 2015 to 2021 stood at 7511.
- 7. Security laws were broadly applied beyond their touted purposes. SOSMA was abused to detain Lim Kian Aik and R. Nathan in 2020 for allegedly sabotaging water services in Selangor⁷. Lim was arbitrarily detained for over six months before being granted bail due to ill health⁸. Whilst the Court of Appeal ruled that the offence was not a classifiable

- Amended in 2013

¹ SOSMA differs from its peers as it only provides for 28 days detention under police order and detainees are produced in court for criminal charges at the conclusion of the investigation period; however, detainees are all unbailable under SOSMA and will remain in detention until the conclusion of all appeals.

² Amended in 2015

³ Partially accepted recommendations: 151.126, 151.141

⁴ Under the Pakatan Harapan administration between 2019 and early 2020, the GoM proposed a timeline for SOSMA amendments and expressed the intention to amend the procedural law (via the Attorney General's statements), but this did not materialise.

⁵ On 23 March 2022, the motion tabled in Parliament to reactivate SOSMA was defeated with 86 votes against 85 votes, which meant that the power to detain without trial under SOSMA would have lapsed after 31 July 2022. In the Parliamentary session in July 2022, the GoM retabled the motion to replace the 23 March motion – and the new motion was passed with 105 votes against 83 votes.

⁶ Data disclosed by the government consisted of missing timeframes, specifically from September or October to December 2021.

⁷ 'Two men charged with committing sabotage at Sg Selangor ' (The Sun Daily, 23 November 2020) https://www.thesundaily.my/home/two-men-charged-with-committing-sabotage-at-sg-selangor-LH5283519

⁸ 'Man held under Sosma for sabotage on water services granted RM50,000 bail' (New Straits Times, 16 April 2021) https://www.nst.com.my/news/crime-courts/2021/04/682896/man-held-under-sosma-sabotage-water-services-granted-rm50000-bail

security offence under SOSMA, Nathan's bail application was still dismissed⁹. POCA was used to address all types of criminal activity especially during COVID-19, with 2264 arrests¹⁰ made between March 2020 and March 2021. The overreach of executive powers was especially prominent in gaming or gambling offences, with two high-profile cases, that of Tan Chin Kiat¹¹ as well as Zaidi Kanapiah and two police officers¹², becoming the subject of legal debate. Whilst Tan's case highlighted GoM's abuse of POCA, Kanapiah's case challenged POCA's constitutionality as it gives the executive, instead of the courts, unfettered discretion to determine whether remand applications should be granted.

- 8. Detainees are disproportionately vulnerable to torture and abuse, experiencing unfair trial processes, as well as undergoing prolonged detention due to delayed trials. In 2022, 35 men were detained under SOSMA for alleged involvement in organised crime group activity, in which 33 were reportedly beaten up by the police to extract false confessions. In the first court hearing in July 2022, not only were confessions from detainees unrecorded by the judge, but also were bail applications of 6 out of 7 detainees with chronic health conditions rejected. Multiple postponements in subsequent court proceedings then took place between August and December 2022, with the final hearing date set two years later in 2024.
- 9. SOSMA and POCA are commonly used to perpetuate chain remand¹³. In 2021, Mitheswaran Kumar was initially remanded for 3 days under the Dangerous Drugs Act 1952 for drug possession but was re-arrested under the Penal Code for housebreaking and subsequently under POCA. Under POCA, he was detained for 60 days and was banished to another state for 2 years.

C. Torture and Custodial Deaths

10. A noteworthy action by GoM included setting up the Criminal Investigation Unit on Deaths in Custody (USJKT) in 2022 to investigate deaths in police custody. Despite swift public disclosure of custodial deaths, case information remained limited, in that names

⁹ 'Contractor charged with sabotaging water services in Selangor fails again in bail bid' (The Borneo Post, 26 August 2021) https://www.theborneopost.com/2021/08/26/contractor-charged-with-sabotaging-water-services-in-selangor-fails-again-in-bail-bid/

^{10 &#}x27;Kes kesalahan seksual kanak-kanak, keganasan rumah tangga meningkat' (Sinar Harian, 4 May 2021)
https://www.sinarharian.com.my/article/136841/berita/semasa/kes-kesalahan-seksual-kanak-kanak-kanak-keganasan-rumah-tangga-meningkat

^{11 &#}x27;Ex-waiter held under Poca for gambling walks free' (Free Malaysia Today, 5 February 2021)
https://www.freemalaysiatoday.com/category/nation/2021/02/05/ex-waiter-held-under-poca-for-gambling-walks-free/

^{12 &#}x27;Federal court orders Addy Kana, two cops be released from POCA detention' (The Sun Daily, 4 April 2021) https://www.thesundaily.my/home/federal-court-orders-addy-kana-two-cops-be-released-from-poca-detention-NF7799593

¹³ Chain remand in Malaysia refers to the abuse of the remand system where an individual is re-arrested for investigation upon the conclusion of the remand order granted by a magistrate.

of victims and continuous investigation updates were not furnished. Furthermore, after September 2022, USJKT stopped reporting custodial deaths. Case progress is slow – out of the 24 cases handled, 70.8% are still pending at the report stage¹⁴.

- 11. Health reasons constitute the primary cause of custodial deaths, with proportion in police custody as high as 80%¹⁵. Detainees live in overcrowded facilities with poor sanitary conditions, as well as receive irregular healthcare access, be it in the form of health screening upon entry to detention facility or untimely diagnosis or treatment whilst in detention. In the case of Roopan Karnagaran whose identified cause of death in prison was deep vein thrombosis, his condition remained untreated despite his D-dimer test results showing a high possibility of getting blood clots. Limited mobility in his cell and the detention facility's substandard conditions were also identified during the inquest as potential contributing factors that worsened his health condition. Whilst initiatives such as setup of custodial health units in centralised lockups and appointment of private healthcare professionals for health screenings before entry into detention facilities were undertaken by the government, impact of these initiatives and additional measures taken by GoM to ensure effectiveness are unknown.
- 12. Access to justice for custodial death victims' families is limited, due to existing legal loopholes. The Criminal Procedural Code only mandates inquests to be conducted on police custodial deaths but not in other detention facilities.
- 13. In the last UPR, GoM accepted Switzerland's recommendation to systematically conduct an "independent and impartial investigation" into allegations of human rights violations in prisons. There are no updates on the implementation status of this investigation.
- 14. Within the reporting period, notable cases of custodial deaths (allegedly) due to torture include:
- 15. A. Ganapathy in 2021 less than 2 weeks after being arrested and placed under police custody, Ganapathy was rushed to the hospital for severe injuries. Witnesses claimed seeing the deceased brutally assaulted whilst in custody, hit by a rubber hose and forcibly dragged across a road. He was subsequently admitted to ICU and died 43 days later. The inquest verdict is yet to be delivered as of time of writing;
- 16. Kim Shih Keat in 2022 Kim was found unconscious on the final day of his 1-week detention and later pronounced dead. There were bruises on his arms, stomach and

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¹⁴ This figure was provided by Deputy Home Minister in the special parliamentary session about deaths in custody

back, as well as scratch marks on his elbow, chest and sexual organs. His family maintained that Kim was in excellent physical condition prior to imprisonment. Prison officials argued that Kim's injuries were self-inflicted, and there was no attempt to produce an independent forensic pathology report to substantiate the claims made.

D. Police Accountability

17. The Independent Police Conduct Commission Act (IPCC) was passed in Parliament in 2022 and will take over the Enforcement Agency Integrity Commission's (EAIC) oversight role in police misconduct from July 2023 onwards. Whilst there is the shared similarity of having no authority to compel disciplinary action from officers with misconduct, IPCC is weaker than EAIC, having no powers of search and seizure, limited authority to compel evidence and able to only visit police premises upon prior notice.

E. Freedom of Expression

- 18. Among laws that restrict freedom of expression include the Sedition Act 1948 and Section 233¹⁶ of the Communications and Multimedia Act 1998 ("Section 233"). Efforts by the GoM to rescind or revise these laws belie the 2 recommendations that were partially accepted in the last UPR¹⁷. Between 2018 and 2023, GoM reneged its manifesto promises to repeal these laws twice¹⁸, whilst continuing to assert relevance of these laws. As of the time of writing this report, GoM expressed "no plans" to abolish the Sedition Act¹⁹, whilst welcoming ideas to improve enforcement and investigations of cases charged under Section 233²⁰.
- 19. There are more cases involving Section 233 than of the Sedition Act, with discrepancies as large as two to threefold during and post-pandemic. Coverage of network facilities and services in Section 233 enable clampdowns on online users especially human rights activists, and this was especially used by GoM in 2020 during the movement control order to criminalise freedom of expression in the name of containing 'fake news' when the Anti-Fake News Act was repealed. Refugee rights activist Heidy Quah was charged

¹⁶ criminalises the use of network facilities or network services by a person to transmit any communication that is deemed to be offensive and could cause annoyance to another person

¹⁷ The partially accepted recommendations: 151.137, 151.140

¹⁸ In 2018, GoM reiterated its commitment to abolish the Sedition Act 1948, with the Cabinet imposing a moratorium on cases, but the moratorium was short-lived as it was lifted following the Seafield Temple Fracas, which consisted of violent clashes between a group of thugs and temple devotees. Between 2022 and 2023, the Pakatan Harapan coalition within the current unity government administration made manifesto promises of revising and repealing laws that restrict freedom of expression including the Sedition Act and Section 233 of the Communication and Multimedia Act 1998.

^{19 &#}x27;No plans to abolish Sedition Act just yet, says Ramkarpal' (Free Malaysia Today, 21 March 2023) https://www.freemalaysiatoday.com/category/nation/2023/03/21/no-plans-to-abolish-sedition-act-just-yet-says-ramkarpal/

²⁰ 'Govt welcomes ideas to improve Section 233 of the Communications and Multimedia Act' (Malay Mail, 1 March 2023) https://www.malaymail.com/news/malaysia/2023/03/01/govt-welcomes-ideas-to-improve-section-233-of-the-communications-and-multimedia-act/57384>

for her Facebook post that exposed alleged mistreatment of refugees at immigration detention centres²¹. After receiving a discharge not amounting to an acquittal in 2022²², there was another court charge attempt by authorities in 2023 before being swiftly withdrawn²³.

- 20. The Sedition Act continues to be applied by GoM to curtail speech with 'seditious tendency', especially those related to issues of race, religion and royalty (3R). A high-profile case involves the arrest of Chief Minister of Kedah Muhammad Sanusi Md Nor at 3am on 18 July 2023 by 20 police officers under 2 Sedition Act charges for insulting the Sultan of Selangor in his political speech²⁴ drawing flak from politicians and civil society on the timing of arrest and the application of the Sedition Act in light of the GoM's manifesto promise to repeal the legislation. During COVID-19, the vague definition of 'seditious tendency' provided GoM unfettered discretion in quelling any dissent, including youth activists such as Fadiah Nadwa Fikri and Sarah Irdina who merely urged others to attend protests.
- 21. Continued implementation of these laws is concerning, in light of current systematic hardline efforts by GoM to stem alleged insults on 3R in the name of maintaining public order as well as racial and religious harmony, such as the police's operation of a 3R task force²⁵.

F. Freedom of Peaceful Assembly

22. Amendments were made in 2019 by GoM to the Peaceful Assembly Act 2012, in line with 3 accepted and partially accepted recommendations from the last UPR²⁶. Whilst reducing the required notice period from 10 to 5 days is a welcoming change, the compound system that can be implemented by the police with the consent of the Public Prosecutor is a punitive element that should be removed. Other longstanding gaps such as the non-inclusion of children under 15 and non-citizens in exercising their right to participate in peaceful assemblies as well as individuals under 21 to organise peaceful assemblies, remained unaddressed.

²¹ 'Cops to question NGO over FB post on immigration detention' (Malaysiakini, 7 July 2020) https://www.malaysiakini.com/news/533338

²² 'Activist Heidy Quah gets DNAA after judge rules charge defective' (Malaysiakini, 25 April 2022) https://www.malaysiakini.com/news/619177>

²³ 'Authorities drop plan to charge activist again over criticism of Immigration Dept' (Malaysiakini, 14 February 2023) https://www.malaysiakini.com/news/655116>

²⁴ 'Caretaker Kedah MB arrested at 3am ahead of sedition charge' (Malaysiakini, 18 July 2023) https://www.malaysiakini.com/news/672308>

²⁵ 'Special 3R police task force probes 7 cases since inception' (Malaysiakini, 8 April 2023) https://www.malaysiakini.com/news/661534

²⁶ Recommendation with full acceptance: 151.147. Recommendations with partial acceptance: 151.141, 151.146

- 23. Investigations against organisers who have adhered to the notification period remained the most prevalent form of harassment. Attempts by law enforcement to pre-emptively deter public assemblies or curtail participants' movements were also common, with notable examples including the closure of roads prior to the #TangkapAzamBaki protest, police barricade to deter participants of the #Turun assembly from walking to the Independence Square and confinement of participants to the parking lot instead of walking to Parliament in the Walk for Judicial Independence.
- 24. Harsher clampdowns were implemented during COVID-19 between 2020 and 2021, via not only abuse of public health regulations such as charging participants under the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) Regulations 2020 despite their adherence to physical distancing measures²⁷, but also use of forceful arrests, detention and even remand of participants such as in the 2021 candlelight vigil for COVID-19 victims. In the largest public assembly in 2021, a dismaying precedent was set in which public assembly observers from the Bar Council and SUHAKAM were summoned for investigations.

G. Human Rights Commission of Malaysia (SUHAKAM)

- 25. No recommendations were made in the last UPR on reforms to strengthen SUHAKAM's functioning.
- 26. In June 2021, SUHAKAM was reaccredited 'A' status by the the Sub-Committee on Accreditation of the Global Alliance for National Human Rights Institutions (GANHRI-SCA).
- 27. In 2022, there was a delay of 2 months in appointing SUHAKAM Commissioners. This delay was not a first, having previously occurred in 2019²⁸. The belated appointments fell short in human rights competency: all Commissioners except one had either no or questionable human rights expertise²⁹. Compared to the previous batch of Commissioners from 2019-2022, there was also significantly less diversity in professional

²⁷ 'Police to call organisers of court complex gathering' (The Malaysian Reserve, 30 July 2020) https://themalaysianreserve.com/2020/07/30/police-to-call-organisers-of-court-complex-gathering/

²⁸ 'Ex-chief: Suhakam can't function without new commissioners' (Malaysiakini, 30 June 2022)

https://www.malaysiakini.com/news/626568>

²⁹ Among the new Commissioner lineup, the Chairperson previously co-authored an academic paper that persuaded Malaysia to not accede to the Rome Statute and ICERD; 2 Commissioners were publicly known to be strongly affiliated with the political party UMNO; 1 Commissioner was the former director-general of the Islamic Development Department (JAKIM) which does not recognise LGBTIQ+ rights; 3 Commissioners are professionals (lawyers and medical practitioner) with no background/experience in human rights; 1 Commissioner is the former lawyer of the Prime Minister who was in office at the time. The last remaining Commissioner has background in human rights, in that she is the former Children's Commissioner (2019-2022) in SUHAKAM.

background, ethnicity and other categories³⁰. These controversial appointments stemmed from a longstanding opaque commissioner selection process. Whilst 2011 amendments to the SUHAKAM Act 1999 stipulated the Prime Minister to consult a selection committee prior to appointments being made, there are no specific legal requirements concerning the manner of consultation, leaving room for political interference. Merit-based processes that also promote greater transparency and pluralism such as publicising vacancies and assessing applicants on the basis of predetermined, objective and publicly available criteria are absent in the SUHAKAM Act 1999.

- 28. Another critical gap that can place SUHAKAM's independence at risk is the dismissal process in Section 10(d)³¹, which alongside the vaguely-defined nature of some of the grounds for dismissal, provides significant discretion to the Prime Minister in recommending the removal of a Commissioner.
- 29. There was also a delay in tabling SUHAKAM's annual reports for the years of 2020 to 2022 in Parliament. Instead of during the first meeting of Parliament the following year, the 2020 annual report was tabled in 2023. Timelines for the 2021 and 2022 annual reports remain unannounced. On the other hand, there is no legal requirement to debate SUHAKAM's annual reports. For the laudable two attempts made by SUHAKAM to debate the reports in 2018 and 2023, they were done through the Executive.
- 30. In 2023, the SUHAKAM Chairperson filed a defamation suit against a staff member, after the latter filed a formal complaint within the institution against the former on

Among SUHAKAM's Commissioners of the 2019-2022 batch:

Religion: 44.4% Muslim (4 out of 9); remaining 55.6% non-Muslim (5 out of 9)

Ethnicity: 44.4% Malay (4 out of 9), 22.2% (2 out of 9) Chinese, 11.1% (1 out of 9) Indian, 22.2% Indigenous from East Malaysia (2 out of 9)

Professional background: much more diverse compared to the current batch. 1 in diplomacy, 1 in civil service in general, 1 in education, 1 in rural development, 1 in racial intolerance and xenophobia, 4 in law but each with different foci and backgrounds (2 in academia but respectively focusing on fatwa research and children's/women's rights respectively; 2 in the legal & judicial service). At least 5-6 Commissioners gained human rights expertise or exposure via their work, among whom at least 3 of them came from civil society.

Among SUHAKAM's Commissioners of the 2022-2025 batch:

Religion: 77.8% Muslim (7 out of 9); remaining 22.2% non-Muslim (2 out of 9)

Ethnicity: at least 55.6% (5 out of 9) are Malay, 11.1% (1 out of 9) are Chinese and 11.1% (1 out of 9) are Indian. As for two others, not too certain about exact ethnicity

Professional background: 77.8% (7 out of 9) have a background in law, with 11.1% (1 out of 9) in medicine and 11.1% (1 out of 9) in religion. With the exception of one, the rest comparatively to the previous batch of Commissioners had little to no experience or background in human rights.

³¹ Section 10(d) in the SUHAKAM Act 1999: "A member of the Commission may be removed from office by the Yang di-Pertuan Agong if...(d) the Yang di-Pertuan Agong, on the recommendation of the Prime Minister, is of the opinion that the member (i) has engaged in any paid office or employment which conflicts with his duties as a member of the Commission; (ii) has misbehaved or has conducted himself in such a manner as to bring disrepute to the Commission; or (iii) has acted in contravention of this Act and in conflict with his duties as a member of the Commission."

³⁰ All in all, the previous batch of Commissioners (2019-2022) reflected far greater diversity in more categories than the current batch of Commissioners (2022-2025).

allegations of racial discrimination and abuse of power in a new staff appointment. The legal suit is a possible attempt to circumvent internal investigations on the complaint, in light of Section 12(2) of the SUHAKAM Act³². Hours after criticism from civil society organisations that aligned with international human rights standards emerged, not only was the defamation suit withdrawn, but also did SUHAKAM reply that the allegations are referred to the Prime Minister's Department's Legal Affairs Division for "advice and direction"³³ with the commitment that an inquiry by an independent body will be undertaken. Nevertheless, calls from civil society for the Chairperson to go on garden leave to ensure objectivity and independence in investigations remain unheeded³⁴.

31. The current SUHAKAM Chairperson's reiterated commitment to uphold human rights in a local context³⁵ ('mengikut acuan tempatan') is appalling, in light of potentially devastating ramifications on vulnerable groups especially the LGBTIQ+ community due to still-prevalent socio-cultural sensitivities.

H. Recommendations

- 32. Guarantee the right to fair trial by repealing all laws that permit arbitrary detention, in line with international human rights standards.
- 33. Strengthen USJKT's functioning by increasing the quantity and quality of capable personnel and addressing external factors that affect investigation capacity.
- 34. Uphold detainees' basic right to healthcare access by:
 - a) Setting up adequately-equipped health units in all detention facilities managed by the police, prison and immigration departments;
 - b) Amending the Lockup Rules 1953 and other internal detention facility regulations to ensure better streamlined detainee management;
 - c) Decriminalising minor drug offences whilst implementing a restorative justice approach to reduce overcrowding in prisons.
- 35. Amending the Criminal Procedural Code to mandate inquests for all custodial deaths in all detention, correctional and rehabilitation facilities operated by GoM, with the

³² Section 12(2) of the SUHAKAM Act 1999 prohibits the institution from inquiring into a complaint or continuing to do so if it is the subject matter of or already has its outcome decided in court proceedings

³³ 'Suhakam to refer complaints against chairperson to Putrajaya' (Malaysiakini, 24 June 2023) https://www.malaysiakini.com/news/669832

³⁴ 'Suaram urges Suhakam chair take garden leave amid probe' (Malaysiakini, 20 June 2023) https://www.malaysiakini.com/news/669338>

³⁵ This stance was first publicised shortly after the Chairperson appointment in July 2022, but only in non-mainstream Malay newspapers (such as https://www.getaran.my/artikel/semasa/26441/rahmat-berazam-pastikan-hak-asasi-manusia-terus-terjamin-beri-saya-masa). In July 2023, the stance emerged again but this time in mainstream English and Malay newspapers such as Malaysiakini (https://www.malaysiakini.com/news/670482)

- enactment of a Coroner's Court Act to ensure high quality of inquests.
- 36. Provide mandatory human rights training with emphasis on Mendez principles of effective interviewing for law enforcement officers across all government agencies.
- 37. Amend IPCC to provide the commission with full investigative and disciplinary powers to address police misconduct, that is also independent of political interference from the Executive.
- 38. Undertake comprehensive legislative form of the Sedition Act and Section 233 of CMA in line with international principles of legitimacy, necessary and proportionality; and whilst reform initiatives are in progress, implement a moratorium on the use of these laws.
- 39. Cease harassment by law enforcement of human rights defenders and public assembly observers for organising, participating in and monitoring peaceful assemblies under the Peaceful Assembly Act 2012.
- 40. Amend the Peaceful Assembly Act 2012 to enable children under 15 and non-citizens to exercise right to peaceful assembly, with implementation of safeguards against delays and abuse of process that can cause individuals to be arbitrarily detained or their fundamental rights under the Federal Constitution to be eroded.
- 41. Amend the SUHAKAM Act 1999 in line with recommendations by GANHRI-SCA to strengthen SUHAKAM's independence, plurality and independence.
- 42. Ratify the remaining core human rights conventions, especially the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.