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**Promotion et protection de tous les droits de l'homme,
civils, politiques, économiques, sociaux et culturels,
y compris le droit au développement**

Note verbale datée du 9 mars 2011, adressée au Haut-Commissariat des Nations Unies aux droits de l'homme par la Mission permanente de la Malaisie

La Mission permanente de la Malaisie présente ses compliments au Haut-Commissariat des Nations Unies aux droits de l'homme et au secrétariat du Conseil des droits de l'homme et a l'honneur de se référer au rapport du Groupe de travail sur la détention arbitraire sur la mission que celui-ci a effectuée en Malaisie du 7 au 17 juin 2010 (A/HRC/16/47/Add.2), examiné par le Conseil des droits de l'homme lors du dialogue avec le Groupe de travail, le 7 mars 2011.

La Mission permanente a également l'honneur de demander que le document d'information ci-joint*, auquel la délégation de la Malaisie s'est référée au cours du dialogue avec le Groupe de travail le 7 mars 2011, figure dans la documentation officielle de la seizième session du Conseil.

* Ces observations sont reproduites telles qu'elles ont été reçues, dans la langue originale seulement.

Annexe

Observations of the Government of Malaysia on the report of the Working Group on Arbitrary Detention on its visit to Malaysia (7-17 June 2010) (A/HRC/16/47/Add.2)

Judicial independence

1. In relation to the conclusion made by the Working Group in Paragraph 12 based on amendments made to Clause 1 of Article 121 of the Federal Constitution, Malaysia wishes to inform that according to the legislative history of Clause (1) of Article 121 of the Federal Constitution, regardless of the terminology used to refer the jurisdiction and powers of the courts, the position and effect of Clause (1) of Article 121 of the Federal Constitution prior and after the amendment to Article 121(1) via Act A704, remains the same as both subject the judicial power of the courts to Federal law. In fact, the post amendment position states the law in clearer terms.

2. It is to be noted that a shoulder note appearing in a legislation, including the Constitution, does not carry any special legal meaning. It appears as a reference only and the substantive provision carries the legal intent of the legislature. Such is the case with the phrase “Judicial power of the Federation” as found in the shoulder note to Article 121 of the Federal Constitution.

3. The amendment to Clause (1) of Article 121 of the Federal Constitution does not affect the hierarchy between the three branches of the Malaysian system as there is no such hierarchy or ranking among these three branches.

4. In the case of *PP v. KOK WAH KUAN* [2007] 6 CLJ 341 the Federal Court held inter alia as follows with regards to the doctrine of separation of power:

“The doctrine of separation of powers is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power. However, Malaysia has its own model. Whilst our Constitution does have the features of the separation of powers, it also contains features which do not strictly comply with the doctrine. To what extent the doctrine applies, therefore, depends on the provisions of the Constitution.”

5. In determining the constitutionality or otherwise of a statute under our Constitution, it is the provision of the Constitution that matters, not a political theory expounded by some thinkers. The doctrine of separation of powers is not a provision of the Malaysian Constitution. Thus, a provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine.

Preventive laws

6. Actions taken under the Preventive Laws are not considered as punishments and the detainees are not being registered as an offender. The main purpose of Preventive Laws in Malaysia is prevention and rehabilitation, which clearly differs as against the philosophy of the Penal Code. Cases under preventive laws are subjected to its own procedures and rules of evidence.

7. It is not true that the Minister of Home Affairs has excessive powers to keep people in detention indefinitely. The power to detain provided to the Minister of Home Affairs is limited to a maximum period of two (2) years in one order. This period of two (2) years is subjected to periodical review of every six (6) months by an Advisory Board established by the Federal Constitution.

8. With regard to paragraph 28 of the report, the Government takes strong exception to the Working Group's views that "*the Office of the Attorney General elude the normal penal procedure for common crimes and offences.*"

9. Actions taken under the preventive laws are also subject to be challenged in Courts through applications of writ of habeas corpus. Recently, the Courts had also allowed the ground of detention to be challenged and there are cases where the courts had decided against the Minister.

10. The preventive laws also provide for special procedures for the detainees to make representation before the Advisory Board established by the Federal Constitution. In this process, the detainee may appoint legal counsel of his own choice.

Internal Security Act (ISA)

11. The Internal Security Act 1960 (ISA) which came into force on 1 August, 1960 (West Malaysia) and 17 September 1963 (East Malaysia) aims to counter the subversive elements and threats prejudicial to the national security. Its purpose is to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in Malaysia and matters incidental thereto. The ISA is needed to maintain peace, stability and security of persons in Malaysia.

12. The ISA empowers the Minister to detain any person 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.

13. Section 73 allows any police officer without warrant to arrest and detain, pending enquiries, any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 8 and 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.

14. Section 8 provides for the Minister's power to make an order for the detention of any person without trial for up to two years, on the ground that the Minister is satisfied that the detention is necessary to prevent the person from acting in any manner prejudicial to national security. Such detention order may be renewed for a further period not exceeding two years at a time and reviewed not less than once in every six months by an Advisory Board.

15. Section 11 of the ISA provides that any person against whom an order by the Minister under section 8 has been made shall be entitled to make representations against that order to an Advisory Board. The said Board shall, within three months of the date on which the representations are received, or within such longer period as the King allow, consider the representations and make recommendations thereon to the King, whom shall in turn give such directions he thinks fit regarding the order made by the Minister.

16. The detainees have rights to file writs of habeas corpus as provided for under section 365 of the Criminal Procedure Code challenging the procedural requirement of their detention order. In the proceedings for the writ of habeas corpus and the representation before the Advisory Board, the detainees are entitled to be legally represented by counsels of their or their family's choice. The detained person is never held incommunicado and is

provided with the right of visitation to their family members and access to counsels of their choice.

17. The Government places high importance on the rights of those detained under the ISA and have various legal safeguards in place to protect the rights of the detainees under the ISA, which include the following:

- 17.1. access to family members;
- 17.2. access to legal representations of the detainee's choice;
- 17.3. access to medical check-ups;
- 17.4. to be informed of the grounds of detention as soon as possible;
- 17.5. to be informed of the allegations of fact on which the order is based subject to the proviso that the authority is not bound to release any information which, in the opinion of the authority, is against the national interest to release;
- 17.6. to be served with a copy of the detention order as soon as possible after it is made;
- 17.7. to be entitled to make representations against the order to an Advisory Board;
- 17.8. to have the Advisory Board hear and consider representations;
- 17.9. to have the Advisory Board make recommendations thereon to the King within three months of the date on which the detainee was detained;
- 17.10. to be informed of such a right; and
- 17.11. to be furnished in writing with the grounds and allegations of fact on which the order is made, and any other particular if any, which, in the opinion of the Minister, the detainee may reasonably require in order to make his representations against the order of the advisory board.

18. With regard to paragraph 41, Malaysia reiterates that the legal counsels of the detainees are provided with access to the Statement of Ground of Detention and Allegation of Facts. These are key documents used by the legal counsel of the detainees to dispute the finding of the Minister before the Advisory Board as an effort to release the detainee. Apart from documentary evidence, the Advisory Board also allowed witnesses to be called during its sittings.

Powers of the Police and the Ikatan Relawan Rakyat Malaysia (RELA)

19. RELA was established on 11 January 1972. The objective of RELA is to assist the police department in maintaining the security and stability of the country. Through the amendments of the Essential Rules (Amendment) Regulations 2005, RELA was tasked to assist enforcement authorities, namely the police and Immigration Department to apprehend illegal immigrants.

20. The Government wishes to inform that all volunteers wishing to be a member of RELA would need to undertake a one-day orientation course to be accepted. However, members who are involved in field operations such as on illegal immigrants will be obligated to attend several advance courses conducted at RELA Training Centres nationwide.

21. It is also worth noting that the Government takes a serious view on the allegations of the unprofessional conduct of RELA members, including allegations of the abuse of illegal

immigrants at Immigration Detention Centres. Any incident of beatings and mistreatment by RELA and immigration officers made known to the relevant authorities, such as through a police report, would be investigated to ensure the rights of the illegal immigrants are safeguarded. In addition to steps taken by the Government to place administration of detention centre under the Immigration Department, RELA members are only given the task to deal with the security and safety of the external premises of immigration detention centres.

Police detention

22. Malaysia does not condone any act of torture, cruel, inhuman or degrading treatment and takes a serious view on any allegations of ill-treatment against any persons in police station and detention centres. Between 2008 - 2010, nine (9) police officers have been charged in court for abuse of power and excessive use of force against detainees during police interrogation sessions. Apart from judicial proceedings, such police officers also face disciplinary action which may include demotion and re-assignment.

Pre-trial Detention

23. Malaysia remains seized of the issue of extended period of pre-trial detention. On this, Malaysia wishes to inform that the Government is taking necessary steps to address this issue through an increase in the appointment of judges, the establishment of courts and also in terms of efficiency and speed in the delivery of judgment without sacrificing on quality and justice.

Detention Centres and prisons

24. With regard to the issue pertaining to overcrowding of some prisons and detention centres in Malaysia, the Government is aware of its responsibility to ensure that the right to security and the right to physical and psychological integrity of all those detained in Malaysia as provided for under Section 51A of the Immigration Act 1959/63 [Act 155]. Currently, there are sufficient laws and regulations in place to ensure humane conditions at immigration detention centre as provided for under the Immigration (Administration and Management of Immigration Depots) Regulations 2003.

25. Apart from current laws and regulations in place, the Government is also taking additional steps such as establishing a new body comprising of personnel from relevant authorities that would oversee improvements done on detention centres. The Government is allocating a total amount of RM 100 million (USD32.5 million) to upgrade physical conditions and for renovations to detention centres. At the same time, the Government is also undertaking a study to enable it to emulate best practices of other countries such as Australia and The Netherlands.

26. Various measures have also been taken by the Government to reduce the number of prisoners. This includes improving the rehabilitation programmes in prisons and reducing recidivism through effective rehabilitation and segregation of prisoners. With reference to the Working Group's comment in paragraph 54 of the report, the Government wishes to inform that it is working towards facilitating foreign prisoners to undergo parole or serve their sentences in their country of origin. In addition, the Government is working towards improving the delivery in terms of prosecution processes.

Deaths in Custody

27. On the issue of deaths in custody, the Government wishes to inform that in Malaysia, an inquiry of death is carried out when there is reason to suspect that a person has died in the following manner:

- 27.1. sudden;
- 27.2. unnatural;
- 27.3. by violence; or,
- 27.4. cause of death unknown and in situations where the law requires an inquiry.

28. In this regard, inquiries of deaths are governed by Chapter XXXII of the Criminal Procedure Code. The inquiry is conducted by a Magistrate in a place open to the public. The Magistrate will inquire as to:

- 28.1. when, where, how and after what manner a deceased person came by his death; and
- 28.2. whether any whether any person is criminally concerned in the cause of such death.

29. Public interest requires that inquiries of death should be held as soon as possible after the death is reported. The current measures in place are adequate to address cases of deaths in custody.

Detention pursuant to immigration powers

30. With reference to paragraph 69 of the report, the Government takes strong exception to the Working Group's views that the Government "*does nothing to facilitate access and, as part of its immigration enforcement efforts, often arrest and detain asylum-seekers and refugees*". In fact, Malaysia has consistently facilitated access to the office of the UNHCR on the basis humanitarian ground.

31. In paragraph 75 of the report, WGAD has concluded that the Government is unwilling to perform State functions of asylum management. In this regard, the Government wishes to reiterate that even though that it is not a party to the 1951 Convention Relating to the Status of Refugee and its 1967 Protocol Relating to the Status of Refugees, Malaysia has been cooperative with the United Nations High Commissioner for Refugees (UNHCR) office in dealing with issues pertaining to illegal immigrants.

Monitoring Mechanisms

32. In demonstrating the Government's commitment to ensure that the National Human Rights Commission of Malaysia (SUHAKAM) retains its A-status accreditation, the Government amended Act 597 of 1999 which established and sets out the terms of reference for SUHAKAM, taking into consideration the concerns of the International Coordinating Committee (ICC) for National Human Rights Institutions (NHRIs). The Government wishes to highlight that SUHAKAM was reaccredited with A-status by the ICC on 28 January 2011.

Other issues

33. With regard to the conclusion made by the Working Group in paragraph 96 of the report, the Government is of the view that this issue falls outside the scope and mandate of the Working Group.
