

INTERIM REPORT – International Fact-Finding Mission on Elections in Malaysia, 25-29 April 2012

EXPLANATORY NOTE

This is the Interim Report of the International Observer Group which conducted a Fact-Finding Mission on Elections in Malaysia, 25-29 April 2012.

The Report is reproduced here in the form in which it was completed by the members of the Group on 29 April 2012. Copies were transmitted to, and comments invited from, the Chairman of the Electoral Commission of Malaysia, the Government of Malaysia, the leadership of the Malaysian Opposition, BERSIH (Gabungan Pilihanraya Bersih dan Adil), and the Malaysian Bar Council. Copies were subsequently made available online to all other interested parties.¹

¹ For electronic copies, see the Friedrich Naumann Foundation Regional Office for Southeast and East Asia (www.fnfasia.org), the Office of the Independent Senator for South Australia, Senator Nick Xenophon (http://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=8IV), and others.

Letter of Transmittal

29 April 2012

We have the pleasure in sending you the Interim Report of the International Observer Group which conducted a Fact-Finding Mission on Elections in Malaysia from 25-29 April 2012. You are invited to examine this Report and provide comments on or before 10 May 2012. The final report will be prepared within twenty one (21) days after submissions have been received. Our aim, simply expressed, is to help governments and institutions make better decisions in the long-term interest of Malaysia. We hope that this report will be of assistance to the people of Malaysia and that it will assist in strengthening Malaysia's democracy in the years to come.

Yours sincerely,

The Members of the International Observer Group on Elections in Malaysia:

Mr Mobashar Jawed Akbar, Republic of India.

Senator Mir Hasil Khan Bizenjo, Islamic Republic of Pakistan.

Dr Clinton Fernandes, Commonwealth of Australia.

Ms Juliane Schmucker, Federal Republic of Germany.

Dr Mohamad Nasir Tamara Tamimi, Republic of Indonesia.

Dean Amado D. Valdez, Republic of the Philippines.

Senator Nick Xenophon, Commonwealth of Australia.

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Chapter One – Introduction

Invitation

The invitation to conduct this Fact-Finding Mission came from the Office of the Leader of the Opposition in mid-April 2012.

Members of the Group were invited in their individual capacities and it was made clear that the views they expressed would be their own and not those of their respective governments or institutions. They subsequently confirmed their intentions to constitute an International Observer Group in order to conduct a fact-finding mission. Having been given the necessary assurances on access and after establishing that there would be broad support for its presence, the Group then conducted a Pre-Election Fact-Finding Mission in Malaysia from 25-29 April 2012.

Terms of Reference

The Terms of Reference of the Group were as follows:

The International Observer Group will conduct a pre-election Fact-Finding Mission on Elections in Malaysia from 25-29 April 2012.

The Group will focus on the federal elections in the House of Representatives.

The Group is to act impartially and independently and shall conduct itself according to the standards expressed in the International Declaration of Principles, to which the Commonwealth, of which Malaysia is a member, is a signatory.

The Group is to gather information concerning the laws, processes and institutions related to elections and the overall electoral environment.

The Group is to analyse such information impartially and offer recommendations to improve the integrity of elections and the overall electoral environment.

The Group will be process oriented; it will not be concerned with any particular electoral result. Members of the Group will be free from political, economic or other conflicts of interest that may interfere with accurate and impartial observations. Members of the Group will not accept payment or support (other than basic logistical support) from any stakeholder in the Malaysian elections.

The Group is to consider the laws, practices and institutions related to:

- The credibility of the electoral rolls.
- The integrity of the postal voting system.
- The appropriateness of an absentee voting system.
- The appropriateness of a Caretaker Convention in the Malaysian context.
- The electorate's access to information during the election campaign.
- Prevention of slander/defamation of election candidates.

- The conduct of the electoral process in the areas of voting, counting and declaration of results.

The Group is to determine in its own judgment based on facts gathered whether the elections can be conducted according to the standards for democratic elections to which Malaysia has committed itself, with reference to national election-related legislation and relevant regional, Commonwealth and other international commitments.

The Group has no executive role. It may only propose recommendations for change on institutional, procedural and other matters as would assist the holding of elections.

The Group is to submit its report to the Chairman of the Election Commission of Malaysia, the Government of Malaysia, the leadership of the Malaysian Opposition, BERSIH (Gabungan Pilihanraya Bersih dan Adil), and the Malaysian Bar Council. The report is to be made available online subsequently to all interested parties.

Activities of the Group

Members of the Group began arriving from 24 April 2012 onwards. They traveled to various locations in Kuala Lumpur, Selangor and Putrajaya. They met a range of stakeholders including:

- Datuk Wira Hj. Wan Ahmad Bin Wan Omar, the Deputy Chairman of the Election Commission.
- Dato' Seri Mohamed Nazri Bin Abdul Aziz, Minister in the Prime Minister's Department.
- Datuk Seri Tengku Adnan B. Tengku Mansor, Secretary-General of the United Malays National Organisation and Secretary-General of the Barisan Nasional.
- Dato' Seri Anwar Ibrahim, Leader of the Opposition.
- Tan Sri Mohamed Khalid Ibrahim, Menteri Besar of Selangor State Government.
- Maria Chin Abdullah, a representative of BERSIH (Gabungan Pilihanraya Bersih dan Adil).

Members of the Group held a press conference on 29 April 2012. They released this Interim Report at the press conference. They left Malaysia shortly thereafter.

Chapter Two – The Electoral Framework

The legal framework governing parliamentary elections in Malaysia consists of the Federal Constitution, the Election Offences Act 1954, the Election Commission Act 1957, and the Elections Act 1958 & Regulations (1959, 1981, 2002, 2003).

Related to this, other Acts of Parliament should be considered, insofar as they have a direct impact on the conduct of election campaigns. These Acts include the Police Act 1967, the Malaysian Anti-Corruption Commission Act 2009, the Printing and Publications Act 1984 and the Sedition Act 1948.

Constitutional background

Malaysia is a federation of 13 states. The capital, Kuala Lumpur, the administrative capital, Putrajaya, and the island of Labuan are separate Federal Territories. The country is divided into 137 administrative districts. The Malaysian Constitution describes the powers of the executive, the legislature and the judiciary.

The head of state, or Supreme Head of Malaysia, is a monarch (Yang di-Pertuan Agong), elected for a five-year term (with a Deputy head of state) by and from the hereditary rulers of nine of the states. The monarch acts on the advice of Parliament and the Cabinet. The head of state appoints the Prime Minister and, on the latter's recommendation, other ministers. The Cabinet is responsible to Parliament.

Parliament consists of the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives). The Senate has 70 members. The head of state appoints 44 of them and the 13 State Legislative Assemblies choose two each. The House of Representatives has 222 members (increased from 219 at the March 2008 general election), elected for five years by universal adult suffrage: 165 from Peninsular Malaysia (including 11 from Kuala Lumpur and one from Putrajaya), 31 from Sarawak and 26 from Sabah (including one from Labuan).

The Election Commission

The Election Commission is empowered under article 113 of the Federal Constitution to conduct elections to the House of Representatives and the Legislative Assemblies of the States and prepare and revise electoral rolls for such elections. It is also empowered to delineate electoral constituencies and to recommend changes to the delineation of these constituencies.

The 13th Schedule to the Constitution, Part I, 2 (c) provides for the number of electors within each constituency in a State 'to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies.'

The International Observer Group considers that the term 'a measure of weightage' permits unacceptably wide latitude in constituency delineation. This can lead to mal-apportionment of constituencies (also known as a gerrymander). Dato' Seri Mohamed Nazri Bin Abdul

Aziz, Minister in the Prime Minister's Department, confirmed that while the Malaysian election system enshrined the principle of 'everyone having one vote,' it did not enshrine the principle of 'everyone's vote being of equal value.'

The Group **recommends** that the Government take steps to reduce the difficulty of reaching electors in the country districts. Members from rural constituencies should be given extra resources (staffing, transport, allowances and infrastructure) to enable them to reach their electors. In the longer term, steps should be taken to reduce the 'other disadvantages facing rural constituencies.'

In addition, the Election Commission confirmed that certain constituencies, although not rural at all, have a much smaller number of voters than others. Putrajaya, with only approximately 7,000 voters, was cited as one such example by the Deputy Chairman of the Election Commission, compared with over 100,000 voters in some other constituencies.

The Group notes that the 13th Schedule to the Constitution, Part I, 3A, provides for Putrajaya to be regarded as a State. Since 2 (a) of Part I states that 'constituencies ought to be delimited so that they do not cross State boundaries,' the only feasible option for the voters of Putrajaya to preserve the spirit and letter of 2 (c) of Part I (and thus not be significantly over-represented) may be to not regard Putrajaya as a State but to absorb it within the boundaries of a neighbouring constituency. Other non-rural constituencies should also be audited and redrawn as necessary so that they may be delineated fairly, preserving the spirit and letter of 2 (c) of Part I of the 13th Schedule to the Constitution.

Some of the Group's interlocutors expressed concern at the large increase in the number of voters in certain constituencies (largely held by members of the Opposition). They suggested that these voters may be allocated to these constituencies in order to enable government candidates to win elections.

The Election Commission rejected this view. It stated that its initiative in aggressively promoting and calling out to register as voters, and the publicity surrounding the general elections were the main factors contributing to the increase in the number of voters. However, concern has been raised by a number of interlocutors that some of these increases could not be credibly explained. The Election Commission advised that 'in some constituencies, the increase in total registration was rather high, exceeding 30% in some cases compared to the number of electors in 2008. This includes constituencies such as P.107 Subang (34%), P. 158 Tebrau (34%), P.111 Kota Raja (33%), P.086 Pekan (33%) and P. 032 Gua Musang (30%).'

The Group notes that the rapid increase is not confined exclusively to Opposition-held constituencies. However, to allay concerns that the increase in registration may have some nefarious purpose, the Group **recommends** that the Election Commission should constitute its own verification team. It needs to physically verify the identities of the new voters in order to build public confidence in the democratic process.

Some of the Group's interlocutors expressed concern about the length of the campaign period in the election timetable. In the 2008 elections, the time period from the Nomination Day to Election Day was eleven days. Such a short timeframe disenfranchises hundreds of thousands of Malaysians who are out of the country as well as those who are away from their registered voting address.

The Group notes that at the time of writing this report, the Election Commission has not announced the timetable for the next election. According to an Election Commission statement, the campaign period for the forthcoming period will be at least seven days long. The Group **recommends** that there should be a reasonable time of not less than 21 days to inform the voters of the relevant campaign issues and to allow them to arrange travels to their registered voting constituencies.

The Group discussed the absence of a Caretaker Convention with Dato' Seri Mohamed Nazri Bin Abdul Aziz, Minister in the Prime Minister's Department responsible for electoral matters. The Minister explained in general terms that the Government's preference in these and other matters was for the Westminster model as practiced in the United Kingdom.

The Group **recommends** that the Caretaker Convention as practiced in the United Kingdom be introduced.

Several of the Group's interlocutors raised allegations of tens of thousands of doubtful voters being on the electoral roll. The Group raised these allegations with the Election Commission, which explained that the National Registration Department advised it in September 2011 that of the total of 12.5 million electors, there were 42,051 names of electors about whom it did not have clear and reliable information. This means that these 42,051 electors cannot be contacted because their addresses are not recorded, and that they had not been to any of the NRD offices to update their status. Accordingly, the Election Commission decided to categorize the 42,051 electors as doubtful. The Commission further explained that on 28 March 2012, the NRD informed it that the number of electors with dubious status was reduced to 40,803 people. This is due to the fact that there had been individuals who went to the NRD to update the information on their identity cards while others, as heirs, came forward with evidence to the NRD on the death of family members or their relatives. According to the advice provided to the Group by the Election Commission, there still remain 40,803 electors of dubious status.

The Group notes that at all times there is a need to weigh the risk of denying a vote to a legitimate voter who might be an 'elector of dubious status' against the risk of electoral fraud. Currently, not enough weighting is given to the latter consideration. The Group **recommends** that the Election Commission should constitute its own verification team. It **recommends** that the Commission should conduct its own physical verification, including door-knocking if necessary, in order to ensure that only legitimate voters are on the rolls and that there are no 'electors of dubious status.'

The Group considered the issue of the independence of the Election Commission. It notes that Article 114 (2) of the Constitution deals with 'the importance of securing an Election Commission which enjoys public confidence.' The Election Commission confirmed that it understood the importance of public confidence. The Deputy Chairman of the Commission expressed his personal view that no member of the Commission ought to belong to a political party. He stated that to the best of his understanding no current member of the current Election Commission belongs to a political party. The Group **welcomes** this assurance.

The Group has identified a problem concerning voters who come from Sarawak and Sabah but are working in Peninsular Malaysia. They face special difficulties in going back home to vote. The Deputy Chairman of the Election Commission advised the Group, 'That is the

reality in Malaysia. They should change their registration. We proposed that Parliament should legislate to introduce postal voting for people in Sabah and Sarawak. Our proposal was not accepted.’ The Group has also identified a more general problem of Malaysian voters who are required to go back to their registered constituency to vote. The Election Commission stated, ‘There is high mobility in Malaysia. So voters must go back to their voting addresses to vote. No absentee voting is possible.’

The Group **recommends** that Parliament should legislate to enable absentee voting.

The Group considered the issue of voters who have not updated their voting addresses. The Election Commission advised the Group that approximately three million voters may have changed their details held by the National Registration Department but have not updated their voting addresses, and are therefore not on the electoral roll. The International Observer Group asked the Election Commission about the possibility of automatic registration. The Election Commission advised that there is no automatic registration in Malaysia. The Group **recommends** that appropriate legislation be enacted to introduce automatic registration.

The Group expresses deep concerns about the postal voting system. In particular, it sees no reason why the 240,000 election workers who will be deployed during the forthcoming campaign cannot conduct early voting. To require them to engage in postal voting is to expose the system to the possibility of massive electoral fraud. Accordingly, the Group **recommends** that the 240,000 election workers be required to vote early and not by postal voting.

Chapter Three – The Campaign

Parity of media coverage

Some of the Group’s interlocutors expressed the strong view that there needed to be laws or conventions to ensure that political parties receive parity of coverage during an election campaign. National politics, particularly during the heightened atmosphere of an election campaign, is heavily influenced by media coverage. In the contemporary age, national politics is played out on national television.

The Election Commission advised that the power to control the media during the election is not under the authority and responsibility of the Commission. The Group concludes that the absence of a law or a widely accepted convention requiring the media to provide equal access to all parties contesting the elections is a serious concern.

The Group believes that it is in the public interest to provide fair and balanced coverage in order to ensure that voters have the opportunity to make an informed decision. The Group notes that the Constitution provides the Election Commission with wide latitude in the conduct of the electoral process. Even in the absence of a legal provision, the Group **recommends** that the Election Commission exercises its moral and persuasive authority by releasing a report on each day of the campaign as to its view regarding whether the national television stations (publicly and privately owned) have provided balanced coverage over that 24 hour period.

The Group **recommends** that government-owned electronic media be required to provide fair and balanced coverage of the election campaign including time for party political broadcasts (similar to the system in the UK, which Minister Nazri confirmed was the government’s preferred point of reference).

The government has the absolute authority to issue broadcasting and publication licenses. The Group concludes that restrictions in relation to newspapers and newsletters are draconian because they prevent alternative views from being heard. The Group **recommends** that these restrictions be lifted.

The Group notes that Article 115 (2) of the Constitution states that ‘All public authorities shall on the request of the [Election] Commission give the Commission such assistance in the discharge of its duties as may be practicable.’ Some of the Group’s interlocutors offered the opinion that this provision might empower the Commission to compel the state-owned media to give parity of coverage to political parties during the election campaign. The Deputy Chairman of the Election Commission did not share this opinion. His view was that Article 115 (2) of the Constitution empowered the Election Commission to obtain ‘logistical assistance only.’ Nonetheless, to clear all doubts on this matter, the Group **recommends** clear legislation to require the state-owned media to give parity of coverage to political parties during the election campaign.

Vilification of candidates

Concern was expressed to the Group that candidates are often vilified by sections of the media during the course of an election campaign. The Group believes that the absence of regulatory law or precedents in this regard can be a problem. There was apprehension that the content of the campaign could be open to the use of scurrilous accusations in the absence of a well-defined code of conduct. The Group was assured by the Deputy Chairman of the Election Commission that slander and other vilification would not be allowed. The Group **welcomes** this assurance.

The International Observer Group held valuable discussions with Datuk Seri Tengku Adnan B. Tengku Mansor, Secretary-General of the United Malays National Organisation and Secretary-General of the Barisan Nasional. He stressed the importance of 'avoiding racial strife' and asked, 'Are our people mature for freedom?' Commenting on political developments in Indonesia, he offered the view that 'One of the problems with Indonesia is that there is too much freedom.'

It is the view of the Group that these comments are disturbing, and that they reflect the authoritarian attitudes at the highest levels of power.

Chapter Four – The Poll, Count and Results Process

The International Observer Group is committed to the integrity of the election rather than to a political party or candidate. It notes that the Parliamentary Select Committee into electoral matters in Paragraph 13.3 of its Report was of the unanimous view that there should be further investigations into dubious electoral rolls such as in the state of Sabah as well as recommending the establishment of a Royal Commission of Inquiry to achieve the aim of an electoral roll that is recognized as honest by all parties prior to the implementation of proposed automatic registration of voters.

To date, the Government has failed to act on this key and serious recommendation despite the fact that Government MPs also supported it. The Group **recommends** that a Royal Commission of Inquiry be established in accordance with the Parliamentary Select Committee's Report as a matter of urgency.

The Group identified the problem that following a recent legislative amendment, for the coming elections, political party agents are no longer allowed in the voter verification booth. In the 2008 elections up to four people could be appointed to check voter identification in order to prevent phantom voting. According to the government, the reason for that amendment was that 'the attendance of observers at the booths causes difficulties to the election workers in performing their duties.'

The Group was of the view that this amendment alone would increase the risk of electoral fraud. Some of the Group's interlocutors raised the issue of traceability of votes through the recording of identification card and ballot serial numbers. Other interlocutors stated that this practice occurred in the 2004 election but not in the 2008 election. The Group hopes that the recent legislative amendments preventing party agents from being present at voter verification booths will not compromise the principle of voter anonymity. The Group **recommends** re-establishing the presence of voter verification agents to ensure that only registered citizens are able to cast their vote.

The Group also heard disturbing, first-hand testimony from a former senior military officer of apparently widespread practices during the 2008 election. This individual, who requested anonymity, indicated that military personnel's votes could be easily traced given the procedures adopted within the military of forms being completed and certified in the presence of an officer. This witness stated: 'There was a definite fear factor amongst the soldiers that if they did not vote for the government they could be victimized because they knew that their vote could be traced. Troops would discuss this in front of me. I and other officers would say "You can vote any way you want." Troops would laugh and say "Who will give us protection if we're traced?... It was common and widespread knowledge amongst military personnel that they knew they could face retribution if they voted the wrong way.'

The Group **recommends** that the postal vote system for military personnel be reformed and protocols changed to ensure fair practice.