

# *Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia*

Catherine RENSHAW\*, Andrew BYRNES†, and Andrea DURBACH‡  
Australian Human Rights Centre, Faculty of Law, University of New South Wales, Australia  
*cren3863@uni.sydney.edu.au; andrew.byrn@unsw.edu.au; and a.durbach@unsw.edu.au*

---

## **Abstract**

In April 2008, the Human Rights Commission of Malaysia (SUHAKAM) was informed of the possible downgrading of its “A” status within the UN system, due to its apparent failure to comply with the Paris Principles relating to the status of national human rights institutions. This article explores this threat to downgrade SUHAKAM and the actions which it stimulated on the part of the Malaysian government and SUHAKAM itself. It argues that despite expectations by government and civil society at the time of its establishment, SUHAKAM has directly challenged government on major human rights issues on a number of occasions. At the same time, it has had difficulty persuading government to give effect to its recommendations and has as a consequence drawn strong criticism from civil society for failing to protect human rights that are within the government’s power to rectify.

In April 2008, the Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia—SUHAKAM) was informed by the Sub-Committee on Accreditation of the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), that it was considering downgrading SUHAKAM from an “A” to a “B” status institution. The Sub-Committee gave

---

\* Research Fellow; Director, Project on National Human Rights Institutions in the Asia Pacific Region, Australian Human Rights Centre, Faculty of Law, University of New South Wales. The research on which this article is based forms part of an Australian Research Council Linkage project between the Australian Human Rights Centre and the Asia Pacific Forum of National Human Rights Institutions (LPO776639). In July and August 2008, the authors conducted interviews with SUHAKAM commissioners, members of civil society, and government representatives, in Kuala Lumpur, Malaysia. These interviews form part of the research presented in this article. We are grateful to Francesca Erts and Eleanor Bath for their assistance with the preparation of this article, to Jono Lusthaus for his research assistance in Sydney and Kuala Lumpur, and to Greg Heesom and Suraina Pasha for their comments on earlier drafts of this article. We are also grateful to Amanda Whiting who provided us with contacts in Malaysia.

† Professor of Law; Chair, Australian Human Rights Centre, Faculty of Law, University of New South Wales.

‡ Associate Professor of Law; Director, Australian Human Rights Centre, Faculty of Law, University of New South Wales.

SUHAKAM one year to provide evidence of its continued conformity with the Principles Relating to the Status of National Institutions [Paris Principles].<sup>1</sup> The Sub-Committee noted four areas of concern: (a) the lack of clear and transparent appointment and dismissal processes for commissioners, which weakened the independence of the institution; (b) the short term of office of commissioners (two years); (c) insufficient regard to the requirement of pluralism and representation in the constitution and composition of the body; and (d) the requirement that a National Human Rights Institution (NHRI) interact with the international human rights system.

Within the United Nations (UN), the consequence of a NHRI being downgraded from “A” status to “B” status by the ICC is significant: the commission loses its speaking rights within the UN Human Rights Council.<sup>2</sup> Within the state, the political consequences of a downgrade may also be significant: human rights activists and opposition parties can point to downgrading or potential downgrading as evidence of a government’s lack of genuine commitment to the protection and promotion of human rights, a commission’s own failure to fulfil its mandate, or both. For the human rights commission itself, downgrading is a reputational blow to the professional sense of worth of commission members and staff.

Sonia Cardenas has argued that NHRIs are established primarily to appease the international community—an act of “state adaptation”—which has a “paradoxical effect”.<sup>3</sup> She stated: “most NHRIs remain too weak to protect society from human rights violations at the same time that they create an unprecedented demand for such protection”.<sup>4</sup>

This article considers Cardenas’s argument in the context of the development and work of SUHAKAM and the effects of its proposed downgrading. It examines the dynamics that exist between SUHAKAM and the Malaysian government, civil society, and the regional human rights organization of which it is a member, the Asia Pacific Forum of National Human Rights Institutions (APF). It concludes that while SUHAKAM’s creation may have been “an instrumentally or strategically motivated adaptation by a national government to growing domestic and transnational pressures”,<sup>5</sup> SUHAKAM’s influence has exceeded the expectations that accompanied its birth.

Part I of this article provides an overview of the role of NHRIs within the international community and their increasing significance as instruments of human

- 
1. *Principles Relating to the Status of National Institutions*, GA Res. 48/134, Annex, UN Doc. A/RES/48/134 (1993) [*Paris Principles*].
  2. The current practice in the Human Rights Council is that only NHRIs with “A” accreditation, as well as the ICC, are issued full accreditation (with a NHRI badge), which gives them the right to take the floor on any agenda item of the Human Rights Council and to submit written statements: Nineteenth Session of the Annual Meeting of the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, “Participation of Regional Co-ordinating Committees in the Human Rights Council” (March 2007), online: NHRI Forum <[www.nhri.net/docs/ICC\\_HRC-regional\\_coordinating\\_committees\\_paper\\_E.pdf](http://www.nhri.net/docs/ICC_HRC-regional_coordinating_committees_paper_E.pdf)>.
  3. Sonia CARDENAS, “Adaptive States: The Proliferation of National Human Rights Institutions”, Carr Center for Human Rights Policy Working Paper T-01-04, 25 September 2003 at 3.
  4. *Ibid.*
  5. Thomas RISSE and Kathryn SIKKINK, “The Socialization of International Human Rights Norms into Domestic Practices” in Thomas RISSE, Stephen C. ROPP, and Kathryn SIKKINK, eds., *The Power of Human Rights International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), 1 at 10.

rights implementation over the past two decades. Part II considers the evolution of the ICC as the international body charged with assessing the independence and effectiveness of NHRIs in light of the Paris Principles. Parts III to V explore SUHAKAM's origins and composition and the motivations of the Malaysian government in establishing it, and review SUHAKAM's achievements and its efforts to defy the institution's structural limitations. Part VI analyses the interaction between Malaysian civil society and SUHAKAM, which Part VII explores in depth through an examination of SUHAKAM's efforts to bring about reform of the Internal Security Act 1960. Part VIII recounts the attempt by NGOs (non-governmental organizations) to use the ICC accreditation process to pressure the Malaysian government to strengthen SUHAKAM's independence and provide longer tenure for its commissioners.

## I. THE INCREASING IMPORTANCE OF NHRIS IN INTERNATIONAL HUMAN RIGHTS FORA

Since the 1990s, national institutions for the protection and promotion of human rights have proliferated around the globe.<sup>6</sup> Most commentators have greeted the development as a major advance in the field of human rights, viewing NHRIs as the “practical link between international standards and their concrete application”,<sup>7</sup> as an important way of embedding international norms in domestic systems,<sup>8</sup> as a tool for reinforcing the primary role of the state as protector of human rights,<sup>9</sup> and as an essential part of promoting the rule of law.<sup>10</sup>

NHRIs are assuming an increasingly important role in the implementation of international human rights law. This is particularly so in the Asia Pacific, where at present no regional mechanism for the protection of human rights exists.<sup>11</sup> But even in those regions which boast highly developed systems of human rights protection, such as the Council of Europe's system of human rights protection, there are growing calls for the establishment or strengthening of national institutions.<sup>12</sup>

- 
6. Raj KUMAR, “National Human Rights Institutions (NHRIs) and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights” (2006) 28 *Human Rights Quarterly* 755; Sonia Cardenas, “Emerging Global Actors: The United Nations and National Human Rights Institutions” (2003) 9 *Global Governance* 23; Bertrand RAMCHARAN, ed., *The Protection Role of National Human Rights Institutions* (Leiden: Martinus Nijhoff, 2005); Brian BURDEKIN, *National Human Rights Institutions in the Asia Pacific Region* (Leiden: Martinus Nijhoff, 2006).
  7. Cardenas, *ibid.*
  8. Amanda WHITING, “Situating SUHAKAM: Human Rights Debates and Malaysia's National Human Rights Commission” (2003) 39 *Stanford Journal of International Law* 59.
  9. Anna-Elina POHJOLAINEN, *The Evolution of National Human Rights Institutions* (Copenhagen: The Danish Institute for Human Rights, 2006) at 1.
  10. *Strengthening of the United Nations: An Agenda for Future Change*, Report of the Secretary-General, UN Doc. A/57/387 (2002).
  11. Andrea DURBACH, Catherine RENSHAW, and Andrew BYRNES, “A Tongue but No Teeth? The Emergence of a New Human Rights Mechanism in the Asia Pacific Region” (2009) 31 *Sydney Law Review* 211.
  12. There have been suggestions that the European Court of Human Rights, overwhelmed by the number of its individual complaints, should consider giving national institutions standing to bring class actions, or require applicants to submit their complaints to their NHRI as part of the process of exhausting

On 20 December 1993, the UN General Assembly endorsed the Paris Principles as the minimum criteria for establishing an independent and effective NHRI. These criteria require: “a clearly defined, broad-based human rights mandate, incorporated in legislation or (preferably) constitutionally entrenched; independence from government; membership that broadly reflects the composition of society; appropriate cooperation with civil society, including NGOs; and adequate resources”.<sup>13</sup> While acknowledging that NHRIs may be fashioned to suit the unique political and social and environment in which they operate, the Paris Principles require that NHRIs should (at least):

1. Monitor any violations of human rights and be permitted access to groups or individuals with knowledge of existing or threatened violations;
2. Advise the government, the Parliament and any other competent body on specific violations, on issues related to legislation and compliance with international human rights standards;
3. Encourage the government to ratify human rights instruments, and contribute to requisite State reports to regional and international institutions or committees;
4. Educate and inform in the field of human rights and formulate and implement educational human rights programmes; and
5. Prepare and publicize reports on any human rights matter and utilize the media.<sup>14</sup>

National institutions are accredited by the ICC according to their level of compliance with the Paris Principles.<sup>15</sup> The ICC consists of representatives from NHRIs in Africa, the Americas, the Asia Pacific, and Europe. Its principal functions are to co-ordinate the activities of NHRIs, to support the creation and strengthening of Paris Principles-compliant national institutions in conformity with the Paris Principles, to liaise with the UN and other international organizations, to ensure regular contact with the Office of the UN High Commissioner for Human Rights (OHCHR), and to implement recommendations of International Conferences of National Institutions, UN resolutions, and recommendations.<sup>16</sup>

Since 2006, “A” status NHRIs have had the right to participate in key UN human rights bodies such as the Human Rights Council, in an independent capacity and on

---

domestic remedies. Greer argues that “there is a strong case that the Council of Europe should develop its current policy of encouraging member states to establish NHRIs, to requiring them to do so”; see Steven GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) at 314.

13. Burdekin, *supra* note 6 at 7. See also Andrew BYRNES, Andrea DURBACH, and Catherine RENSHAW, “Joining the Club: The Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the Advancement of Human Rights Protection in the Region” (2008) 14 *Australian Journal of Human Rights* 63.
14. *Paris Principles*, *supra* note 1.
15. The accreditation classifications are: (a) “A” status—the national human rights institution is in compliance with the Paris Principles; and (b) “B” status—Observer Status—where the NHRI is not fully in compliance with the Paris Principles or insufficient information has been provided to make a determination; or (c) “C” status—the NHRI is not in compliance with the Paris Principles. Prior to 2008, the ICC also used a fourth category: A(R) “Accreditation with reserve—granted where insufficient documentation is submitted to confer A status”. In 2008, the ICC discontinued use of the A(R) category for new accreditations. Byrnes *et al.*, *supra* note 13 at 64, note 1.
16. National Human Rights Institutions Forum homepage, online: NHRI Forum <www.nhri.net>.

all agenda items. “A” status NHRIs may submit written statements, issue documentation (with a UN document symbol), and are allocated their own separate seating on the Council floor.<sup>17</sup> “A” status NHRIs also play “a crucial role in all phases of the universal periodic review (UPR), from submission of documentation to attendance of the review and follow-up to recommendations”.<sup>18</sup>

ICC evaluation of a commission as having an “A” status bolsters an institution’s domestic legitimacy and enhances its ability to critique its state’s human rights performance. As a national commission’s ability to be effective at the domestic level increases, civil society is more inclined to engage with an independent commission, and most states are less able to ignore the reports and recommendations of a commission that is publicly perceived to be independent.<sup>19</sup> The growing significance of NHRIs is reflected in the prominent role they are accorded in more recent human rights conventions. Article 33 of the Convention on the Rights of Persons with Disabilities (CRPD) provides a role for NHRIs as national monitoring bodies for the Convention.<sup>20</sup> Article 17 of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (OPCAT)<sup>21</sup>, requires states to “maintain, designate or establish one or several independent national preventative mechanisms” to visit places of detention at the national level, and Article 19(4) of OPCAT refers specifically to the Paris Principles.<sup>22</sup>

Domestic and international NGOs have expressed some disquiet at the greater prominence being accorded to NHRIs.<sup>23</sup> They argue that NHRIs are *state* institutions whose effectiveness and independence is sometimes questionable, and they have concerns about these institutions being seen as the primary or most legitimate providers of critiques of state performance on human rights.

NGO concerns may be grouped around three main themes. First, NGOs are concerned that if NHRIs assume the role of providing the “legitimate” evaluation of state compliance with human rights obligations, civil society critiques will be displaced. They fear the appropriation of the discourse of challenge by a state institution that in most cases lacks the power of genuine grass-roots opposition to state practice and policy.

17. *National Institutions for the Promotion and Protection of Human Rights*, Report of the Secretary-General, UN Doc. A/HRC/10/54 (2009).

18. Louise ARBOUR, Address at the 20th Session of the International Co-ordinating Committee of National Institutions, 15 April 2008 (material on hand with author).

19. *Ibid.*

20. *Convention on the Rights of Persons with Disabilities*, 13 December 2006, GA Res. 61/106, Annex I, UN Doc. A/RES/61/106 (entered into force 3 May 2008), art. 33(2) [CRPD].

21. *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, GA Res. 57/199, UN Doc. A/RES/57/199 (entered into force 22 June 2006), art. 19 [OPCAT].

22. “The Relationship Between Accreditation by the International Coordinating Committee of National Institutions and the Optional Protocol to the UN Convention Against Torture”, University of Bristol OPCAT Project (November 2008), online: University of Bristol <www.bris.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/opcatdocs/iccaccreditationandnpps.pdf>.

23. See e.g., Human Rights Watch, *National Human Rights Institutions: Protectors or Pretenders? Government Human Rights Commissions in Africa* (New York: Human Rights Watch, 2001); Maria O’SULLIVAN, “National Human Rights Institutions: Effectively Protecting Human Rights?” (2000) 25 *Alternative Law Journal* 236.

Second, NHRIs have become one of the indicia of a progressive democratic liberal state: “if in the 1950s, the status symbol of a developing country was a steel mill, in the 1990s, apparently, it was a human rights commission.”<sup>24</sup> NGOs object to state claims to being a good international citizen by virtue of establishing an institution to promote and protect universal rights, while simultaneously refusing to ratify, or ratifying with substantial reservations, the core international human rights treaties.

Third, NGOs question the efficacy of NHRIs established without sufficient input from civil society organizations, such as institutions set up in post-conflict societies as a specific term of the peace agreement that brings an end to hostilities or marks the emergence of a new political system.<sup>25</sup>

## II. EVOLVING ROLE OF THE INTERNATIONAL CO-ORDINATING COMMITTEE OF INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Decisions on accreditation are made by the ICC on the advice of its Sub-Committee on Accreditation (SCA). The Sub-Committee is composed of representatives of each of the four regions of Africa, the Americas, the Asia Pacific, and Europe.<sup>26</sup> The Secretariat of the ICC is the National Institutions Unit of the OHCHR. In 2006, the ICC established a Working Group to examine the NHRI accreditation process in recognition of:

1. A need to clarify and refine the current process and the basis for recommendations and determinations;
2. The increasing role of NHRIs in the international arena and a concern to ensure their legitimacy; and
3. The requirement to review accreditation decisions periodically.<sup>27</sup>

The Working Group stated “the environment in which National Human Rights Institutions function has evolved since the adoption of the Paris Principles in 1991 and the creation of the ICC. Membership in the Group is given growing importance by international and national actors”.<sup>28</sup>

The Working Group recommended an accreditation procedure which aimed to ensure a process that was fair and impartial and that satisfied the principles of natural

24. See South Asia Human Rights Documentation Center (SAHRDC), *National Human Rights Institutions in the Asia Pacific Region, Report of the Alternate NGO Consultation on the Second Asia-Pacific Regional Workshop on National Human Rights Institutions* (New Delhi, India: SAHRDC, March 1998) at 37, quoted in Cardenas, *supra* note 3 at 2.

25. Christine BELL, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000) at 231.

26. In 2008, Germany was the representative of Europe and Chair of the Sub-Committee, Morocco was the member representing Africa, the Republic of Korea was the member for the Asia Pacific, and Canada was the member for the Americas.

27. International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, “Report and Recommendations on the Sub-Committee on Accreditation Annexure 5: Decision Paper on the Review of ICC Accreditation Procedures for National Human Rights Institutions (NHRIs)” (March 2008), online: NHRI Forum < [www.nhri.net/2008/DecisionPaper-NHRI-March2008](http://www.nhri.net/2008/DecisionPaper-NHRI-March2008) > at 1–15.

28. *Ibid.*

justice. Its proposed new procedure was based on the principles of transparency (clear standards and criteria for assessment), rigour (compliance with the spirit as well as the letter of the Paris Principles), and independence (delineated roles, responsibilities, and accountability for both the ICC and the SCA). At the heart of the recommendations was a view that determinations “may have to look beyond technical compliance to examine whether the Institution’s actions demonstrate compliance with some or all of the Principles, to the extent that this can be done in an appropriate, reasonable, consistent and fair manner”.<sup>29</sup> This statement indicated that the past practice of accreditation “on the papers”, using an “accreditation grid”, where NHRIs supplied supporting documents that indicated the legislative basis for, stated objects of, and mandates of their commissions, would not necessarily secure accreditation.

At present, the SCA makes recommendations to ICC members regarding compliance of applicant institutions with the Paris Principles “in law and practice”.<sup>30</sup> Two aspects of the SCA’s deliberations are of particular note. First, the SCA is entitled to consider information received from civil society. In its April 2008 Report, the Sub-Committee stated that it “agreed to share that information with the concerned NHRIs”.<sup>31</sup> Second, since 2006, the SCA has published “General Observations” in relation to accreditation. These observations “are intended to be guidelines for NHRIs concerning the implementation of the Paris Principles”,<sup>32</sup> to be used by the SCA to advise national institutions and governments on the steps needed to ensure Paris Principles compliance, and to guide the SCA itself in its decisions on (re)accreditation.<sup>33</sup>

These two developments—the ICC’s decision to receive information about NHRIs from third parties such as NGOs, and the ICC’s elaboration of the Paris Principles in its “General Observations”—are indicators of a more demanding standard in assessing compliance. This reflects the increasingly significant role being accorded to NHRIs in the domestic implementation of international human rights and civil society’s insistence that NHRIs are accorded the independence and powers to fulfil their function by the state. The experience of SUHAKAM is illustrative of the evolving dynamic between NHRIs, civil society, regional human rights networks, and the international community.

### III. ESTABLISHMENT OF SUHAKAM

In 1999, Prime Minister Mahathir Mohamad surprised many with his decision to create the Malaysian Commission on Human Rights. At the time, Malaysian society was subject to four Proclamations of Emergency<sup>34</sup> and repressive provisions within

29. *Ibid.*, at 21.

30. International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, “Report and Recommendations of the Sub-Committee on Accreditation” (April 2008) at 1.

31. *Ibid.*, at para. 2.3.

32. *Ibid.*, at para. 1.7.

33. *Ibid.*, at para. 1.8.

34. The State of Emergency declared in 1964 as a result of the Indonesian confrontation, the Sarawak political crisis in 1966, the 13 May riots in 1969, and the Kelantan political crisis in 1977, had not been

legislation such as the Official Secrets Act, the Printing Presses and Publications Act, the Sedition Act, and the Police Act.<sup>35</sup> There had been domestic and international condemnation of the government's treatment of Datuk Seri Anwar Ibrahim, political rival and critic of the Mahathir regime (though formerly a political ally of Mahathir and his Deputy Prime Minister), after the infamous "black eye" incident.<sup>36</sup> The nascent *Reformasi* movement was being repressed<sup>37</sup> and the Barisan Nasional (BN)<sup>38</sup> government was responding to "popular, legitimate and lawful expressions of dissent with fiercer repression against the leaders of legal opposition parties, social activists, and the promoters of the alternative media".<sup>39</sup> Malaysia's Internal Security Act of 1960 was being deployed to suppress political opposition.

There appears to have been no single catalyst for the establishment of SUHAKAM. It seems that a set of complex and somewhat contradictory motives underpinned Mahathir's decision to accede to the request of his former Deputy Prime Minister, Tun Musa Hitam, to establish a national human rights commission. It is likely that Mahathir saw the move as politically expedient from a number of perspectives. First, it had the potential to appease domestic civil society, which was growing increasingly vociferous under the *Reformasi* movement. Second, the move might placate the international community, outraged by the Mahathir government's treatment of Anwar Ibrahim. Third, three of Malaysia's influential ASEAN neighbours (the Philippines, Indonesia, and Thailand) had established or were in the process of establishing their own NHRIs. Mahathir saw no reason why Malaysia should not join the ranks of these progressive ASEAN states. It also appears that the personal influence of Musa Hitam played a part in Mahathir's decision.

---

annulled and were all subsisting collectively. Lim Kit Siang (Secretary-General, Democratic Action Party, Leader of the Opposition, House of Representatives, Malaysia) writes that:

The most repressive laws of British colonial times to keep subjects under tight control have become even more draconian—as in the case of the Official Secrets Act, which marks Malaysia as the only Commonwealth parliamentary democracy which provides for mandatory minimum one year jail sentence for any offence under the act—institutionalising a more secretive government to protect corruption, cronyism and nepotism and going against the international trend towards a more open and accountable government, especially with the advent of the era of information technology.

See LIM Kit Siang, "Will the Human Rights Commission be Irrelevant?" in S. Sothi RACHAGAN and Ramdas TIKAMDAS, eds., *Human Rights and the National Commission* (Kuala Lumpur: HAKAM, 1999), 111 at 113.

35. *Official Secrets Act 1972* (Act 88); *Printing Presses and Publications Act 1984* (Act 301); *Sedition Act 1948* (Act 15) (Revised 1969); *Police Act 1967* (Act 344) (Revised 1988).
36. As Deputy Prime Minister, Ibrahim responded to the 1997 economic crisis by calling for greater accountability. He argued against government bail outs to politically connected companies and cut government expenditure in several large projects. He also introduced controversial Anti-Corruption Legislation. These measures led to a public fall-out with Prime Minister Mahathir. On 29 September 1998, Anwar Ibrahim was photographed walking into court (charged with sodomy and corruption) with a black eye, allegedly received while in police custody. The photograph made headlines around the world. Ibrahim was subsequently imprisoned at Sungai Buloh Penitentiary on charges of corruption.
37. See *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Report on the Mission to Malaysia, UN Economic and Social Council Commission on Human Rights by Abid Hussein, UN Doc. E/CN.4/1999/64/Add.1. (1998).
38. "Barisan Nasional" is Malay for "National Front".
39. P. RAMAKRISHNAN, "Suhakam: A Warehouse for Reports?" *Aliran Monthly* (July 2003).



The factors which motivated the government to establish SUHAKAM, and the interplay between them, contributed to SUHAKAM's shape at birth and to the manner in which it functioned in its early years. The decision to establish SUHAKAM generated at least three different sets of expectations about the role that the body would fulfil in Malaysian society: the expectations of the ruling power elite, of civil society, and of the international community. The ICC's notification of its possible downgrading of SUHAKAM in April 2008, primarily reflects a crystallization of the unmet expectations of civil society and the international community.<sup>40</sup>

#### IV. THE MALAYSIAN GOVERNMENT AND SUHAKAM

The Human Rights Commission of Malaysia Act 1999 was “rushed through Parliament in September 1999 with scant consultation with civil society organisations”.<sup>41</sup> In the opening words of his speech in the *Dewan Rakyat*<sup>42</sup> introducing the Human Rights Commission of Malaysia Bill, 1999, the then Foreign Minister, Datuk Seri Syed Hamid Bin Syed Jaafar Albar, said:

I want to emphasize that the Human Rights Commission of Malaysia Bill, 1999, is not a public relations exercise by the Government. It is neither fair nor correct to regard the altruistic intention of the Government as a cynical exercise without first hearing and considering the Government's view on human rights.<sup>43</sup>

He emphasized that SUHAKAM was being created as a “channel for the people to forward their grievances about infringements and violations of human rights”<sup>44</sup> but cautioned that democracy is a “two way process” and that it was “crucial that human rights are seen in tandem with responsibility ... and reason to ensure peace and security”.<sup>45</sup>

It was in the interests of the government that SUHAKAM be perceived by civil society as legitimate, as civil society's ally in engagement with government. At the same time, it is unlikely that Mahathir wanted to create an institution that would undermine his authority and challenge key government policies. The Human Rights Commission of Malaysia Act 1999 (the 1999 Act) was drafted to reflect this balance.

Under the 1999 Act, SUHAKAM has the following functions:

- To promote awareness of and provide education relating to human rights;
- To advise and assist the government in formulating legislation and procedures and to recommend necessary measures;

40. SUHAKAM was awarded “A” status by the ICC at the time of its establishment. As discussed in the first section of this article, the ICC's accreditation procedures were at that time (and until recently), largely “paper based”, involving a review of an institution's founding legislation and an assessment of its financial independence.

41. See Ramakrishnan, *supra* note 39.

42. The Hall of the People (House of Representatives), the lower house of the Malaysian Parliament.

43. Datuk Seri Syed Hamid Bin Syed Jaafar Albar, “Rationale for the Human Rights Commission of Malaysia” in Rachagan and Tikamdas, eds., *supra* note 34 at 103.

44. *Ibid.*, at 108.

45. *Ibid.*, at 104.

- To recommend to the government the subscription to, or accession of, human rights treaties and international instruments;
- To inquire into complaints on infringement of human rights.<sup>46</sup>

The 1999 Act established a body that was purely advisory and whose part-time commissioners (a maximum of twenty) held office for only two years.<sup>47</sup> Commissioners were appointed by the King on recommendation of the Prime Minister and there was no explicit requirement that Commissioners have knowledge of or expertise in human rights.<sup>48</sup> The mandate of SUHAKAM was restricted to “such fundamental liberties as are enshrined in Part II of the Federal Constitution of Malaysia”.<sup>49</sup> The Constitution guarantees a set of civil and political rights,<sup>50</sup> some of which (such as the right to free speech and expression, to peaceful assembly, and to form associations) may be subject to “such restrictions as the Parliament may deem necessary or expedient in the interest of the security of the Federation or any part thereto, friendly relations with other countries, public order or morality”.<sup>51</sup> Parliament had not been reticent about using these provisions to curtail constitutional liberties.

SUHAKAM was established on the premises of and under the auspices of the Department of Foreign Affairs,<sup>52</sup> an arrangement interpreted by some as a clear signal that SUHAKAM was intended to exist under the shadow of the government and was not to stand alone.<sup>53</sup> A Minister in the Prime Minister’s Department publicly said that SUHAKAM would not be given “teeth”.<sup>54</sup>

46. *Malaysian Human Rights Commission Act 1999* (Act 597), s. 4(1) [*Malaysian Human Rights Commission Act 1999*].

47. There is a reappointment period of another two years. These provisions were amended in 2009: see the discussion in section VIII of this article.

48. See *Malaysian Human Rights Commission Act 1999*, *supra* note 46.

49. *Ibid.*, s. 2.

50. There are nine rights regarded as fundamental in the *Federal Constitution of Malaysia*: liberty of the person (art. 5); freedom from slavery and forced labour (art. 6); protection against retrospective criminal laws and repeated trials (art. 7); equality (art. 8); prohibition of banishment and freedom of movement (art. 9); freedom of speech, assembly, and association (art. 10); freedom of religion (art. 11); rights in respect of education (art. 12); and the right to property (art. 13).

51. *Federal Constitution of Malaysia*, art. 10(2).

52. The Commission was later moved to the Prime Minister’s Department.

53. The Foreign Minister at the time stated that SUHAKAM was established “to ensure that human rights do not continue to be played up by groups providing a cynical or inaccurate picture”. Anil NETTO, “Skepticism Greeted Malaysia’s New Human Rights Body” *Asia Times Online* (8 April 1999), quoted in Whiting, *supra* note 8 at 69.

54. SUHAKAM itself wrote in its report to the UN Human Rights Council’s UPR in February 2009:

A Minister in the Prime Minister’s Department publicly said that SUHAKAM would not be given “teeth”. The credibility and effectiveness of SUHAKAM may now be greatly damaged together with a loss of international standing if steps are not taken by April 2009 to address the concerns raised in an ICC report recommending to downgrade SUHAKAM’s status grading to “B”. The ICC perceives SUHAKAM’s founding Act to be not fully compliant with Paris Principles especially where the appointment process of Commissioners is non-transparent. Pertinent legislative amendments to the Act are of utmost necessity and urgency.

See SUHAKAM, “Report for the Universal Periodic Review (UPR) on Malaysia”, 4th Session, February 2009, Human Rights Commission of Malaysia (SUHAKAM) at 1, para. 4 [SUHAKAM, “UPR Report”].

Section 12(2) of the 1999 Act bars the Commission from inquiring into any complaint relating to an allegation of infringement of human rights which is before, or has been determined by, the courts.<sup>55</sup> This provision has had the effect of causing key investigations to be aborted, where particular incidents which may form a small part of an investigation or raise different issues have been brought before the courts. In 2007, SUHAKAM cancelled its public inquiry into alleged excessive police violence and the shooting of unarmed civilians during a *ceramah* (political gathering involving public speeches) in Batu Buruk, Terengganu. Two individuals, who had been shot at by police, were charged in court with the criminal offence of deterring police from pursuing their duties while being members of an unlawful assembly, causing injury to a policeman. Similarly, in August 2007, SUHAKAM cancelled its public inquiry into the alleged state-sanctioned burning of some twenty-eight homes in the East Malaysian state of Sabah after one of the victims in the incident filed a suit against the director of the Sabah Forestry Department. In its 2008 Report to the APF, the Malaysian Commission stated that:<sup>56</sup>

Guided by Section 12(2) and (3) of the Human Rights Commission of Malaysia Act 1999, the decision to call off the inquiry was made ... Nevertheless, the Commission remains concerned that the persons who were shot have been charged in court and that the police officer who allegedly shot them was not charged, more so when the alleged offenders were charged in court just four days before the Commission was to begin its inquiry.

The perception of human rights groups was that the Act was deliberately structured to ensure that the Commission was debilitated. One commentator writing at the time of the Commission's establishment suggested that section 7(4) of the Act—which requires members to endeavour to reach decisions by consensus, failing which decisions are to be taken by a two-thirds majority of members present—had “the potential to ground the Commission in stalemate and indecision and make it a hapless bystander and spectator of violations of human rights”.<sup>57</sup>

SUHAKAM's Commissioners are appointed “from amongst prominent personalities including those from various religious and racial backgrounds”.<sup>58</sup> Commissioners hold office for a period of two years and are eligible for reappointment.<sup>59</sup>

The term of office for SUHAKAM Commissioners originally provided for under the Act is markedly shorter than that of the Commissioners of the national institutions of Indonesia (five years, with possible reappointment for a further

---

55. See *Malaysian Human Rights Commission Act 1999*, *supra* note 46, s. 12(2). Section 12(3) provides that “if an allegation of human rights infringement or violation being investigated by SUHAKAM” becomes the subject matter of any proceedings in any court, then “SUHAKAM shall immediately cease its investigation”.

56. Asia Pacific Forum Member Activity Reports: APF Annual Conference Paper—Report of Malaysia (July 2008) (material on hand with author).

57. S. Sothi RACHAGAN and Ramdas TIKAMDAS, “Human Rights Commission of Malaysia Act 1999: A Critique” in Rachagan and Tikamdas, eds., *supra* note 34 at 189.

58. *Human Rights Commission of Malaysia Act 1999*, *supra* note 46, s. 5(3).

59. *Ibid.*, s. 5(4).

five years),<sup>60</sup> of the Philippines (seven years),<sup>61</sup> and of Thailand (six years).<sup>62</sup> While SUHAKAM Commissioners are not explicitly required by the legislation to have any expertise in human rights, the Indonesian legislation requires the appointment of Commissioners who have “experience” in the promotion and protection of individuals or groups whose human rights have been violated.<sup>63</sup> The Philippines legislation has no specific requirement that those appointed to the Commission have experience in human rights, but does require that a majority of those appointed to the Commission be from the Philippines Bar.<sup>64</sup> The legislation in Thailand requires the appointment of persons “having apparent knowledge or experiences in the protection of rights and liberties of the people, having regard also to the participation of men and women and representatives of private organizations in the field of human rights”.<sup>65</sup>

The thirty-five Indonesian Commissioners are selected by the House of Representatives based on the recommendation of the National Human Rights Commission and validated by the President.<sup>66</sup> In the Philippines, the five Commissioners are appointed by the President, and in Thailand, eleven Commissioners are appointed by a Selection Committee consisting of a Supreme Court judge, the President of the Supreme Administrative Court, the Prosecutor-General, the Chairman of the Law Council, Rectors or representatives of higher education institutions which are juristic persons (five), representatives of human rights organizations (ten), representatives of political parties that have a member in the House of Representatives (five), and representatives of the public media (three).<sup>67</sup>

The mandate and powers of SUHAKAM compare unfavourably with those of its ASEAN neighbours: the “Basic Rights” protected under Chapter II of the Indonesian legislation include a broad range of civil, political, social, and economic rights. The Indonesian Commission, Komnas Ham, has a mandate to promote human rights and also the power to investigate, issue subpoenas, and make recommendations. The Philippines Commission has a broad mandate, in the light of the state’s ratification of all the major treaties;<sup>68</sup> the Commission possesses considerable powers to investigate,<sup>69</sup> cite for contempt,<sup>70</sup> and grant immunity from prosecution.<sup>71</sup> The Thai

60. *Indonesia Law No. 39 of 1999 Concerning Human Rights*, art. 83(4) [*Indonesia Law No. 39*].

61. *Philippines Executive Order No 163* (1987), s. 2(c).

62. *Thailand National Human Rights Commission Act*, B.E. 2542 (1999), s. 10 [*Thailand National Human Rights Commission Act*].

63. *Indonesia Law No. 39*, *supra* note 60, arts. 83(4) and 84(4).

64. *Philippines Executive Order No. 163*, *supra* note 61, s. 2(a).

65. *Thailand National Human Rights Commission Act*, *supra* note 62, s. 5.

66. *Indonesia, Law No. 39*, *supra* note 60, art. 83(1).

67. *Thailand National Human Rights Commission Act*, *supra* note 62, s. 8(1).

68. There apparently exists a view, however, that the Commission’s investigative power is limited to violations of civil and political rights. See *Simon v. Human Rights Commission*, [1994] 2229 SCRA 117, G.R. No. 100150, cited in ANNI, *Report on the Performance and Establishment of National Human Rights Institutions in Asia* (Bangkok: FORUM-ASIA, 2008) at 141.

69. *1987 Constitution of the Republic of the Philippines*, art. XIII, s. 18(1) [*Philippines Constitution*].

70. *Ibid.*, art. XIII, s. 18(2).

71. *Ibid.*, art. XIII, s. 18(8).

Commission is empowered to protect all rights which are guaranteed under the Constitution of the Kingdom of Thailand, Thai laws, or treaties with which Thailand has an obligation to comply.<sup>72</sup> The Thai Commission is also able to file cases in court.

Malaysian NGOs have constantly highlighted the inadequacies of the 1999 Act: the short tenure and appointment process of Commissioners, their part-time status, and the Commission's restricted mandate and limited powers. A comparison with the other ASEAN Commissions provides some support for the position of NGOs. Nonetheless, even with these structural limitations, SUHAKAM has achieved some notable successes in raising human rights awareness and investigating violations. That these successes have been achieved despite the structural challenges identified by NGOs, explains the clear sense of grievance exhibited by SUHAKAM Commissioners<sup>73</sup> at being threatened with demotion from SUHAKAM's "A" status for legislative limitations beyond their power to change.

At the time it established SUHAKAM, the Malaysian government publicly portrayed the new body as the result of a "natural progression"<sup>74</sup> towards a human rights-centred state. The official version of SUHAKAM's genesis commences with a reference to the 1993 attendance by a Malaysian delegation, led by Musa Hitam, to the World Conference on Human Rights in Vienna. At that conference, governments (including Malaysia) agreed that human rights are universal and indivisible, and recognized the importance of setting up NHRIs.<sup>75</sup> At the same time, Malaysia's involvement in the world of international human rights was increasing: in 1993, Malaysia was elected by the UN Economic and Social Council to the UN Commission on Human Rights (UNCHR), where it served until 1995. In 1995, Musa Hitam was elected Chairman of the 52nd Session of the UNCHR. In 1995, Malaysia ratified CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) and the CRC (Committee on the Rights of the Child)—with reservations. In 1996, Tan Sri Razali Ismail was elected President of the 51st Session of the UN General Assembly and between 1996 and 1998 Malaysia served a second term as a member of the UNCHR. The Malaysian government portrayed SUHAKAM's establishment merely as the next item on the government's expanding curriculum vitae of human rights responsiveness, and asked civil society to withhold judgement until the fledgling Commission had commenced work.

72. *Thailand National Human Rights Commission Act*, *supra* note 62, s. 3.

73. See section VIII below, which details some of the responses of SUHAKAM Commissioners to the prospect of being downgraded by the ICC.

74. SUHAKAM, "Malaysia's Report to the 2002 Meeting of the Asia Pacific Forum of National Human Rights Institutions" (2002), online: APF <[www.asiapacificforum.net/about/annual-meetings/7th-india-2002/downloads/apf-members/suhakam2.pdf](http://www.asiapacificforum.net/about/annual-meetings/7th-india-2002/downloads/apf-members/suhakam2.pdf)>.

75. See *Vienna Declaration and Programme of Action*, World Conference on Human Rights, UN Doc A/CONF.157/23 (2003) at 36:

the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory role to the competent authorities, their role at remedying human rights violations, in the dissemination of information and education in human rights.

## V. SUHAKAM'S COMMISSIONERS

It was actually, literally, my own personal stubbornness that pushed the establishment of SUHAKAM. I had two agendas: one was image but number two was a genuine wish to improve ourselves ... my idea was long-term. The people of Malaysia needed to be conditioned in their mind to the idea of human rights. Before the creation of the Commission, "human rights" were dirty words, or not known to us.<sup>76</sup>

Much existing commentary on the work of NHRIs provides a critique of the institutional framework of individual commissions, noting how their mandates (broad or narrow) and powers (merely promotional or enforcement) influence their effectiveness.<sup>77</sup> Few academic commentators note, as Linda Reif does in passing, that "the strength of character and, occasionally, the courage needed to operate an effective national human rights institution should not be underestimated".<sup>78</sup> Yet there is much evidence to suggest that the character and commitment of individual Commissioners is at least as relevant to the effectiveness of a Commission as its formal structure, powers, and mandate.<sup>79</sup> Given the constrained resources and high level of demand for the services of a NHRI, Commissioners must inevitably exercise discretion in deciding which issues to pursue, when to use tactics of persuasion, and when to overtly challenge governments on human rights issues. How independent, resourceful, determined, and well connected a Commissioner is, will determine the success of his or her endeavours. From this, one could argue that the ICC ought to scrutinize the selection process of Commissioners. However, there is no guarantee that a selection process, no matter how transparent and inclusive of different societal interests it may be, will secure the appointment of courageous and creative Commissioners.

Musa Hitam, "the original idealist who conceived the idea of SUHAKAM",<sup>80</sup> is a key figure in the genesis of SUHAKAM. Musa Hitam's character, his standing in Malaysian society, and the personal influence he carried with Mahathir, have all been offered as explanations for the establishment of a national human rights commission. SUHAKAM Commissioner Simon Sipaun's view is typical of many: "Tun Musa Hitam was a very influential person in the country and he was very pro human rights and I think he had a strong influence on the government to have a national human rights agenda."<sup>81</sup>

76. Interview with Musa Hitam, Former Deputy Prime Minister and First Commissioner of SUHAKAM, in Kuala Lumpur (1 August 2008).

77. See "International Council on Human Rights Policy, Assessing the Effectiveness Of National Human Rights Institutions" (2005), online: OHCHR <[www.ohchr.org/Documents/Publications/NHRlen.pdf](http://www.ohchr.org/Documents/Publications/NHRlen.pdf)>; Anne SMITH, "The Unique Position of National Human Rights Institutions: A Mixed Blessing" (2006) 28 *Human Rights Quarterly* 904.

78. See Linda C. REIF, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Journal* 27.

79. Interview with Brian Burdekin, former Australian Human Rights Commissioner, in Sydney, NSW (20 February 2009).

80. Chin Refugee Committee Malaysia, "The Toothless Tiger" *Malaysia Today* (28 October 2008), online: Chin Refugee Committee <[crcmalaysia.blogspot.com/2008/10/toothless-tiger.html](http://crcmalaysia.blogspot.com/2008/10/toothless-tiger.html)>.

81. Interview with Simon Sipaun, SUHAKAM Commissioner, in Kuala Lumpur (5 August 2008).

There can be little dispute that Musa Hitam used his influence to challenge the Mahathir regime's intransigent attitude to human rights, ultimately achieving the establishment of a national human rights commission. The commission was not the result of Mahathir's capitulation to Malaysian civil society, which had been calling upon the government to set up a commission for some years. If part of the explanation for SUHAKAM's genesis lies in Musa Hitam's personal commitment to human rights and his tenacity in convincing Mahathir's government that a national commission would serve Malaysia well, then the environment that bred these attitudes in Musa Hitam deserves attention.

Musa Hitam served as Mahathir's deputy from 1981 to 1986, resigning over what he called "irreconcilable differences" with Mahathir. For the next two years he served as Malaysia's Special Ambassador to the United Nations. During his time at the United Nations, Malaysia's international image was poor: "every time I went out of the United Nations building there was some demonstration or other against us."<sup>82</sup> It was during his period as UN Ambassador that Musa Hitam became aware of the various UN institutions such as the Human Rights Commission and ECOSOC (Economic and Social Council). In Musa Hitam's words:

I looked at the membership of these groups and thought: "Wow, Malaysia is supposed to be bad, but look who belongs to these groups!" I saw no reason why Malaysia shouldn't be more proactive with human rights. I thought: "Why doesn't Malaysia sensitize herself to human rights? Why don't we become a member of ECOSOC or the Human Rights Commission?" We had never been a member, indeed during the twenty years of Mahathir's rule, human rights was a dirty word. So naturally, we kept away from the human rights bodies of the United Nations. But when I came back to Kuala Lumpur from one of my trips I had a chat with the Prime Minister, with Mahathir and I said: "Why don't we bid for this?"<sup>83</sup>

In 1994, Musa Hitam suggested to Mahathir that Malaysia should establish its own national human rights commission.<sup>84</sup> In 1995, Musa Hitam was elected chairman of the 52nd Session of the United Nations Commission on Human Rights. Musa Hitam reported that the Prime Minister was "not immediately responsive to the idea" of establishing a commission, but after persistently "building up the case for it",<sup>85</sup> Musa Hitam convinced the government "that the time was right for Malaysia to establish its own independent Human Rights Commission".<sup>86</sup> In 2000, Mahathir appointed Musa Hitam as SUHAKAM's first Chairman of Commissioners. During the first few years of its existence under his leadership, SUHAKAM confounded its critics.<sup>87</sup>

82. Interview with Tun Musa Hitam, Former Deputy Prime Minister and First Commissioner of SUHAKAM, in Kuala Lumpur (1 August 2008).

83. *Ibid.*

84. *Ibid.*

85. *Ibid.*

86. Dato K.C. VOHRAH, "The National Human Rights Commission of Malaysia: Fulfilling the National Mandate and Challenges" (Address to the Commonwealth Conference for National Human Rights Institutions, undated), online: Commonwealth Secretariat <[www.thecommonwealth.org/Shared\\_ASP\\_Files/UploadedFiles/EA007E7A-18F2-4E11-931E-23A78FCF3FFE\\_PresentationbyMalaysia.pdf](http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/EA007E7A-18F2-4E11-931E-23A78FCF3FFE_PresentationbyMalaysia.pdf)>.

87. SUHAKAM's initial critics included Amnesty International; see Amnesty International, "Malaysian Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy" (28 June 1999),

S. Arutchelvan, Secretary-General of the Malaysian Socialist Party, recalls the first time that he met with SUHAKAM's first chairperson, Musa Hitam:

The first thing he told us was that SUHAKAM needs to go in between the government and the NGOs. As if the role of SUHAKAM was the middle part, as if they were supposed to balance things. And in that same meeting we said: "Why must you be in the middle? You have to be pro human rights, you don't have to be political, you don't have to be affiliated with the state." At that same meeting, in his winding-up speech, Musa Hitam said: "SUHAKAM would be pro human rights." He is a world-class politician! In the one meeting, he changed his position! How SUHAKAM moves is because of how it looks at itself, it looks at itself as a go-between, between the state and civil society.<sup>88</sup>

SUHAKAM's first set of Commissioners, selected by Mahathir from a range of academic and political backgrounds, won the respect of civil society for their first report, highly critical of the police, into the Kemas Highway incident. SUHAKAM reported that the police response to the peaceful protest of a hundred thousand people on the Kemas Highway had been brutal and disproportionate.<sup>89</sup> SUHAKAM's view was not accepted by the government. Datuk Seri Utama Dr Rais Yatim, Minister in the Prime Minister's Department, told Parliament, "the action taken by the police is correct ... SUHAKAM's report on the incident does not portray the real situation, and is biased".<sup>90</sup>

In 2002, the terms of three Commissioners (former Chief Judge of Malaya, Tan Sri Anuar Zainal Abidin, former law lecturer Mehrun Siraj, and Malaysian Nature Society President Dr Salleh Mohd Noor), were not extended. Commissioners Abidin and Siraj had led the probe into police brutality in the Kemas Highway incident. Media reports critical of the decision not to reappoint the Commissioners stated that:

The axing of Anuar and Mehrun is a gross violation of the Paris Principles ... Can the government give reasons why Anuar and Mehrun have been dropped from Suhakam when they were the two most distinguished and outstanding Suhakam Commissioners in the past two years to discharge Suhakam's statutory duty to protect and promote human rights?<sup>91</sup>

Similarly, in 2006 the Malaysian government failed to reappoint Hamdan Adnan, head of the investigations and complaints committee, a particularly forthright and effective Commissioner.

---

online: UNHCR <[www.unhcr.org/refworld/docid/3ae6a9e04.html](http://www.unhcr.org/refworld/docid/3ae6a9e04.html)>. See also Whiting, *supra* note 8 at 1.

88. Interview with S. Arutchelvan, Secretary-General of the Malaysian Socialist Party, in Kuala Lumpur (31 July 2008).
89. SUHAKAM, "Inquiry on Its Own Motion into the November 5th Incident at the Kemas Highway" (2001), online: SUHAKAM: <[www.suhakam.org.my/215](http://www.suhakam.org.my/215)>.
90. Datuk Seri Utama Dr Rais Yatim, quoted in ERA Consumer Malaysia, "SUHAKAM After 6 Years: Are We, Honestly, Making Any Headway?" (Petaling Jaya: Education and Research Association for Consumers, Malaysia, 2007) at 3.
91. See "DAP Calls for the Filling of the Seven SUHAKAM Vacancies with Nominees from the NGO Human Rights Community to Resolve the SUHAKAM Crisis of Confidence" *New Straits Times* (26 April 2002).



In its early years, SUHAKAM Commissioners made recommendations in relation to repressive laws such as the Internal Security Act, and made strong statements supporting the right to freedom of speech and freedom of assembly. They advocated Malaysia's ratification of international human rights covenants, particularly the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic, Social, and Cultural Rights). Highly sensitive issues such as religious freedom in the supposedly secular Malaysian state and the growing problem of racially based violence were, however, largely ignored. SUHAKAM was strongly criticized for not holding an inquiry into the racial attacks at Kampong Medan near Kuala Lumpur in 2001.<sup>92</sup> In 2002, NGOs also observed that since SUHAKAM's formation, the number of people detained under the Internal Security Act had climbed steadily and, by the end of the term of appointment of SUHAKAM's first Commissioners, the number had doubled to about a hundred.<sup>93</sup> 2001 was not an auspicious year to be operating a human rights commission: Musa Hitam disappointed many when he claimed, in the wake of the September 11 attacks on the United States, that "human rights must take a back seat" to winning the war on terror.<sup>94</sup>

Perhaps as a reaction to the appointment of liberal Commissioners at the establishment of SUHAKAM, the Malaysian government appointed retired Attorney General Abu Talib Othman its next Chairman in April 2002. As Attorney General under Mahathir, Abu Talib had played a key role in the 1988 ousting of the head of the Malaysian judiciary,<sup>95</sup> which occurred just prior to the hearing of a case that was politically sensitive for the ruling party. Abu Talib also executed "repressive government measures such as Operation Lalang and the preventive detention of opposition leaders".<sup>96</sup> After his period as Attorney General, Abu Talib was brought back as a special investigator to conduct the inquiry into the assault on deputy premier Anwar Ibrahim, providing a report considered by many to be favourable to the government.<sup>97</sup> Five new Commissioners, "virtually unknown in human rights circles in Malaysia",<sup>98</sup> were also appointed.

In response to Abu Talib's appointment, civil society called for a more transparent selection process for Commissioners and that the selection criteria explicitly include human rights expertise. Thirty-two NGOs disengaged from interaction with SUHAKAM for one hundred days "to protest Abu Talib's appointment and the scant respect the government showed for SUHAKAM recommendations".<sup>99</sup> A spokesman for

92. See Anil NETTO, "Malaysia's New Rights Watchdog Already Under Fire" *Asia Times* (27 April 2002).

93. *Ibid.*

94. Maznah MOHAMAD, "Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment" (2002) 24 *Contemporary Southeast Asia* 230.

95. This incident has been the subject of much commentary and debate. The account of A.J. HARDING in "The 1988 Constitutional Crisis in Malaysia" (1990) 39 *International & Comparative Law Quarterly* 57 is particularly helpful.

96. THIO Li-ann, "Panacea, Placebo or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (SUHAKAM)" (2009) 40 *George Washington International Law Review* 1271 at 1296.

97. Anil Netto writes that "Critics of the inquiry felt that its scope was too narrow and did not fully explore whether others were involved". Talib's inquiry pinned responsibility on the country's then chief of police. See Netto, *supra* note 92.

98. *Ibid.*

99. See Thio, *supra* note 96 at 1296.

one of Malaysia's leading human rights organizations, Aliran, stated at the time that "it is the perception of civil society that the Commissioners who have been dropped are among those who have actually discharged their statutory duties in the promotion and protection of human rights, without fear or favour".<sup>100</sup>

Abu Talib proved to be a more independent and critical Commissioner than many NGOs had anticipated. As Attorney General in 1991, Abu Talib had drafted ouster clauses precluding judicial review over preventive detention cases—necessary, he claimed, in the context of an irresponsible press and the grave security concerns existing at the time.<sup>101</sup> As Human Rights Commissioner in 2006, Abu Talib called for a repeal of these same ouster clauses, because "they were against human rights".<sup>102</sup>

The Paris Principles are underpinned by the twin concepts of independence and effectiveness. The forthright criticism of SUHAKAM that has emanated from NGOs has largely focused on SUHAKAM's ineffectiveness and not on any lack of independence from government exhibited by its Commissioners.<sup>103</sup> SUHAKAM's reports regularly note human rights abuses committed by the state or its agents and regularly exhort the government to fulfil its international human rights obligations and to ratify the major human rights treaties.<sup>104</sup> NGO criticism of SUHAKAM tends to focus on SUHAKAM's failure to effect change. This failure is sometimes attributed to factors such as the statutory requirement of part-time rather than full-time Commissioners which, NGOs argue, leads to the appointment of men and women unable to discharge their work efficiently. Human rights advocate Ivy Josiah states:

Part of the scepticism that civil society has, comes from the fact that the commissioners themselves, their individual backgrounds, from the corporate sector, they're so busy with their own work. You know, they lead academic institutions, they have very large criminal law practices, and so on. We often wonder how they can be human rights commissioners when 80% of their time is really their other paid commitments.<sup>105</sup>

NGOs attribute the lack of outcomes to the fact that Commissioners work only part-time. Leading human rights organization SUARAM (Suara Rakyat Malaysia "Voice of the Malaysian People") stated that one of the Commission's major failings was its slow response to human rights violations:

In practice, the Commission does not open an inquiry until a complaint is lodged. When the Commission receives complaints of violations, it is often slow in responding or, in many cases, does not respond at all. A common excuse is that commissioners need time

100. See "No Engagement with SUHAKAM for 100 Days" *Aliran Monthly* (May 2002).

101. See Thio, *supra* note 96 at 1296.

102. *Ibid.*

103. Although ineffectiveness, of course, can often be a product of a lack of independence, it is important to consider other causes of ineffectiveness as well, such as in the case of SUHAKAM: a Commission's restricted mandate, limited powers, a government which is unresponsive to recommendations and reports.

104. Malaysia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child; other key human rights conventions (including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights) have not been ratified.

105. Interview with Ivy Josiah, human rights advocate, in Kuala Lumpur (9 August 2008).

to discuss the matter and that their meetings are convened only once a month ... The commissioners are not exclusively focused on human rights work, and most of the time, are not even in the office. As a result, there is lax follow-up of complaints.<sup>106</sup>

Some of SUHAKAM's Commissioners agree that they would be better able to serve SUHAKAM if they were employed on a full-time basis. Commissioner Denison Jayasooria states that:

While the honorariums are much higher than one would get in any other sort of employment, it is not enough for someone to leave their full-time job. So it's seen as being "part-time" ... my personal view is that full-time would be better. Being full-time and detached from other commitment would give better focus ... as it is, inevitably its retired or early retired people coming in. Then you have your pension, you have your remuneration.<sup>107</sup>

Commissioner Simon Sipaun agrees: "I think if you want commitment it should be full-time. Otherwise you cannot focus on your work. And there may be a basis for people to complain."<sup>108</sup> However, one SUHAKAM Commissioner expresses a different view:

Why do a job which ties you down to a social interest, when the newspaper attacks you every day, you know why take that trouble? So, many commissioners including myself do other things. In this age of electronic communication you can be contacted on the phone or you work on your computer at home and then you have meetings ... I tell you if you do it any other way, if you force by law every commissioner to be full time, I think many good men will say that "I'm sorry I really want to retire", maybe he'll do something else.<sup>109</sup>

But whether SUHAKAM is able to effect change depends less on the part-time or full-time status of its Commissioners and more on the responsiveness of the Malaysian government to SUHAKAM's reports. Until 2006, the Malaysian government had not issued a formal response to any of SUHAKAM's annual reports and had not debated the reports in Parliament. This fact has clearly frustrated Commissioners as well as NGOs:

Year after year, our reports to Parliament detailing our activities and recommendations are never debated by Parliament, much less acted upon by the relevant ministries. On the contrary, there is a tendency to undermine our independence by certain ministries.<sup>110</sup>

Well if I had my way, I would put in law that ... parliament is duty bound because we report to parliament, to at least debate our recommendations. But somehow mine is a lone voice, at least that's how I feel.<sup>111</sup>

106. See SUARAM, Malaysia Human Rights Report 2007 (Kuala Lumpur: SUARAM, 2007) at 166.

107. Interview with Denison Jayasooria, SUHAKAM Commissioner, in Kuala Lumpur (4 August 2008).

108. Interview with Simon Sipaun, *supra* note 81.

109. Interview with SUHAKAM Commissioner, in Kuala Lumpur (7 August 2008).

110. Aniza DAMIS, "SUHAKAM Treads an Arduous Path: Interview with Tan Sri Abu Talib Othman" *New Straits Times* (3 August 2008).

111. Interview with Simon Sipaun, *supra* note 81.

Commissioner Simon Sipaun considers the government's recent preparedness to respond to SUHAKAM's annual reports as one result of a larger and more powerful opposition, elected to the Parliament in March 2008:

The government lost for the first time in fifty years its two-thirds majority. The two-thirds majority in Malaysia was something that you took for granted, something that you expect, something that you know you take for granted. But now no more the case. A lot of these parliamentarians used to come and see us and complain about human rights violations and now they are in parliament. So hopefully they will take this up.<sup>112</sup>

Perspectives such as these show the extent to which the effectiveness of a NHRI depends on the efficient functioning of other democratic institutions, such as an impartial judiciary, an effective Parliament and credible opposition party, and a free media. NHRIs, even if granted the power to redress individual human rights grievances in judicial or quasi-judicial proceedings, rely on the techniques of soft power to effect change to government policy—on publicity, public awareness, high-level personal influence, and garnering political support from opposition parties. SUHAKAM was born into an authoritarian state; at various stages of its life SUHAKAM has seen the arrest of media representatives who criticized the government<sup>113</sup> and the imprisonment of opposition politicians.<sup>114</sup> Within these constraints, SUHAKAM has created new dynamics between civil society and the Malaysian government, as NGOs attempt to hold the government to its promise of reform and respect for human rights.

## VI. SUHAKAM AND CIVIL SOCIETY

In 1999, the Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies to the United Nations High Commissioner, Brian Burdekin, wrote in relation to plans to establish a Malaysian National Human Rights Commission (NHRC):<sup>115</sup>

It is also important that there be the widest possible participation of civil society in the creation of the NHRC. The international experiences in this aspect are very clear. If you give birth to a human rights commission in a climate of ignorance and lack of understanding, potential hostility and suspicion, this will prove to be problematic; people will not understand the role of such a commission.

Malaysians heard of the government's proposal to set up a National Human Rights Commission via a press release issued on 25 April 1999 by the Minister of

112. *Ibid.*

113. On 12 September 2008, online social commentator and editor of *Malaysia Today*, Raja Petra Kamarudin, was arrested under section 73(1) of the Internal Security Act, for threatening national security and potentially causing tension among the country's multiracial and multi-religious society. "Raja Petra Arrested Under ISA" *MalaysiaKini* (12 September 2008).

114. See *supra* note 36, regarding the arrest of Anwar Ibrahim.

115. Brian BURDEKIN, "Basic Concepts of a National Human Rights Commission: An International Perspective" in Rachagan and Tikamdas, eds., *supra* note 34 at 67.

Foreign Affairs, Syed Hamid Albar. The Minister announced that a Bill, setting out the terms of reference and powers of the Commission, would be tabled in the July 1999 sitting of Parliament. The contents of the draft Bill would not be made public prior to its introduction into Parliament.<sup>116</sup>

While Malaysian civil society “welcomed in principle”<sup>117</sup> the establishment of SUHAKAM, it remained “sceptical and suspicious”<sup>118</sup> of the Malaysian government’s motives in establishing the Commission. There were “initial fears that SUHAKAM would be nothing more than window dressing to restore the credibility of the government while it dealt with Anwar [Ibrahim]”.<sup>119</sup> Human rights organizations questioned whether an organization with SUHAKAM’s limited mandate, restricted jurisdiction,<sup>120</sup> and lack of financial independence, could operate effectively. The concern was that SUHAKAM had been hobbled at birth by a government concerned to deflect domestic and international criticism from its increasingly repressive policies.<sup>121</sup>

One of Malaysia’s leading human rights NGOs, HAKAM,<sup>122</sup> openly questioned the government’s motives in establishing SUHAKAM. HAKAM’s spokesman at the time, Lim Kit Siang, noted that the government’s Human Rights Commission Bill did not comply with the Paris Principles<sup>123</sup> requirement of a broad mandate to protect and promote the human rights recognized by international human rights instruments and that the government had not complied with the Paris Principles requirement that civil society be involved in consultation about the establishment of human rights commissions. He also noted that the two-year tenure of Commissioners was “not conducive to conferring independence of office” and that a requirement that commissioners be “prominent personalities” was unlikely to encourage the appointment of those with a commitment to human rights, and more likely to encourage “sinecures for political hacks and has-beens”.<sup>124</sup> Lim called on the government to refer the Human Rights Commission Bill to a Select Committee to allow for the full and widest public consultation “to prove that the government is not involved in a PR exercise but is genuinely concerned

116. S. Sothi RACHAGAN and Ramdas TIKAMDAS, “Introduction”, in Rachagan and Tikamdas, eds., *ibid.*

117. Aliran, HAKAM, and SUARAM, “What We Expect of the Human Rights Commission of Malaysia, Memorandum to Suruhanjaya Hak Asasi Manusia Malaysia” *Aliran Monthly* (July 2000).

118. Ramakrishnan, *supra* note 39.

119. Mohamad, *supra* note 94 at 230.

120. See the restrictions contained in section 12(2) of the *Human Rights Commission of Malaysia Act* (1999), which provides that the Commission shall not inquire into any complaint relating to any allegation of the infringement of human rights which (a) is the subject matter of any proceedings pending in any court, including any appeals; or (b) has been finally determined by any court. Section 12(3) provides that if the Commission inquires into an allegation under subsection 12(1) and during the pendency of such inquiry the allegation becomes the subject matter of any proceedings in any court, the Commission shall immediately cease the inquiry.

121. Philip Eldridge also suggested that the establishment of SUHAKAM may have represented “an attempt at rapprochement with the UN human rights system”. Philip ELDRIDGE, “Emerging Roles of National Human Rights Institutions in Southeast Asia” (2002) 14 *Pacifica Review* 209 at 220–1 [footnotes omitted].

122. Persatuan Kebangsaan Hak Asasi Manusia (National Human Rights Society).

123. See *Paris Principles*, *supra* note 1.

124. LIM Kit Siang, “Will the Human Rights Commission be Irrelevant?”, in Rachagan and Tikamdas eds., *supra* note 34 at 125.

in establishing a Human Rights Commission which can genuinely promote and protect human rights".<sup>125</sup>

NGOs demanded that the government "take immediate measures" to strengthen the independence and effectiveness of SUHAKAM by requiring SUHAKAM to report directly to Parliament (rather than to the Prime Minister's Department); establishing an independent search committee to appoint Commissioners; setting credibility, independence, and competence in the field of human rights as key criteria for Commissioner selection; and introducing a longer, five-year tenure for Commissioners, with no reappointments.<sup>126</sup>

However, much of civil society disaffection with SUHAKAM stems from the fact that the Commission's reports are not debated in Parliament and its recommendations are not implemented by the government. In its statement for the Universal Periodic Review (UPR) on Malaysia in February 2009, SUHAKAM acknowledged the government's lack of implementation of its reports.<sup>127</sup> SUHAKAM's former chairman, Abu Talib Othman, has stated:

We are not deterred whether people criticise us or ignore our reports. The law clearly states that we can only advise. If those that we advise do not act on our reports, there is nothing we can do. We are required to submit our reports to parliament, but mind you, our powers are limited.<sup>128</sup>

Civil society also complained of SUHAKAM's lack of engagement with NGOs and human rights organizations. According to a 2007 report by ERA Consumer, Malaysian NGOs have initiated annual consultations with SUHAKAM each year since 2002, but the SUHAKAM chairman had never attended these sessions and fewer than ten percent of the Commissioners had attended.<sup>129</sup>

In 2002, a coalition of NGOs disengaged from SUHAKAM for a hundred days to protest against the appointment of Abu Talib and the non-renewal for a second term of two high-profile Commissioners who were seen as effective advocates of human rights. In June 2006, NGO representatives walked out after five minutes of a meeting with SUHAKAM to push for a public inquiry into the "Bloody Sunday" incident of March 2006, where crowds protesting against a sharp fuel price hike were violently dispersed by police. NGOs also threatened to boycott SUHAKAM's 2005 Malaysian Human Rights Day Conference at which SUHAKAM had invited Mahathir to give the keynote address. NGOs were outraged that the leader who had authorized the 1987 Operation Lalang affair, the 1988 assault on the judiciary, the 1988 displacement of ten thousand indigenous people from Bakun, and the incidents

125. *Ibid.*

126. Florence A. SAMY, "SUHAKAM Risks Being Downgraded" *The Star* (25 July 2008).

127. See SUHAKAM, "UPR Report", *supra* note 54 at 1.

128. See interview with Abu Talib Othman, SUHAKAM chairperson, in "Q & A: SUHAKAM 'Undeterred' by Criticisms" *Malaysiakini* (25 August 2007), online: Malaysiakini <[www.malaysiakini.com/news/71615](http://www.malaysiakini.com/news/71615)>, as quoted in SUARAM, *supra* note 106 at 165.

129. ERA Consumer is a federation of Malaysian Consumer Associations and one of Malaysia's largest and most powerful NGOs.

involving Anwar Ibrahim, would be invited by the nation's Human Rights Commission to address the nation on human rights. Mahathir's response was "I have been invited. That's my right. Are they [NGOs] denying me my human right?" Mahathir added that the fact that the NGOs could say this proved that the country had defended human rights.<sup>130</sup>

## VII. SUHAKAM AND THE INTERNAL SECURITY ACT 1960

There are many detailed accounts of the achievements and limitations of SUHAKAM in the course of its ten-year history.<sup>131</sup> It is not the object of this article to repeat that work. What interests us is the response of civil society and NGOs to SUHAKAM's work and how this response fed into the ICC's finding that SUHAKAM ought to face demotion of its status. The history of SUHAKAM's efforts to convince the government to repeal the 1960 Internal Security Act (ISA), the government's (lack of) response to these efforts, and civil society's growing frustration with SUHAKAM, illustrates the dynamics of engagement between NGOs and SUHAKAM.

Article 149 of the Constitution of Malaysia sets out the circumstances in which the Yang di-Pertuan Agong<sup>132</sup> may pass legislation that is inconsistent with, or which violates, the rights protected under the Constitution. These circumstances include: the threat, or fear, of organized violence against persons or property by "any substantial body of persons";<sup>133</sup> any action taken "to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation";<sup>134</sup> any action taken "to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence";<sup>135</sup> and any action taken "which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof".<sup>136</sup>

The ISA "slipped into force"<sup>137</sup> during the last days of the 1948 state of emergency.<sup>138</sup> The ISA was proclaimed necessary to combat subversion and communist terrorism.<sup>139</sup> It allowed for detention for police investigation for sixty

130. See "Mahathir: It's My Right to Attend Seminar" *The Star* (8 September 2005).

131. See Thio, *supra* note 96 and Whiting, *supra* note 8. SUARAM publishes yearly reports on the human rights situation in Malaysia; since 2000 these reports have included an appraisal of SUHAKAM's achievements over the course of the year.

132. Malaysian Head of State.

133. *Federal Constitution of Malaysia*, *supra* note 50, art. 149(1).

134. *Ibid.*, art. 149(1)(b).

135. *Ibid.*, art. 149(1)(c).

136. *Ibid.*, art. 149(1)(e).

137. Dato K.C. VOHRAH, "Perspectives in Modern Public Order Policing" (2007) 1 *Malaysian Journal of Human Rights* 1.

138. Declared by the British in 1948. See R.H. HICKLING, *The Constitution of Malaysia, Its Development 1957-1977* (Kuala Lumpur: Oxford University Press, 1978) at 7 which states that "the powers conferred by the Act were not, initially at least, abused, nor was the Act originally designed to afford a weapon against political opponents, other than those dedicated to violence as a means of persuasion".

139. See SUHAKAM, *Review of the Internal Security Act 1960* (Kuala Lumpur: SUHAKAM, 2003).

days and then by order of the Minister for two years, renewable for another two years. The decision to detain is not judicially reviewable.<sup>140</sup>

In 2002, a delegation from Fordham Law School conducted a study of the operation of the ISA after September 11 and reported the following:

Affidavits collected from detainees tell a familiar tale of abuse, physical assaults and various forms of torture, including long periods of solitary confinement and sleep deprivation with the object of coercing them to make confessions. In the first sixty days of their incarceration, when detainees are at their most vulnerable, they are denied access to lawyers. This makes it virtually impossible to challenge either the basis or the conditions of their detention. Detainees who describe their interrogations by the police, state that their interrogators are often more concerned about their political views rather than any security threat that they allegedly pose. An indication that the purpose of the detention is to stifle political dissent.<sup>141</sup>

In its September 2008 submission to the UN under the UPR procedure, SUARAM detailed how the ISA was “repeatedly deployed to stifle opposition political movements. More specifically, political leaders who challenge the ruling coalition’s sway within particular ethnic constituencies have most often been targets of ISA detentions.”<sup>142</sup> The ISA was used in the notorious Operation Lalang in 1987, when government forces detained more than a hundred “dissenting” opposition leaders, trade union leaders, and representatives of educational bodies, NGOs, and civil society.<sup>143</sup> The ISA was used to arrest Anwar Ibrahim in 1989, before he was eventually charged with sodomy and corruption. In 2001, the ISA was used to detain ten of Anwar Ibrahim’s political associates and supporters prior to a demonstration planned to mark the second anniversary of his sentencing. The Inspector-General of Police, Tan Sri Norian Mai, claimed that the detainees were members of a “secret cell” that sought to violently overthrow the government.<sup>144</sup> In the wake of September 11, the Malaysian government used the threat of terrorism as the justification for the continued existence and use of the ISA. Mahathir “publicly boasted of Malaysia’s prescience in using the ISA, describing the USA Patriot Act as an example of American reliance on Malaysian precedent”.<sup>145</sup>

In 2003, SUHAKAM’s Law Reform Working Group, chaired by respected former Court of Appeal judge Dato K.C. Vohrah, released its Review of the Internal Security Act 1960 (the Review). The Review called for the repeal of the ISA and for a new law to be enacted that would redress the situation that was presently “disproportionately weighted in favour of national security”.<sup>146</sup> The Commission’s view was that

140. See *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* (1969) 2 Malaysian Law Journal 129.

141. Nicole FRITZ and Martin FLAHERTY, “Unjust Order: Malaysia’s Internal Security Act” (2003) 26 Fordham International Law Journal 1345.

142. SUARAM, “Submission to the Universal Periodic Review of MALAYSIA” (September 2008), online: OHCHR <<http://lib.ohchr.org/HRBodies/UPR>>.

143. The operation was carried out on 27 October 1987. One hundred and six persons were arrested under the Internal Security Act. Two dailies, *The Star* and *Sin Chew Jit Poh*, and two weeklies, *The Sunday Star* and *Watan*, had their publishing licences revoked.

144. International Federation for Human Rights, “Malaysia—Mortgaging Freedom for Security: Arbitrary Detention of Five HINDRAF Leaders”, Occasional Report No. 495/2, May 2008 at 5.

145. *Ibid.*, at 9.

146. See SUHAKAM, *supra* note 139 at 83.



“[h]istory has shown that law and practice in relation to the ISA have adversely affected the status of human rights in Malaysia”.<sup>147</sup> Vohrah wrote that:

[T]hese powers (of detention) which cannot be subject to curial scrutiny and which when exercised can put a person without trial behind locked doors cannot be justified ethically or in a democracy; it is against the human rights principle that one can be detained without trial or a court order.<sup>148</sup>

In its subsequent reports, SUHAKAM reiterated its recommendation for the repeal of the ISA, stating that detention without trial was a denial of the individual’s rights to personal liberty, the right to a fair trial, and the right to be presumed innocent until proven guilty.<sup>149</sup>

SUHAKAM’s recommendations to the government were specific: the ISA should be repealed and replaced by a consolidated national security law that “conforms with international human rights principles”.<sup>150</sup> Under the new law, detention without trial should not exist, apart from a maximum 29-day detention period for the purposes of police investigation, after which the detainee is charged or released. SUHAKAM recommended that until the new legislation was enacted, and that there should be reforms of the ISA and its regulations.<sup>151</sup>

The Malaysian government did not respond to a request in 2005 from the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, for information related to ISA detentions.<sup>152</sup> SUHAKAM’s 2006 Annual Report reiterated the Commission’s recommendations for the repeal of the ISA. The 2006 Report argued that the enactment of a new law which contained specific offences protecting national security interests and respecting human rights would enable the state to satisfy its “responsibility ... to take measures to ensure the security and well-being of citizens”.<sup>153</sup>

Leading human rights organisations such as SUARAM and the Abolish ISA Movement (Gerakan Mansuhkan ISA—GMI) have made the abolition of the ISA a pillar of their protest movement. After Abdullah bin Haji Ahmad Badawi took over

147. *Ibid.*, at 86.

148. Vohrah, *supra* note 137.

149. In a statement signed by SUHAKAM secretary Hashimah Nik Jaafar, SUHAKAM said that preventive detention without trial was an infringement of human rights, and that after SUHAKAM’s initial 2003 study on the ISA and submission of its report to the government recommending the repeal of the Act, SUHAKAM’s further annual reports had maintained the Commission’s stance on the ISA. The statement was refuting the comments made by the Minister of Home Affairs, Datuk Seri Syed Hamid Albar, who said that SUHAKAM’s view on the ISA was its “own perspective and that SUHAKAM should submit its views to the Government”. See SUHAKAM, “Press Statement: Government Should Repeal the ISA and Amend Act 597” (15 December 2008), online: SUHAKAM <[www.suhakam.org.my/docs/press\\_room/PS23\\_repeal\\_isa\\_amend\\_act\\_151208.pdf](http://www.suhakam.org.my/docs/press_room/PS23_repeal_isa_amend_act_151208.pdf)>.

150. See SUHAKAM, *supra* note 139 at 99.

151. *Ibid.*, at 101.

152. Human Rights Watch, “Submission to the UPR Review of Malaysia” (September 2008), online: Forum-Asia <[www.forum-asia.org/news/press\\_releases/pdfs/2008/HRW-Malaysia%20UPR%202008.pdf](http://www.forum-asia.org/news/press_releases/pdfs/2008/HRW-Malaysia%20UPR%202008.pdf)>. (The Malaysian government has not responded to a request for a visit by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, nor has it responded to his request for information related to ISA detention.)

153. SUHAKAM, *Annual Report 2006* (Kuala Lumpur: SUHAKAM, 2006) at 109.

from Mahathir as Prime Minister in November 2002, NGOs intensified their calls for the abolition of the ISA and all laws allowing detention without trial. NGOs commended SUHAKAM's 2003 Report on the ISA as

the most authoritative and weighty review of the ISA that has been made in the 43-year history of the ISA, specifically under the statute that has been passed by Parliament establishing SUHAKAM to 'advise and assist the government' on human rights.<sup>154</sup>

SUHAKAM's Report was not debated in Parliament and there was no repeal or amendment of any of the legislation permitting detention without trial. Foreign Minister Datuk Seri Syed Hamid Albar and Minister for Domestic Trade and Consumer Affairs Tan Sri Muhyiddin Mohd Yassin dismissed SUHAKAM's 2003 Report on the ISA as "irrelevant".<sup>155</sup> In 2008, SUHAKAM's Vice President, Tan Sri Simon Sipaun, stated:

[N]ot a single report, its findings or recommendations, had been discussed by Parliament. It is sad that Parliament has no time to deliberate on the findings and recommendations on various issues related to the government, its agencies or the man in the street.<sup>156</sup>

In 2008, journalists and opposition politicians were still being arrested under the ISA and held without charge.<sup>157</sup>

For Malaysian civil society organizations and NGOs, the existence and use of the ISA is the litmus test for civil liberties in Malaysia. When asked to identify the principal shortcomings of SUHAKAM, NGOs refer first to the Commission's failure to effect change to the status of the ISA.<sup>158</sup> But NGOs also find it difficult to state

154. LIM Kit Siang, Media Statement, "SUHAKAM ISA Review Report" (2003), online: Lim Kit Siang <[www.limkitsiang.com/archive/2003/apr03/lks2248.htm](http://www.limkitsiang.com/archive/2003/apr03/lks2248.htm)>.

155. "DAP calls for a serious consultation process, involving a Cabinet Committee, an all-party parliamentary working group and nation-wide discussions on Suhakam's most commendable review and recommendations for repeal of ISA and its replacement by a new comprehensive human rights-sensitive national security legislation". See LIM Kit Siang, Media Statement, (10 April 2003), online: Democratic Action Party Malaysia <[www.dapmalaysia.org/all-archive/English/2003/apr03/lks/lks2248.htm](http://www.dapmalaysia.org/all-archive/English/2003/apr03/lks/lks2248.htm)>.

156. "MPs Yet to Discuss SUHAKAM Issues", *New Straits Times* (22 May 2008).

157. See "Malaysia, UN Review Should Challenge Rights Record" (9 February 2009), online: Human Rights Watch <[www.hrw.org/en/news/2009/02/09/malaysia-un-review-should-challenge-rights-record](http://www.hrw.org/en/news/2009/02/09/malaysia-un-review-should-challenge-rights-record)> which stated:

One of the journalists, Raja Petra Lamarudin, founder and editor of Malaysia Today, Malaysia's most popular website, is now on trial for sedition. In December 2007, five leaders of the Hindu Rights Action Force (Hindraf) were charged under ISA after the organization staged a demonstration to draw attention to education and economic policies that discriminate against Malaysia's Indian population. These five remain in detention.

158. Interview with Andrew Khoo, Deputy Chair of the Human Rights Committee of the Bar Council of Malaysia, in Kuala Lumpur (31 July 2008):

The law provides that SUHAKAM has to present an annual report to parliament, which it does, but parliament doesn't discuss it. So nobody picks up the report, there's no debate in parliament about human rights and even the opposition members don't bring it up very much. Which is why there has been criticism of SUHAKAM as a toothless tiger. And basically to a certain extent we would have to agree that's true. I mean there's been some very good recommendations, about

what else SUHAKAM could have done, within its powers, to effect the required changes. SUHAKAM is established as an advisory body with no power to compel the government to amend or repeal legislation which, in the Commission's view, contravenes human rights. In relation to the ISA, SUHAKAM's statutory role is to monitor the ISA's implementation, to educate the executive and civil society about its impact, to report on human rights violations which occur as a result of executive actions under the ISA, and to recommend to Parliament amendments or repeal of the ISA if its use results in the diminution of internationally recognized human rights which are not inconsistent with the Malaysian Constitution.

It could be argued that since 2003, when Vohrah published his comprehensive review of the ISA, SUHAKAM has ably and independently fulfilled its function. Its inability to effect change in relation to the ISA is the result of legislative inertia and not of a lack of commitment on the Commission's part. SUHAKAM's tactics in promoting compliance with human rights norms are restricted to enlisting the agents of publicity and the pressure of public opinion; tactics for which there is no guarantee of success in an "authoritarian state with a relatively tame judiciary and controlled media".<sup>159</sup> By 2008, NGOs had realized that SUHAKAM was not "the mighty champion that was going to sweep down from the mountains and resolve their problems for them" but "merely one cog in the wheel of human rights activism".<sup>160</sup>

Nonetheless, Malaysian NGOs held the view that SUHAKAM was a cog that could be made to work more effectively. NGOs continued to urge the government to amend the 1999 Act to ensure that SUHAKAM had structural autonomy from government and that its Commissioners were full-time, appointed for five years without reappointment, qualified in the field of human rights, and selected after full consultation with civil society. In addition, they continued to advocate for a broader Commission mandate and that SUHAKAM's reports be debated in Parliament.<sup>161</sup>

SUHAKAM's 2002 Report identified the Commission's own shortcomings and suggested legislative amendments along the lines suggested by NGOs. In its 2008 Report, prepared for the UPR of Malaysia by the UN Human Rights Council, SUHAKAM stated that "from the outset, Commissioners themselves as well as civil society had found the [Malaysian Human Rights Commission] Act to be too restrictive and behind those of leading best practices".<sup>162</sup>

The question was how to persuade the Malaysian government to amend the legislation establishing SUHAKAM and to strengthen an institution that had spent much of its existence challenging the government.

---

amendment of laws and also the repeal of some draconian laws. There is the Internal Security Act, for example. SUHAKAM has called for the reform of the Internal Security Act. It recognises on the one hand the need for the government to protect national security but it feels there's too much internal security, it's far too draconian.

159. Thio, *supra* note 96 at 19.

160. Dr Azni SHAROM, "High Hopes on SUHAKAM Which Has Little Power" *The Star* (5 March 2009).

161. ANNI Joint Press Statement, "Imminent Downgrading of SUHAKAM: Government Must Take Action" (25 July 2008).

162. See SUHAKAM, *supra* note 139, para. 4.

## VIII. SUHAKAM AND THE INTERNATIONAL CO-ORDINATING COMMITTEE

In 2002, the Council of the Asia Pacific Forum of National Human Rights Institutions determined that SUHAKAM was fully compliant with the Paris Principles and admitted it as a full member of the Forum.<sup>163</sup> In July 2008, SUHAKAM hosted the 13th Annual APF Meeting,<sup>164</sup> which was attended by Commissioners and senior staff from the APF's seventeen members,<sup>165</sup> representatives of governments of the region,<sup>166</sup> UN representatives,<sup>167</sup> and members of domestic and international non-governmental organizations.<sup>168</sup>

Something of a pall hung over the meeting. In April 2008, the ICC had put the hosts on notice that they were in danger of losing their "A" status accreditation. It was unclear what effect a downgrading of status by the ICC would have on SUHAKAM's membership of the APF.<sup>169</sup> Malaysian NGOs used the occasion of the APF meeting to embarrass the government about its poor human rights record and the perceived limitations of SUHAKAM. Indeed, two of Malaysia's most prominent civil society organizations, ERA Consumer and SUARAM, had themselves submitted a report to the ICC outlining their perception of SUHAKAM's non-compliance with the Paris Principles. One member of a Malaysian NGO stated that:

There was no other way to put pressure on the Malaysian government. The government ignored the calls of civil society and continued to run the Commission in its present way.

- 
163. At the 2002 APF Annual Meeting, during the consideration of SUHAKAM's application for membership, the Fiji Human Rights Commission (FHRC) had raised two concerns about SUHAKAM's compliance with the Paris Principles. The FHRC questioned SUHAKAM's policy on equality and the right to be free from unfair discrimination, suggesting that the Paris Principles requirement that "a national institution shall be vested with competence to protect and promote human rights" was not satisfied unless a Commission was empowered to (and took actual steps to) protect the fundamental right to equality. The FHRC also questioned whether SUHAKAM satisfied the Paris Principles requirement of pluralism, arguing that "there is no provision for representatives from the private sector, such as companies or corporations", a reference to those SUHAKAM commissioners who held directorships in public and private companies. Forum Council representatives from Australia, India, New Zealand, the Philippines, and Sri Lanka spoke in support of SUHAKAM's application for membership, and Malaysia was ultimately accepted as a full member of the APF; see Asia Pacific Forum, "Seventh Annual Meeting Report" (2002), online: APF <[www.asiapacificforum.net/about/annual-meetings/7th-india-2002/downloads/final.pdf](http://www.asiapacificforum.net/about/annual-meetings/7th-india-2002/downloads/final.pdf)>.
164. The 13th Annual Meeting of the APF brought together two hundred participants from thirty-one countries in the Asia Pacific region.
165. Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, the Philippines, South Korea, Sri Lanka, Thailand, Timor Leste (full members); the Palestinian Territories, Qatar, the Maldives (associate members).
166. Kerry Rea (Australia) and Zaid Ibrahim (Malaysia).
167. Representatives of the Office of the High Commissioner for Human Rights and its National Institutions Unit attended the meeting, as did the International Co-ordinating Committee's Chair, Jennifer Lynch QC.
168. International NGOs represented included the International Service for Human Rights and the International Women's Rights Action Watch Asia Pacific.
169. Until August 2009, when at its 14th Annual Meeting the APF Council decided to adopt the ICC accreditation decisions as its own criterion for membership, the APF had its own independent membership procedures. The difference between the two procedures was that ICC procedure involves regular reviews of status, while the APF procedures contemplated only an ad hoc review of status, triggered by a request from the NHRI in question or instituted by the Forum Council in response to actions of a NHRI or its government: See Byrnes *et al.*, *supra* note 13.

Hopefully with the ICC accreditation, things will change. It is very important for the Malaysian government to show that we have an independent, credible institution and we are recognised by the UN and we can participate in the Human Rights Council: Malaysia is a member of the Human Rights Council.<sup>170</sup>

The decision of ERA Consumer and SUARAM to submit a report to the ICC was unprecedented for NGOs of the Asia Pacific. The decision appears to have been taken as part of a strategy of NGO engagement with international institutions promoted by the Asian Network of NGOs on National Institutions (ANNI). In 2006, ANNI was established as an umbrella organization of NGOs, with the purpose of providing a forum through which NGOs involved with the work of national commissions could share expertise, provide support, structure campaigns, and act in concert to achieve regional goals. ANNI has as its members NGOs from each country in the region with a NHRI.<sup>171</sup> In its initial<sup>172</sup> and subsequent reports, ANNI has consistently acknowledged the potential power of NHRIs as “the practical link between international standards and their concrete application, the bridge between the ideal and its implementation”,<sup>173</sup> but has also questioned the independence and effectiveness of individual NHRIs in Asia. SUHAKAM is one such institution. In its 2008 review, ANNI describes SUHAKAM’s performance as “disappointing as in previous years, if not even more dismal”.<sup>174</sup> However, ANNI’s 2008 Report recognized that SUHAKAM was constrained by a narrow mandate and limited powers of enforcement. The 2008 Report also condemned the intransigence of the Malaysian government, which had failed to empower SUHAKAM or respond to its reports or recommendations. It was during an ANNI meeting that Malaysian NGOs raised the idea of utilizing the ICC accreditation procedure as a means of procuring legislative change. John Liu of SUARAM stated that:

The ICC accreditation process is a very new process to the NGOs, to civil society, because before this the accreditation process has never taken into account the alternative, NGO report. I was in Bangkok for an ANNI meeting and I was exposed to the ICC as an international regulating body and the mechanism of accreditation and learned that we can actually submit our report to balance the report of SUHAKAM as a national human rights institution.<sup>175</sup>

The Malaysian NGOs’ report about SUHAKAM’s non-compliance with the Paris Principles was sent to the ICC without first being sent to SUHAKAM. The ICC Subcommittee on Accreditation now appears to have rectified these deficiencies in

170. Interview with Malaysian NGO member (28 July 2008).

171. ANNI also includes NGOs from some countries/regions with NHRIs that are not recognized by the APF or the ICC, such as Taiwan.

172. ANNI, *The Performance of National Human Rights Institutions in Asia 2006: Cooperation with NGOs and Relationship with Governments* (Bangkok: Forum-Asia, 2007).

173. Cardenas, *supra* note 6 at 1; Cardenas, *supra* note 3 at 23.

174. ANNI, *Report on the Performance and Establishment of National Human Rights Institutions in Asia* (Bangkok: Forum-Asia, 2008).

175. Interview with John Liu, SUARAM, Kuala Lumpur (4 August 2008).

procedural fairness: the ICC Sub-Committee's November 2008 Report and Recommendations (section 2.5) provides that "The Sub-Committee agreed, commencing with its next session, to consider only that information from civil society that is received by the National Institutions Unit at least four (4) months prior to the next session of the Sub-Committee".<sup>176</sup>

SUHAKAM Commissioners objected to facing downgrading on the basis of an NGO report which they had not seen. During the APF's Annual Meeting in Kuala Lumpur, SUHAKAM's chairman met the ICC chairperson and OHCHR representatives to "express disappointment that the reason for proposing that SUHAKAM be re-graded to 'B' is based solely on the report and criticism of this one civil society group" and to ask of the ICC: "are you acting as a rubber stamp of the civil society, or are you looking at us objectively?"<sup>177</sup>

Commissioner Simon Sipaun describes the NGO SUARAM as "the self-appointed auditor of SUHAKAM".<sup>178</sup> Sipaun's response to the NGO's direct appeal to the ICC on SUHAKAM's shortcomings captures the sense of umbrage felt by many Commissioners:

I did not apply for this job and I said to the King that I would do my level best. SUARAM should come and tell me "you wasted your time doing this. You should have done that". But so far they have not come. That is to me more realistic than just going to the ICC and telling this and then the ICC making a decision to downgrade us from A to B. That John Liu, he assesses SUHAKAM based on his living in Kuala Lumpur. If he is really interested he should come with me to the interior, he should come with me and sleep in the jungle and see what happens to him.<sup>179</sup>

SUHAKAM's Commissioners also objected to demotion per se, arguing that at the time of SUHAKAM's establishment in 1999, the ICC had seen fit to accredit SUHAKAM with "A" status; the only thing that had changed by 2008 was that SUHAKAM had a list of commendable reports to its name and the hard work of many dedicated Commissioners. SUHAKAM's Commissioners also took the view that NGOs were "targeting the government but pointing the barrel of the gun at SUHAKAM".<sup>180</sup> It was beyond SUHAKAM's power to effect the changes demanded by civil society; that power rested with Parliament:

They are not happy with our law, I am not happy with our law; we have done something about it earlier than SUARAM. If they are not happy with the law then I suggest they, as SUHAKAM did, draft legislation, present it to the government ... They are not happy with the Commissioners, so I suggest to them that they pick their list of people that they

176. ICC Sub-Committee on Accreditation, "Report and Recommendations of the Session of the ICC Sub-Committee on Accreditation" (March 2009), online: NHRI Forum <[www.nhri.net/2009/SCA\\_REPORT\\_March%202009%20Session\\_\(English\).pdf](http://www.nhri.net/2009/SCA_REPORT_March%202009%20Session_(English).pdf)>; section 2.4 provides "The Sub-Committee considered information from civil society. The Sub-Committee shared that information with the concerned NHRIs and considered their responses."

177. Aniza DAMIS, "SUHAKAM Treads an Arduous Path" *New Strait Times* (3 August 2008).

178. Interview with Simon Sipaun, *supra* note 81.

179. *Ibid.*

180. *Ibid.*

are happy about, go to the King and say: “Here are all your appointments. Here, you should pick from these people, who we think can be a better protector and promoter of human rights in Malaysia.” They keep criticising SUHAKAM for that over which we have no control.<sup>181</sup>

SUHAKAM’s Commissioners were not convinced that the government set so much store by the international prestige of possessing an “A” status NHRI that the threat of demotion would trigger an amendment to the legislation. Commissioner Simon Sipaun’s view was that “as to what extent this downgrading will affect them, knowing them, I don’t think they will do much. I don’t think they will lose sleep over it.”<sup>182</sup>

It appears that Sipaun was mistaken. On 11 February 2009, Malaysia was reviewed in the UN Human Rights Council’s UPR. In an opening statement on behalf of the Malaysian government, Tan Sri Rastan Mohd Isa, noting the ICC’s contention that SUHAKAM was not in full compliance with the Paris Principles and that the Commission faced possible demotion, stated:

Malaysia is aware of the fact that the Paris Principles ... is not a legally binding instrument. However, in view of the Government’s sincere effort to promote and protect human rights in Malaysia, several measures are being taken ... to ensure that SUHAKAM retains its status as a credible and respected national human rights institution. Malaysia hopes that the Government’s sincere effort in maintaining the credibility of SUHAKAM will be taken into account during the reaccreditation process.<sup>183</sup>

This was not mere rhetoric. The SCA gave SUHAKAM until 26 March 2009 to provide written evidence demonstrating the institution’s continued conformity with the Paris Principles. On 24 March 2009, the government tabled the Human Rights Commission of Malaysia (Amendment) Bill 2009, for a first reading in Parliament. On 25 March 2009, the Bill was passed, amidst protests from the opposition that the Bill had been tabled and passed in unseemly haste (and in contravention of the Standing Orders of the House). No notice of the Bill had been given and no consultation preceded its passage. Opposition MP Lim Kit Siang was temporarily suspended from Parliament when the “vigorous debate” about the Bill’s hasty passage descended into “an exchange of insults” between government and opposition MPs.<sup>184</sup>

The Explanatory Memorandum accompanying the Bill stated that the legislation was intended to make the appointment process of SUHAKAM Commissioners “more transparent”.<sup>185</sup> Section 5(2) of the Amendment Act provided that SUHAKAM Commissioners would be appointed by the Yang di-Pertuan Agong on the recommendation of the Prime Minister, following consultation with a Selection

181. *Ibid.*

182. *Ibid.*

183. Government of Malaysia, “Opening Statement by the H.E. Tan Sri Rastam Mohd Isa, Secretary-General, Ministry of Foreign Affairs Malaysia”, Fourth Working Group on Universal Periodic Review (11 February 2009) at 6, para. 31.

184. ANNI, “SUHAKAM Bill Hastily Passed in Malaysian Parliament” (March 2009), online: ANNI <<http://groups.google.co.th/group/anni21?hl=en>>.

185. SUHAKAM, “Explanatory Memorandum Human Rights Commission of Malaysia Act 1999 (‘Act 597’)”, online: SUHAKAM <[www.suhakam.org.my/web/guest/home](http://www.suhakam.org.my/web/guest/home)>.

Committee comprising the government's Chief Secretary, the Chairperson of SUHAKAM, and three "eminent persons" appointed by the Prime Minister.<sup>186</sup> Section 11(A)(6) of the Amendment Act provided that the views or recommendations of the Selection Committee shall not be binding on the Prime Minister.

The Amendment Act also changed the criteria for the selection of Commissioners. Where the original Act provided that Commissioners be appointed from "amongst prominent personalities, including those from various religious and racial backgrounds",<sup>187</sup> the Amendment Act provided that "members of the Commission shall be appointed from amongst men and women of various religious, political, racial backgrounds who have knowledge of, or practical experience in, human rights matters".<sup>188</sup> The period of tenure for Commissioners was extended in the Amendment Act from two years with possible reappointment for a further two years, to three years with possible reappointment for a further three years.<sup>189</sup> There is also a reference in the Amendment Act to "key performance indicators", which may be devised by the Prime Minister to assess the performance of members of the Commission and which may be taken into consideration in relation to the reappointment<sup>190</sup> and the removal<sup>191</sup> of Commissioners.

The day after the Amendment Act was passed, ANNI sent a letter to the SCA criticizing the "hasty manner" in which the amendments had been passed which "clearly illustrated the government's will to bulldoze this bill through Parliament in time for the (ICC) review of SUHAKAM and ... avoid a debate over the amendments".<sup>192</sup>

ANNI's letter stated that the amendments were "superficial", that they failed to ensure pluralism in the appointment process as required by the Paris Principles, and gave the Prime Minister absolute discretion over the appointment of new Commission members. ANNI argued that if the SCA were to maintain SUHAKAM's "A" status on the basis of the amendments, it would "set a precedent that would negatively affect future accreditation reviews of other NHRIs", and undermine the possibility of securing "more substantial amendments that would truly make SUHAKAM an independent, effective and accountable NHRI".<sup>193</sup>

In support of ANNI's view, in April 2009, the SCA informed SUHAKAM that the government's legislative amendments were inadequate. But again, the SCA deferred its decision on SUHAKAM's reaccreditation, providing a twenty-eight day window for the Malaysian government to consider further legislative amendments.

The Malaysian government took this opportunity. On 8 May 2009, *de facto* Law Minister Datuk Seri Nazri Abdullah Aziz announced that the government would

186. *Human Rights Commission of Malaysia Act 1999 (Amendment) Bill (2009)*, s. 11(A).

187. *Ibid.*, s. 5(3).

188. *Ibid.*

189. *Ibid.*, s. 5(4).

190. *Ibid.*, s. 5(6)(a).

191. *Ibid.*, s. 5(6)(b).

192. Letter from Emerlynne Gil, Co-ordinator Asian NGOs Network on National Human Rights Institutions (ANNI) to Mr David Langtry, ICC Sub-Committee on Accreditation, 26 March 2009, online: SUARAM Penang <<http://suarampg.blogspot.com/2009/03/malaysia-ngos-letter-to-sca-on-suhakams.html>>.

193. *Ibid.*



again amend the 1999 Act in a bid to ensure SUHAKAM's compliance with the Paris Principles.<sup>194</sup> The further amendments would involve two substantial changes. First, the clause which provided that the Prime Minister was not bound by the opinions, views, or recommendations of the Selection Committee would be deleted. Second, the clause referring to the composition of the Selection Committee would be amended from "three eminent persons" to "three members of civil societies of human rights". These changes were passed by the Malaysian Parliament on 2 July 2009.<sup>195</sup> In November 2009, the SCA delivered its recommendation that SUHAKAM's "A" status be maintained, welcoming the passage of the two amendment Acts of 2009 and expressing its appreciation for the constructive approach taken by SUHAKAM in pursuing both sets of amendments with the government.<sup>196</sup>

## IX. CONCLUSION

Well, I think we are still a work in progress. There have been some advances; I mean, I think ten years ago if you said "human rights" people thought: "what's that?" You didn't hear human rights mentioned by government. Now of course we do, and it's slowly getting to become more and more mainstream as the days go by but it's not sufficiently mainstream yet ... cabinet is dominated by old-time conservatives who are protecting their power base. So there's no desire on their part to try and extend freedoms generally or to make international human rights norms more part of our system.<sup>197</sup>

In 2003, Cardenas described the emergence of NHRIs as signalling "an important innovation in global governance",<sup>198</sup> marking a "potentially significant step in the implementation of international human rights law".<sup>199</sup> It is clear that, for governments, NHRIs have become an international status symbol of progressivism and tolerance. There is a tension between these two aspects of NHRIs, one clearly visible in the experience of SUHAKAM.

At its inception in 1999, SUHAKAM was widely perceived to be a creature of the Malaysian government. Civil society held the view that the repressive government

194. "Two More Changes to Suhakam Act" *The Star* (8 May 2009).

195. Continuing uncertainty surrounds the "key performance indicators" which would be applied to Commissioners; see Shaila KOSHY, "KPIs on SUHAKAM Commissioners Should Be Transparent" *Malaysian Bar* (18 May 2009), online: [www.malaysianbar.org.my/legal/general-news/kpis-on-suhakam-commissioners](http://www.malaysianbar.org.my/legal/general-news/kpis-on-suhakam-commissioners).

196. See "Special Review of the Human Rights Commission of Malaysia to the International Coordinating Committee of National Human Rights Institutions" (November 2009), online: [www.nhri.net/default.asp?PID=606&DID=0](http://www.nhri.net/default.asp?PID=606&DID=0). The SCA did note, however, that "these amendments may not, in practice, address all the concerns that were raised in previous session", in particular, (1) the selection of civil society representatives on the committee is at the sole discretion of the Prime Minister and (2) decisions of the selection committee are only recommendatory, since the Prime Minister is not bound by them. The SCA also noted that the adoption of "Key Performance Indicators" for use in the reappointment and dismissal of Commissioners had yet to occur.

197. Interview with Andrew Khoo, Deputy Chair of the Human Rights Committee of the Bar Council of Malaysia, in Kuala Lumpur (31 July 2008).

198. Cardenas, *supra* note 6, at 23.

199. *Ibid.*

of Prime Minister Mahathir had borrowed an instrument from the world of international human rights in an attempt to impress the international community and to quell (or at least control), civil society's demands for greater realization of human rights for Malaysia's people. In 2008, Malaysian NGOs called the Malaysian government to account for its promise of a "free and equal society for all", when they urged the ICC to hold SUHAKAM to the Paris Principles standards of independence and effectiveness. The Malaysian government's reform of the Malaysian Human Rights Commission Act may bring the promise a step closer to realization.