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**REPORT ON THE INTERNATIONAL CONVENTION ON THE
ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)
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SUMMARY OF MAIN POINTS FROM THE FIELD

In the Introduction of this Report, three main objectives of this exploratory research were listed, that is (i) to build a database, gather accessible literature and conduct research on the ICERD and its relation to Malaysia; (ii) study the reasons why Malaysia has not signed and ratified the ICERD; and (iii) evaluate and consider the implications and benefits if Malaysia were to sign and ratify the ICERD.

Pertaining to objective number 1, we have mentioned that there is a dearth of research and publications on Malaysia's position in relation with ICERD, a fact substantiated through interviews with Suhakam, AG Chambers and also Professor Thornberry. In fact, Professor Thornberry specifically mentioned that he had not come across any research on Malaysia and the ICERD. A key source of information would be Wisma Putra, however, the research team had been unavailable to secure any appointments with Wisma Putra officials, despite several attempts. Hence, the bibliography that we have provided at the end of this Report is not comprehensive and further research needs to be done to update the list.

Considering the lack of published data on Malaysia and the ICERD, the research team decided to rely more on empirical data, hence, the decision to organise focus group discussions and interviews with Malaysians representing different segments of society, as well as with Non-Malaysians who were/are connected with the operations of ICERD and CERD. As such, objectives number 2 and 3 are achieved through these empirical activities.

Section IV above has provided an overview of the activities undertaken by the research team as well a detailed presentation of the views of people interviewed during the research period. This section will give a summary of the main points conveyed by the respective individuals regarding Malaysia's position in relation with ICERD, the reasons why Malaysia has not signed and ratified the ICERD, and the implications and benefits if Malaysia were to sign and ratify the ICERD.

On Malaysia's position in relation with ICERD

Malaysia's position in relation with ICERD is said to be cautious or guarded in view of existing conditions in Malaysia. The AG Chambers for example mentioned that Malaysia takes a cautious approach towards international obligation, ensuring that compliance is feasible. This is to avoid criticisms from international community and avoid sanctions from the International Court of Justice.

The core business of ICERD is racial discrimination, as enshrined in Article 1, Paragraph 1 of ICERD: "racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." All participants in this research study (albeit with their respective justifications/rationalisations) agreed that there is discrimination in Malaysia. Whatever label is given — positive discrimination or affirmative action — such policies and practices are seen as going against the basic premise of ICERD, hence, will be seen as 'non-compliant' by the international community.

The participants were also in agreement that it is timely for Malaysia to re-examine its position in relation with ICERD. A detailed and substantive research could be carried out to study the implications of signing and ratifying the ICERD in the context of the content of ICERD, and the necessary measures that need to be undertaken for Malaysia to comply with the provisions enshrined in the Convention. While some participants expressed the view that the Convention is not obligatory, others however felt that the Convention is a treaty, as such all parties have the obligation to abide and comply with the provisions.

On the reasons why Malaysia has not signed and ratified the ICERD, among the reasons cited are as follows:

It is the opinion of most of the discussants that Article 153 of the Federal Constitution is the main impediment as to why Malaysia has not signed and ratified the Convention. Article 153 is said to be inconsistent with the provision on permissibility of special measures in ICERD (Article 1,

Paragraph 4) since there is no time frame set as well as no clear justification as to the 'necessity' and 'reasonableness' of using an ethnic-based instead of need-based criteria to eliminate poverty.

Besides Article 153, the participants also mentioned other focal point of inconsistencies with ICERD. Other matters related are land rights involving indigenous people, New/National Economic Policy (NEP), housing development policy, scholarships to civil servants, preferential treatment to the children of PETRONAS to study for free at Universiti Teknologi Petronas, free medical treatment for certain sections of the society whereas others do not enjoy the same.

Another consistent theme as to why Malaysia has not signed and ratified ICERD is because of the fear that, once Malaysia became a party to ICERD, Malaysia's sovereignty and autonomy would be undermined as it would be subjected to international laws. Hence, there is this show of 'defiance' that Malaysia does not need international laws to help run/govern the country. It is also a show of 'confidence' that Malaysia can take care of its domestic situation as it has enough laws to deal with the situation.

A related theme with the above point is the admission that discrimination exists in Malaysia, hence Malaysia has to solve its own problems first before it opens itself to international scrutiny. On this note, it is said that a road map of measures including mechanisms have got to be put in place to ease out the discriminatory policies and practices currently existing in the country.

Another common theme on why Malaysia has not signed and ratified ICERD is the political factor. Some participants shared the view that Wisma Putra had suggested to the government to sign ICERD, so has SUHAKAM in 2000, but some other government agencies including the Attorney General Chambers did not support this suggestion. Why this is so? The reason given is political, since UMNO is said to lose support from the Malays, should Malaysia sign and ratify the Convention.

Another related theme on why Malaysia is hesitant to sign and ratify ICERD is this concern for identity and the state of readiness for a change in identity. Signing and ratifying an L. international instrument such as the ICERD entails change in domestic agendas and policies, and perhaps Malaysia is not ready for such change. Given the continuing calls for national unity and reports of racial/ethnic-related issues, one would think that Malaysia would work towards positively identifying with the ICERD. According to the participants, Malaysia is not ready for this change

and accommodation to the provisions of ICERD principally because it has no mechanisms and institutions to cater to ICERD. Malaysia does not have official laws on inter-ethnic differences or discrimination, so how does Malaysia deal with racial/ethnic discrimination at the home front? Signing and ratifying ICERD requires drastic shift in mindset and value system, which on the one hand, should be good premise for working towards a just, equitable, united and progressive nation, but which on the other hand, would be good fodder for those wanting to maintain status quo.

Malaysia's reluctance to sign and ratify ICERD can be summed up in a nutshell through the following statement, as expressed by a participant:

My opinion on ICERD is that we need to go through each and every provision proper(ly) and examine the implication to Malaysia. Will it affect our existing structure of special rights of the Bumiputera under our Federal Constitution? Are there room for argument and misconception by international community (or certain countries) that those special rights (are) tantamount to a form of discrimination? If that is possible, then could Malaysia make a reservation on that if we are willing to ratify ICERD? At this point, there will be risk that the reservation cannot stand the test if challenged (refer to the ICJ case of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide) that it may be construed as undermining the objectives of ICERD. There has been a tendency of not ratifying certain international conventions by Malaysia and a number of other countries on issues such as this. Otherwise we will open up our internal system for the scrutiny of others, which may not be exactly desirable as some countries (which I will not mention any names) may take advantage of this and politicise it internationally. These are some of the basic issues which I feel must be addressed first.

On the reasons why Malaysia should sign and ratify the ICERD, among the reasons cited were as follows:

Overall, there are more participants who said Malaysia should sign and ratify ICERD than participants who said otherwise. One common theme among those who said Malaysia should sign and ratify ICERD is that it is becoming increasingly difficult for Malaysia to choose not to sign and ratify the ICERD on the grounds that Malaysia has not resolved its problems concerning discrimination. This is because no country in the world has been able to completely tackle discrimination. The point of adopting the ICERD is to ensure the continuous attempt to improve

and overcome discrimination. Hence, a related theme with this point is that Malaysia should reflect deeply on its motivation to consider signing and ratifying ICERD. Is it to improve relations at the international level, or is it to reform domestic law and put mechanisms in place to see its implementation? The former might make Malaysia look good in the eyes of the international community but without substantive improvement in the state of racial/ethnic relations in the home country.

Another common theme is related with Malaysia's sovereignty. Signing and ratifying ICERD will enhance Malaysia's standing internationally, hence enhancing Malaysia's sovereignty as Malaysia can show that it is doing something to eliminate discriminatory structures and practices and upholding the universal values of human rights. To sign and ratify ICERD requires wisdom, courage and political will. In the long term, Malaysia will have everything to gain including better and stronger promotion and protection of human rights in the country. Hence, signing the ICERD is imperative because it resonates with international norms and in particular, on the home front, with 1Malaysia.

A related theme to this idea of ICERD resonating with 1Malaysia is the hope that breaking down the structures of discrimination (as required by ICERD) will pave the way for genuine national unity and integration among the different racial/ethnic groups in Malaysia. Genuine unity and integration are said to be vital for Malaysia, as opined by one participant:

This country has many potential divisive factors. It is a land of 'multies'. The process of unifying and integrating should be based on justice, equal rights and opportunities and respect rather than slogans. Article 1 of the Universal Declaration of Human Rights provides that all humans are born free and equal in dignity and right. No nation which embraced race-based politics and one community claiming superiority over others survived. Nazi-Germany and apartheid South Africa are cases that come to mind. We are all Malaysians and equal before God. Meritocracy should be recognised, appreciated and practised, otherwise Malaysia will lose out in a globalised and highly competitive world.

Another common theme is the assertion that Malaysia need not have misgivings in signing and ratifying ICERD. This is because the ICERD and General Recommendation No. 32 permits affirmative action, termed 'special measures'. Affirmative action is permissible under the ICERD so long as it is time-bound and purpose-oriented. This nature of affirmative action is in accordance

with the human rights conception of affirmative action and as such, the idea of affirmative action is in line with that found in Article 153 of the Federal Constitution. Article 153 is in tandem with the human rights spirit. The ideal of affirmative action is that it should not promote race classifications. However, there was also the view that Article 153 contributed to racial discrimination. Hence, by signing and ratifying ICERD, Malaysia would be obliged to remove all discriminatory clauses.

There is thus no room for misgivings or apprehension as the very purpose of making a commitment as such to the ICERD is not to reflect an already perfect position but to signal a pursuit of an aspiration. Some participants concluded that there is no mismatch between the ICERD and Malaysia's aspirations for a just and equal society, as outlined in Tun Mahathir's Vision 2020 speech in 1991.

In Section II above, we mentioned about Asian values, and one participant (Student 4, Cambridge) has made a reference to this 'Asian values' in her response as to why Malaysia should sign and ratify ICERD. This 'Asian values' approach, according to Student 4, is politically outmoded and theoretically unfounded. Hence Malaysia needs to move beyond this out-dated approach and engage concretely with international discourse on human rights in order to be valued as an international participant willing to contribute valuably to the dialogue. On this count, the time has come for Malaysia to reflect on what values it want to uphold and adopt to build a united, just, equal and fair nation. While Malaysia may have certain political and social circumstances that may cause the Government to hesitate in signing ICERD, these can be overcome if the Government can show that the National Economic Policy (NEP) is a justifiable unequal treatment because of economic imbalances. The onus would then be on the Government to show that is both 'necessary' to have the NEP and that the measures taken are not more than 'reasonable' (see Article 153 in the Constitution which has both these terms included in the measures that the Agong can take to ensure the special position of the Malays).

Signing and ratifying the ICERD would indicate, both symbolically and practically, that Malaysia is undertaking steps to engage with the international community.

The general consensus for participants who are favourable towards Malaysia signing and ratifying the ICERD is that it is timely for Malaysia to reconsider its stand on ICERD and move positively towards signing and ratifying the Convention. The ICERD will provide a platform for Malaysia to

uphold and recognise human rights instruments that could be translated/assimilated to the national laws. What Malaysia has to do is to construct a roadmap in relation to the harmonisation of the ICERD provisions to her domestic legislations.

On this note, we would like to refer once again to Student 1 (London), who made a very good observation concerning data protection, privacy and media governance in relation to profiling, classification and aggregation of data concerning Malaysians. According to Student 1, ICERD is about human rights and one of the many aspects of human rights is privacy. There are four types of privacy - spatial, informational, bodily and communications. For the purpose of this research, Student 1 focuses on informational privacy, which consists of two components: data protection and media governance. These two components, according to Student 1, should be included in future discussions and policy-making, especially relating to the manner in which profiling, management, transfer and deletion of data is done, and the nature of media ownership, control, contents and dissemination in Malaysia. These considerations involving data protection and media governance are crucial as data profiling is the key that sparks such potential soft-discrimination prior to being aggregated. Therefore, according to Student 1, the classification and aggregation of data, prior to making it a public domain, and the nature of information should and must be made transparent. This is because transparency and accountability hold an invaluable chain of trust not only from the viewpoint of the ruling government, but also all Malaysians.

REFLECTION ON MALAYSIA'S POSITION IN RELATION WITH ICERD

Embarking on this exploratory short term research has been an informative, if not challenging endeavour. It has opened up a plethora of opportunities to meet fellow Malaysians and speak on issues that would normally not be discussed in public. One of the participants reminded team members of the political overtones embedded in such a study related to human rights and discrimination, hence he cautioned us not to sound pedantic or write like we are speaking from the pulpit. The outburst from a fellow Malaysian at the cafeteria of the MSD in London serves to remind us of the intricacies, sensitivities and fragility of ethnic relations in Malaysia, despite assertions to the contrary.

With these concerns in mind, we would like to say that we regard this research as an 'appreciative inquiry' into the reasons why Malaysia has not signed and ratified the ICERD and if Malaysia were to do so, what implications and benefits would this have on Malaysia.

We also would like to reiterate that we are not inclined to make recommendations for Malaysia to sign or not to sign the Convention. Suffice to say that we have tried our best to pose questions to participants in a way that will encourage them to give their thoughts on Malaysia's position in relation with ICERD, the reasons why Malaysia has not signed and ratified ICERD, and the reasons why Malaysia should or should not sign ICERD.

On this count, we chose participants who have knowledge of the law or interest in human rights issues. Given the time frame of three months, we managed to do what needed to be done. Granted, there were some key personnel we planned to meet but did not get to meet, for example, officials from Wisma Putra, Prof Shad Saleem Faruqi, Tun Mahathir, Tun Musa Hitam, among others, and activities we planned to do but could not, for example, FGD sessions with Law students from various universities as well as visits to several countries that have signed and ratified the ICERD. We also could not do a detailed search on Hansard.

Reflecting on the participants' thoughts on Malaysia and ICERD, we can say that, with regard to the reasons why Malaysia has not signed and ratified ICERD, the biggest obstacle seems to be the fear of non-compliance to the provisions of ICERD. This is tantamount to an admission that racial/ethnic discrimination exists in Malaysia — a reality much spoken about by participants in this research, for example, constant reference to Article 153 of the Federal Constitution. Nevertheless, we have also heard from participants connected with the operations of CERD and ICERD (example, Professor Banton), that signing and ratifying ICERD is no big deal, as non-compliance to the provisions of ICERD is not a big issue. There are countries who signed and ratified but still commit acts of non-compliance (USA, Israel, Fiji, Philippines).

The second obstacle seems to be the perception/belief that signing and ratifying the ICERD will erode Malaysia's sovereignty as Malaysia and her domestic state of affairs will be subjected to international scrutiny and international law. Participants who are in favour of Malaysia joining the Convention has refuted such allegation. On the contrary, they believe that signing and ratifying the ICERD will enhance Malaysia's sovereignty, not subtract or diminish it, as Malaysia will look good in the eyes of the international community. This is so because Malaysia can now show to the world that it embraces the value of human rights and non-discrimination, and engage in the international discourse on human rights, at the same time, stand up to the principles of the UN Charter and UDHR. This will then raise Malaysia's reputation as mature and participatory nation. It takes courage and wisdom to stand up to the scrutiny of the international community, and to

sign and ratify an international convention such as the ICERD will show to the world that Malaysia has nothing to hide and nothing to fear. Thus is the benefit of being a signatory to the ICERD.

Malaysia aspires to be a united nation, with a confident Malaysian society, infused by strong moral and ethical values, living in a society that is democratic, liberal and tolerant, caring, economically just and equitable, progressive and prosperous, and in full possession of an economy that is competitive, dynamic, robust and resilient by the year 2020 — as expounded by our former Prime Minister, Tun Mahathir in his speech in 1991 (Mahathir 1991). This aspiration soon came to be known as Vision 2020. Tun Mahathir went on to say that there can be no fully developed Malaysia until we have finally overcome the nine central strategic challenges that have confronted us from the moment of our birth as an independent nation.

These nine challenges that needed to be overcome by 2020 are:

1. Establishing a united Malaysian nation with a sense of common and shared destiny. This must be a nation at peace with itself, territorially and ethnically integrated, living in harmony and full and fair partnership, made up of one 'Bangsa Malaysia' with political loyalty and dedication to the nation.
2. Creating a psychologically liberated, secure, and developed Malaysian Society with faith and confidence in itself, justifiably proud of what it is, of what it has accomplished, robust enough to face all manner of adversity. This Malaysian Society must be distinguished by the pursuit of excellence, fully aware of all its potentials, psychologically subservient to none, and respected by the peoples of other nations.
3. Fostering and developing a mature democratic society, practising a form of mature consensual, community-oriented Malaysian democracy that can be a model for many developing countries.
4. Establishing a fully moral and ethical society, whose citizens are strong in religious and spiritual values and imbued with the highest of ethical standards.
5. Establishing a matured liberal and tolerant society in which Malaysians of all colours and creeds are free to practise and profess their customs, cultures and religious beliefs and yet feeling that they belong to one nation.
6. Establishing a scientific and progressive society, a society that is innovative and forward-looking, one that is not only a consumer of technology but also a contributor to the scientific and technological civilisation of the future.

7. Establishing a fully caring society and a caring culture, a social system in which society will come before self, in which the welfare of the people will revolve not around the state or the individual but around a strong and resilient family system.
8. Ensuring an economically just society. This is a society in which there is a fair and equitable distribution of the wealth of the nation, in which there is full partnership in economic progress. Such a society cannot be in place so long as there is the identification of race with economic function, and the identification of economic backwardness with race.
9. Establishing a prosperous society, with an economy that is fully competitive, dynamic, robust and resilient.

This exposition of a united Malaysian nation by 2020 based on the principles of key values such as equality, common and shared destiny, economic justice, caring, maturity, liberal, tolerance, democratic, moral and ethical - carries with it the basic premise of the Charter of the United Nations, the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. This is that all human beings (in this context, all Malaysians) are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.

Shad Saleem Faruqi, in his article 'Spirit of moderation animation' (The Star, 1 June 2011, pg 32), re-affirms that the guiding principle of the Constitution is equality before the law and equal protection of the law: "Some extremists are suggesting that because of Article 153, which permits affirmative action in favour of Malays and natives of Sabah and Sarawak, no government scholarships should be awarded to a non-Malay. Such bigotry is not surprising because extremism, racism and hatred of "the other" exist everywhere in the world ..."

If the authorities in Malaysia is concerned that existing legislations, structures and conditions in Malaysia do not stand up to this exposition and to the values espoused by the UN Charter, UDHR and the ICERD, then the time has come for Malaysia to look into these legislations, structures and conditions. International conventions such as the ICERD give allowances for reservations and provisions for special measures. Hence if discriminatory measures and practices are in place, Malaysia can still prove why it is still necessary to have such measures and practices based on race and not on need to achieve an 'economically just society, a matured democratic society, a tolerant and liberal society, a caring society ...'