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EFFECTIVE FUNCTIONING OF HUMAN RIGHTS MECHANISMS: NATIONAL INSTITUTIONS AND REGIONAL ARRANGEMENTS

Written statement* submitted by South Asian Human Rights Documentation Centre (SAHRDC), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[3 February 2003]

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*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Malaysia's Suhakam- Yet to earn its spurs

The Malaysian Human Rights Commission, or Suhakam, was established in August 1999 upon the adoption of the Human Rights Commission of Malaysia Act (hereafter the "Act"). However, the Act fails to create a human rights institution that complies with the standards enumerated in the Paris Principles and the United Nations Handbook on the Establishment of National Human Rights Institutions. An examination of the Act, as well as Suhakam's recent performance, raises serious questions about the body's efficacy and credibility.

The Paris Principles state that the independence and pluralism of a national human rights institutions' (NHRI) composition must be ensured through appropriate appointment and dismissal procedures. Suhakam's mandate fails to fulfil these requirements. Section 5 of Malaysia's Act states that members will be appointed by the King or "Yang di-Pertuan Agong [the supreme head of the Federation], on the recommendation of the Prime Minister". There is no system of checks and balances to ensure that the appointment process is politically neutral. The Act does not provide adequate guarantees of pluralism: section 5(3) merely states that Commissioners shall represent different religious and racial backgrounds. The Act does not specify limits on reappointment. Furthermore, there is no prescribed manner for public participation in the selection process.

The Act does outline a standard procedure for removing a member from the commission in Section 10. However, its words may prove hollow in practice as the decision to dismiss a member may be based on the "opinion" of the Yang di-Pertuan Agong. The Act does not lay out standards for proving that this "opinion" has a reasonable basis.

The Paris Principles state: *"The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence"*. Section 19(1) of the Act states that Suhakam will be provided with *"adequate"* annual funds, but does not specify how this adequacy will be measured. This clearly leaves its determination open to government manipulation. Section 19(2) limits Suhakam's funding options by stating that it may not receive funds from foreign sources. It should be noted, however, that Section 19(3) states that extra funds, restricted to use for education and public awareness projects, may be received from individuals or organisations without condition. Yet all other expenses, as indicated in section 19(6) and (7), must be met by the fund designated for the Commission.

Suhakam's current office lacks necessary equipment, impairing the Commission's ability to deal with the large number of complaints that it receives. Though Suhakam is continuing to hire more staff, its 2001 Annual Report notes the need for more investigation officers to expedite the processing of complaints. Not only does this contradict the Paris Principles' instructions regarding adequate funding, but also impairs the Commission's ability to make itself fully accessible and accountable, also as required by the Paris Principles.

In another failure to comply with the Paris Principles' recommendations for

independence, section 22 of the Act states that the Minister of Foreign Affairs may make regulations and change the commissions' procedure of inquiry. This is also contrary to the recommendation of the UN Handbook, which states that a commission should establish independent procedures that are not subject to external modification. Although it is not clear how the foreign minister will use this provision, section 22 unquestionably undermines the investigative independence and quasi-judicial powers of the Commission.

Although section 4(3) of the Act empowers the Commission to inquire into alleged cases of human rights violations and to undertake visits to the prisons and detention centres, the Commission has met with strong resistance. Security personnel frequently fail to co-operate with Suhakam and have often denied the Commission staff access to the detention facilities. In 2001, the Commission had to wait for over a month before it was granted permission to visit six activists detained under the Internal Security Act (ISA). This is especially troubling in light of the well-documented reports of severe ill-treatment, often amounting to torture, of ISA detainees during the first weeks of incommunicado detention. The efforts of the newly established Visitation Sub-Working Group have been significantly frustrated by police procedures and regulations at places of detention, as was the case with the public inquiry held at the Kamunting Detention Centre in June 2002.

Suhakam has failed to comply with the minimum standards of independence as set out in the Paris Principles and the UN Handbook. The UN Handbook specifically notes that the *"founding law of a national institution will be critical in ensuring its legal independence, particularly its independence from the government."* While the Commission took a stand on the right of public assembly in July 2000 and on the rights of ISA detainees in April 2001, in most public statements it avoided directly criticising the government or making allegations of corruption. As of January 2003, no public statement had been issued by the Commission condemning the Government's continuing threat to indiscriminately use the ISA and the Sedition Act.

The Commission has failed to be transparent in the way it handles complaints, despite numerous such recommendations in the UN Handbook. For example, the procedure Suhakam has created and published on its website does not specify what measures are taken to ensure confidentiality for complainants.

The Paris Principles state that the functions of a NHRI shall be based, *inter alia*, on the principles of "[s]eeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality". This implies that national human rights institutions must ensure that external developments to a given case do not hamper the implementation of impartial investigations. However, the last clause of section 15(2) of the Act qualifies a witness' immunity from legal action based on testimony by stating: "except when the person is charged with giving or fabricating false evidence." Although at first this clause may seem logical for maintaining the integrity of Suhakam's quasi-judicial powers, in practice it may undermine protection for witnesses because a charge of contempt is a common occurrence in Malaysia.

The Act does not provide for enforcement or compensation mechanisms following the release of reports or recommendations by the Commission. Suhakam does not have any alternative dispute resolution capacity. It cannot sanction the government, individuals, or organisations that hinder Suhakam's investigations by failing to co-operate.

Finally, the definition provided for "human rights" in section 2 of the Act is: "fundamental liberties as enshrined in Part II of the Federal Constitution." This definition is of concern because, while the Constitution guarantees many human rights, Malaysian laws often fail to preserve these rights even though they may be declared consistent with the Constitution.

In pursuance with section 21(3) of the Act, the Commission submitted its 2000 Annual Report to Parliament and identified areas of human rights in Malaysia that needed to be reviewed. This is also in accordance with the recommendations contained in the Paris Principles and the UN Handbook. However, as of the close of 2002 no action had been taken on Suhakam's recommendations to reform the legislative process, to revoke the Proclamations of Emergency in force since 1964, 1966, 1969, and 1977, or to ratify important international instruments. The recommendations for reform in the Freedom of Assembly Report were apparently ignored by the government, which proceeded to further tighten its grip on public gatherings by imposing a blanket ban on public political assemblies in February 2002. The 2001 Annual Report has been likewise presented to Parliament but is yet to be discussed. It is expected to meet the same fate as the earlier report.

Other bodies have overlooked Suhakam's various inadequacies and have instead moved to lend it undeserved legitimacy. In November 2002, the Asia Pacific Forum of NHRIs admitted Suhakam as a member, contrary to its own founding principle that requires members to conform to the Paris Principles.

Malaysia is still in the early stages of transition towards being a nation built solidly on the principles of democracy, accountability, and transparency. The inadequacies of the present mandate create the risk that a potential Malaysian human rights culture will be fraught with contradiction and inefficiency. To ensure the protection of its citizens from unjust and inhumane treatment, the Malaysian government must act to adequately equip Suhakam. To this end, it must grant the Commission more powers and greater independence.
