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**Tan Sri Datuk Seri Utama Pandikar Amin bin Haji Mulia**

Yang di-Pertua Dewan Rakyat

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Dear Tan Sri Datuk Seri Utama Pandikar Amin bin Haji Mulia,

Greetings from the International Commission of Jurists (ICJ).

Composed of 60 eminent jurists and lawyers from all regions of the world, the ICJ promotes and protects human rights through the Rule of Law, by using its legal expertise to develop and strengthen national and international justice systems.

The ICJ writes to you today to relay our concerns regarding the newly tabled draft **Prevention of Terrorism Act (POTA)** and to urge you and other Members of Parliament to reject this draft law or to amend it to ensure its consistency with international human rights law.

The ICJ recognizes that the Government of Malaysia can and should take measures to protect its people from acts of terrorism. The UN Security Council, General Assembly, and Human Rights Council have all repeatedly emphasized that all States should “ensure that measures taken to counter terrorism must comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law”. The Security Council and other bodies have further underscored that “respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort.”<sup>1</sup>

We note that several provisions in the draft POTA fail to comply with requirements set out above by the Security Council and violate international human rights standards. The Malaysian government has not demonstrated how the current security situation in Malaysia meets the very high threshold required for the creation of a system of administrative security detention. The government has also not demonstrated why the existing criminal law, law enforcement, and criminal justice system, properly resourced and implemented, cannot adequately address acts of terrorism.

In this letter, the ICJ has only highlighted a few of the issues of the highest concern. These concerns are: (a) the unlawful conferral of authority and limitation of judicial control of decisions of the Prevention of Terrorism Board (“Board”) to detain and impose other restrictions on those alleged to have been engaged in the commission and support of acts of terrorism, and (b) the abuse of arrest and remand powers.

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<sup>1</sup> See for example UN Doc S/RES/2178, 2014 and the UN Global Counter-terrorism Strategy adopted by General Assembly resolution 60/288 in 2006 and repeatedly reaffirmed since.

Other provisions not directly mentioned in this letter, such as the creation of the Registry and the creation of a series of offences in relation to it, at minimum also require further legislative scrutiny from the point of view of ensuring compatibility with human rights. The Parliament should therefore ensure that the Bill is not rushed and receives a careful review with ample opportunity for civil society input on all of its provisions.

### **I. Re: the unlawful authority of the Prevention of Terrorism Board and limitation of judicial control over its decisions**

As a preliminary matter, the proposed Board, whose members are appointed by the Yang di-Pertuan Agong (King), lacks sufficient legal expertise. The Chairman is the only member of the Board required to have legal qualifications and at least 15 years of experience in the legal field. Other members of the Board are the Deputy Chairman and no less than three and not more than six other members.

Under section 13(1) of the draft POTA, the Board has the authority to decide whether a person has been engaged in the commission or support of acts of terrorism. If such a determination has been made and the Board believes that it is necessary for the security of Malaysia or any part of the country, the Board may issue a "detention order" directing that such person be detained for a period up to two years. This period may be extended for another two years if the Board decides so at any time before the expiration of the original detention order.

If the Board believes it is not necessary to detain such person (or otherwise control and supervise the person's activities and freedom of movement), it may issue a "restriction order" putting the said person under the supervision of police authorities for a period of up to five years. The types of restrictions that may be imposed by the Board are wide-ranging, including for example: requiring the person to reside within the limits of a particular area (e.g. State, district, town or village), prohibiting the person from transferring residence to any other area, prohibiting the person from leaving the area without the written authority of the Chief of Police of the State concerned, requiring the person to present regularly during designated times to the nearest police station, remaining under curfew or perhaps even house arrest, using only police-approved communications equipment, restrictions or prohibition on internet use, and being attached with an electronic monitoring device. The Board, prior to the expiration of the duration of the restriction order, may direct that the duration be extended for another period of up to five years.

The draft POTA provides that any failure to comply with any such restriction or condition ordered by the Board constitutes an offence punishable by at least two years imprisonment and up to ten years imprisonment. Anyone who "conspires with, abets or assists" in the breach of a restriction or condition also commits an offence punishable by at least two and as much as ten years imprisonment. Neither of these offences include a requirement of criminal intent, that is, any explicit requirement that the individual intended to fail to comply with or to assist with breach of the restriction or condition.

Significantly, the draft POTA (section 19) excludes judicial review of acts or decisions of the Board, except on procedural issues. This section excludes such fundamental judicial protective proceedings as applications for *mandamus*, prohibition, *certiorari*, declaration or injunction. It also excludes proceedings instituted by way of a writ of *habeas corpus*.

These draft provisions would establish a regime of prolonged administrative detention on security grounds, on a permanent basis. These provisions largely remove and otherwise render ineffective the ordinary right to challenge the lawfulness of any deprivation of liberty before a court. Even if such a system of administrative detention could in theory be justified by current circumstances in Malaysia, then the POTA, as currently drafted, would violate Malaysia's international legal obligations in relation to the prohibition of arbitrary detention.<sup>2</sup>

The Malaysian government has not demonstrated why it now needs such arbitrary and broad powers, and why the existing criminal law, law enforcement, and criminal justice system, properly resourced and implemented, cannot adequately address acts of terrorism.<sup>3</sup>

Independent and impartial judicial oversight of detention is essential since it serves to safeguard the right to liberty and, in criminal cases, the presumption of innocence. Furthermore, judicial oversight aims to prevent human rights violations, including torture or other ill-treatment, arbitrary detention and enforced disappearance.

It cannot be emphasized enough that it is important for a judge or judicial authority to examine whether there are sufficient legal reasons for the arrest or detention, and to order release if not; to safeguard the well-being of the detainee; and to prevent violations of the detainee's rights.

Furthermore, if the initial detention of arrest was lawful, the judge or judicial authority shall assess whether the individual should be released from custody and if any conditions should be imposed, or in criminal cases, whether remand in detention pending trial is necessary and proportionate.

According to the UN Special Rapporteur on human rights and countering terrorism, preventive detention for public security reasons may in exceptional circumstances be a proportionate interference only if "detention has a clear and accessible basis in the law, information on the reasons for detention have been given, and the detention is subject to judicial review". The Special Rapporteur further adds that an independent and impartial court should determine the existence of grounds for continued detention.<sup>4</sup>

The UN Working Group on Arbitrary Detention has also emphasized that persons deprived of liberty on any basis, including countering terrorism, have the right to effective court review of the lawfulness of the detention, including through *habeas corpus*. It has in this regard held that for *habeas corpus* to be effective, the court must be able to review not only procedural defects but all possible aspects of unlawfulness or

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<sup>2</sup> See, for further explanation, ICJ, *Legal Commentary to the ICJ Geneva Declaration* (2011), Principle 9 and commentary pp 141 to 159. See also Working Group on Arbitrary Detention, "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law", UN Doc A/HRC/22/44 (24 December 2012), para 71; "minimum requirements for habeas corpus", UN Doc A/HRC/19/57 (26 December 2011), paras 59 to 64 and 77; "principles concerning detentions in the framework of measures countering terrorism", UN Doc AHRC/10/21 (16 February 2009), paras 54 (e) and (f), and 73. See also UN Human Rights Council, resolution 24/7 (8 October 2013), para 6(d) and (e).

<sup>3</sup> See for further explanation, ICJ, *Legal Commentary to the ICJ Geneva Declaration* (2011), Principle 9 and commentary pp 147 to 150. See also Working Group on Arbitrary Detention, "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law", UN Doc A/HRC/22/44 (24 December 2012), paras 68 to 74, and 81; "principles concerning detentions in the framework of measures countering terrorism", UN Doc AHRC/10/21 (16 February 2009), paras 54 (a) and (b), and 73.

<sup>4</sup> See UN Doc. A/HRC/10/3.

arbitrariness of the detention, including among other things: whether the detention in fact results “from the legitimate exercise of a universally recognized human right”, whether it results from “the failure, in whole or in part, to comply with international rules relating to the right to fair trial”, whether it is discriminatory, whether the detainee was deprived of access to the evidence on which the detention order was based, whether the deprivation of liberty was proportionate to the act of which the detainee is accused.<sup>5</sup>

The draft POTA would severely impair access to *habeas corpus* or any other judicial remedy, and so would clearly violate the right of persons detained under the POTA to an effective opportunity to challenge the lawfulness of their detention before a court of law.

Similar concerns arise with respect to the regime for imposing orders with restrictions or conditions and the criminal offences for failure to comply or assisting in breach of such orders. These orders in themselves clearly have the potential to violate a wide range of human rights. The severe criminal penalties attached to failure to comply or assistance in breach both aggravate the potential for infringement of those rights, and bring the right to liberty again into play. Judicial review of all such orders is largely precluded in the same manner as for detention orders.

The government has, again, not demonstrated that existing ordinary criminal law and law enforcement mechanisms, properly resourced and implemented, are incapable of achieving the aims of the restriction/condition regime with less impact on human rights, or why it is necessary to substitute a special administrative board for the role of the courts in determining the imposition of such sanctions on individuals. Even leaving this fundamental concern aside, however, it is clear that to preclude the Courts from considering allegations of violations of human rights occasioned by restriction/conditions orders or their enforcement, other than on procedural grounds, violates Malaysia’s obligation to ensure in all circumstances the availability of effective remedies for human rights violations.<sup>6</sup>

## **II. Abuse of arrest and remand powers**

Under section 3(1) of the draft POTA, a police officer may arrest a person without a warrant if the officer believes that there are “grounds to exist which would justify the holding of an inquiry into the case of that person.” A person arrested under this provision shall be taken “without unreasonable delay”, and in any case within 24 hours, before a magistrate.

However, the draft POTA would in practice remove any requirement that the magistrate be presented with evidence, and would preclude any effective inquiry by the magistrate into the lawfulness or any other aspect of the arrest or detention. Under section 4, as

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<sup>5</sup> See for example Working Group on Arbitrary Detention, “Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law”, UN Doc A/HRC/22/44 (24 December 2012), paras 37 to 75, 79 and 80; “minimum requirements for habeas corpus”, UN Doc A/HRC/19/57 (26 December 2011), paras 59 to 64, and 77; “principles concerning detentions in the framework of measures countering terrorism”, UN Doc AHRC/10/21 (16 February 2009), paras 54(e) and 73.

<sup>6</sup> See for example UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/16/51 (22 December 2010), para 22. Universal Declaration of Human Rights, article 8. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly resolution 60/147 (16 December 2005).

long as the magistrate is presented with a statement signed by a police officer of the rank of Inspector or higher, which does not need to state anything more than "that there are grounds for believing that" there is a basis for the arrest and detention, the magistrate "shall...remand the person in police custody for a period of twenty-one days." The magistrate appears to have no power to require the provision of evidence or even articulation of the reasons, or to otherwise evaluate the lawfulness of the arrest and remand.

The draft POTA appears again to be attempting to preclude effective judicial supervision of arrest and detention. The UN Working Group on Arbitrary Detention, in its principles on deprivation of liberty of persons accused of acts of terrorism, specifically affirms that the competent and independent judicial authority that the detainee is brought to after arrest is to evaluate "the accusations" and the "basis of the deprivation of liberty".<sup>7</sup> It has emphasized that any extension of detention ordered by the Court before whom the person is brought "must be based on adequate reasons setting out a detailed justification, which must not be abstract or general in character."<sup>8</sup>

Even in view only of the specific concerns set out above, we strongly urge the Parliament of Malaysia to reject the draft POTA or to make fundamental amendments to ensure that it is consistent with international human rights law.

The Parliament should ensure that Malaysia fulfills its obligations under international law to protect all persons within its jurisdiction from ongoing threats of terrorism in a manner that does not infringe upon human rights.

Thank you for your kind consideration. Please do not hesitate to contact me if you have any comments or questions.

Yours very truly,



**Sam Zarifi**  
Regional Director for Asia and the Pacific

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<sup>7</sup> Working Group on Arbitrary Detention, "principles concerning detentions in the framework of measures countering terrorism", UN Doc A/HRC/10/21 (16 February 2009), para 54(f).

<sup>8</sup> See "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law", UN Doc A/HRC/22/44 (24 December 2012), paras 66-67.