

**PETITION TO:**  
**UNITED NATIONS**  
**WORKING GROUP ON ARBITRARY DETENTION**

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**HUMAN RIGHTS COUNCIL**  
**UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of  
**Anwar Ibrahim,**  
Citizen of Malaysia

v.

Government of Malaysia

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Petition for Relief Pursuant to Resolutions 1997/50, 2000/36, 2003/31, 6/4, 15/18, 20/16, 24/7<sup>1</sup>

*Submitted By:*

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June 15, 2015

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<sup>1</sup> Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the UN Commission on Human Rights extending the mandate of the Working Group on Arbitrary Detention. The Human Rights Council, which “assume[d]... all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights...” pursuant to UN General Assembly Resolution 60/251, G.A. Res. 60/251, ¶ 6 (Mar. 15, 2006), has further extended the mandate through Resolutions 6/4, 15/18, 20/16, and 24/7.

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY  
ARREST OR DETENTION**

**I. IDENTITY**

**1. Family name:** Ibrahim

**2. First name:** Anwar

**3. Sex:** Male

**4. Birth date:** August 10, 1947 (67 years old)

**5. Nationality:** Malaysian

**6. (a) Identity document (if any):** Passport

**(b) Issued by:** Immigration Department of Malaysia

**(c) On (date):** May 28, 2009

**(d) No.:** A19876100

**7. Profession and/or activity (if believed to be relevant to the arrest/ detention):**

Former Opposition Leader, former Member of Parliament, Permatang Pauh

**8. Address of usual residence:** No 11 Jalan 3/61, Bukit Segambut, 51200 Segambut Dalam, Kuala Lumpur, Malaysia

**II. ARREST**

**1. Date of arrest:** February 10, 2015

**2. Place of arrest (as detailed as possible):** Federal Court of Malaysia, Palace of Justice, Precinct 3, 62506 Putrajaya, Malaysia

**3. Forces who carried out the arrest or are believed to have carried it out:**  
Government of Malaysia

**4. Did they show a warrant or other decision by a public authority?** Yes

**5. Authority who issued the warrant or decision:** Federal Court of Malaysia

**6. Reasons for the arrest imputed by the authorities:** While Anwar has been convicted for alleged commission of “unnatural offences,” this charge is pre-textual and in fact he is imprisoned because he presents a democratic and non-violent threat to Prime Minister Najib Razak and the ruling UMNO party.

Anwar led a diverse opposition coalition, cutting across race and religion to win 52 percent of the popular vote amongst Malaysians in the country's most recent elections.

This is Anwar's fourth imprisonment episode under the same government.

**7. Legal basis for the arrest including relevant legislation (if known):** Sodomy under the Malaysian Penal Code – “Unnatural Offences” (sections 377A and 377B):

377A. Carnal intercourse against the order of nature – “Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.”

377B. Punishment for committing carnal intercourse against the order of nature – “Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.”

### **III. DETENTION**

**1. Date of detention:** February 10, 2015

**2. Duration of detention (if not known, probable duration):** Sentenced to five years imprisonment

**3. Forces holding the detainee under custody:** Prison Department of Malaysia

**4. Places of detention (indicate any transfer and present place of detention):** Sungai Buloh Prison, Selangor 47000 Tel no: +603 60384690

**5. Authorities that ordered the detention:** Federal Court, Malaysia

**6. Reasons for the detention imputed by the authorities:** Guilty of committing sodomy

**7. Relevant legislation applied (if known):** Sodomy under the Malaysian Penal Code – “Unnatural Offences” (sections 377A and 377B)

### **IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY**

#### **A. Statement of Facts**

##### **1. Malaysian Political Context**

Despite Malaysia's reputation as a moderate Muslim nation, the Malaysian Government has undertaken an intensifying crackdown on political opposition and dissent. Initially, when

Prime Minister Najib Razak assumed office in 2009, it had been hoped that the country, which has been ruled by the same party since it achieved independence from Britain in 1957, might be capable of making a true democratic transition.<sup>2</sup> Prime Minister Najib promised to eliminate preferences favoring ethnic Malays,<sup>3</sup> reduce police powers, repeal a repressive anti-sedition law, and promote free and fair elections.

Despite these promises, starting in 2013, when the ruling Barisan Nasional (BN) coalition lost the popular vote to the multi-ethnic People's Alliance (*Pakatan Rakyat* or PR) coalition in national elections, Prime Minister Najib has overseen an increasing crackdown against his political opponents and on basic freedoms.<sup>4</sup> His ruling party, United Malays National Organization (UMNO), clung to power only because of the gerrymandering of parliamentary seats. In the aftermath of the election, Prime Minister Najib launched a campaign aimed at crippling the opposition.<sup>5</sup> Crackdowns on peaceful assembly, restrictions on the media, censorship of books and films, and targeting of ethnic and religious minorities are on the rise.<sup>6</sup>

Meanwhile, Prime Minister Najib's government has led Malaysia in a direction of increased Islamization. Prime Minister Najib developed a "Sharia Index" for the Government, designed to measure how well it is complying with Islamic principles in areas such as law, the economy, politics, and social issues.<sup>7</sup> This trend towards Islamization is worrying for the roughly one-third of the country's population who are non-Muslim.<sup>8</sup> Prime Minister Najib has even showered praise on the Islamic State of Iraq and the Levant (ISIL or ISIS), saying that if UMNO members were as brave as ISIS militants, the party would be strong.<sup>9</sup> Prime Minister Najib has also initiated the return of overbroad security measures to try and repress political dissent. In April 2015, Prime Minister Najib promoted the new Prevention of Terror Act that gives the Government the right to detain terror suspects indefinitely.<sup>10</sup> Additionally, instead of repealing the colonial-era Sedition Act as promised, he has strengthened it, hoping to divide the opposition party by encouraging Islamists and aggravating racial and religious tensions.<sup>11</sup>

Prime Minister Najib's government continues to intimidate and silence any opposition. On March 16, 2015, Nurul Izzah Anwar MP, Anwar Ibrahim's daughter, was arrested for sedition because of a speech she made in parliament that was critical of the Government.<sup>12</sup> Human Rights Watch called her arrest "another step towards the destruction of rights-respecting

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<sup>2</sup> Editorial, *Malaysia's Political Backslide*, WASHINGTON POST, Feb. 11, 2015 [hereinafter *Malaysia's Political Backslide*].

<sup>3</sup> *Id.*

<sup>4</sup> Phil Robertson, *Anwar Imprisoned, Malaysia Rights in Free Fall*, CNN, Feb. 16, 2015 [hereinafter Robertson].

<sup>5</sup> *Malaysia's Political Backslide*, *supra* note 2; Robertson, *supra* note 4.

<sup>6</sup> Robertson, *supra* note 4.

<sup>7</sup> *Non-Muslims in Malaysia Worry About Increasing Islamization*, CCTV NEWS, Feb. 16, 2015.

<sup>8</sup> *Id.*

<sup>9</sup> *Najib Stirs Up Controversy With UMNO-ISIS Comment*, CHANNEL NEWS ASIA, Jun. 24, 2014.

<sup>10</sup> *Lurch to illiberalism*, THE ECONOMIST, Apr. 9, 2015.

<sup>11</sup> *Disconnect: A thuggish government is playing racial politics*, THE ECONOMIST, Apr. 11, 2015 [hereinafter *Disconnect*].

<sup>12</sup> *Anwar Ibrahim's Daughter Arrested in Latest Move Against Malaysian Opposition*, THE GUARDIAN, Mar. 16, 2015.

democracy in Malaysia.”<sup>13</sup> In March 2015, three editors and two executives at *The Malaysian Insider* were arrested under the Sedition Act after the news site published an article about a proposal to allow strict enforcement of Islamic law.<sup>14</sup> On April 3, 2015, cartoonist Zulkiflee Anwar Ulhaque, known as Zunar, was charged with nine counts of sedition for a series of tweets criticizing how the judiciary handled Anwar’s case.<sup>15</sup> Prime Minister Najib even publicly attacked former Prime Minister Mohammad Mahathir, also of the UNMO party, for criticizing the corruption surrounding his “1MDB fund,” which is currently \$12 billion in debt.<sup>16</sup> At a rally marking Anwar’s 100th day in prison, Anwar’s daughter Nurul Nuha noted that Prime Minister Najib has spent millions on his relentless smear campaign against her father and other political opponents.<sup>17</sup>

In addition, Prime Minister Najib’s government has aggressively wielded Malaysia’s anti-sodomy law, comprised of sections 377A and 377B of the country’s Penal Code.<sup>18</sup> Section 377A of the Penal Code criminalizes sodomy and oral sex (fellatio), and section 377B provides that anyone who voluntarily commits the acts described in section 377A shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.<sup>19</sup> These provisions make no distinction between heterosexual and homosexual consensual sexual acts, and are thus applicable to both.<sup>20</sup> Only rarely has the Government of Malaysia prosecuted and convicted individuals for the offense of consensual sexual acts between adults under section 377A/377B of the Penal Code; on the whole, the application and enforcement of the anti-sodomy law has been inconsistent, unequal, and often politically-motivated, calling into question the independence and impartiality of the country’s judicial system.

## 2. Background of Anwar Ibrahim

Anwar is a founder and leading figure of the People’s Justice Party (*Parti Keadilan Rakyat* or PKR). Previously, he served as Deputy Prime Minister of Malaysia from 1993 to 1998 and Finance Minister from 1991 to 1998.<sup>21</sup> However, he was removed from his post by then Prime Minister Mahathir Mohamed and was wrongly imprisoned on sodomy and corruption charges. After his release, he became the leading figure in the opposition and helped bring together the *Pakatan Rakyat* (PR) coalition, which contested the 2008 and 2013 general elections. The PR coalition has provided the most effective challenge to the ruling UMNO party

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<sup>13</sup> *Id.*

<sup>14</sup> Austin Ramzy, *Editors and Executives of News Website Malaysian Insider Are Arrested*, NEW YORK TIMES, Mar. 31, 2015.

<sup>15</sup> *Malaysian Cartoonist Zunar Charged With Nine Counts of Sedition*, WALL STREET JOURNAL, Apr. 3, 2015.

<sup>16</sup> *Disconnect*, *supra* note 11;

*More Smear Tactics and Black Ops by Najib’s PR Hit Team*, SARAWAK REPORT, May 12, 2015 [hereinafter *More Smear Tactics*].

<sup>17</sup> Gathering to Mark Anwar’s 100<sup>th</sup> Day in Jail on May 20, THE STAR, May 16, 2015;

*See also More Smear Tactics*, *supra* note 16.

<sup>18</sup> *Conviction and Sentence of Dato’ Seri Anwar Ibrahim for Sodomy II: Justice is Not Only a Fact to be Established; It Must Also be Seen to be So Established*, MALAYSIAN BAR, Mar. 9, 2014.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Profile: Anwar Ibrahim*, BBC NEWS, Feb. 10, 2015.

in the country's history.<sup>22</sup> Anwar's coalition won a majority of votes in the general election in mid-2013 but was denied victory by gerrymandered districts, which ensured that the UMNO-led BN coalition retained office. On May 18, 2015, Anwar's wife, Dr. Wan Azizah Wan Ismail, the president of PKR, was sworn in as the MP of Permatang Pauh and officially named the leader of the opposition coalition, PR, with unanimous support from her colleagues.<sup>23</sup>

### 3. First Trial and Detention of Anwar Ibrahim

In 1998, a booklet entitled "50 Reasons Why Anwar Cannot Become Prime Minister" was circulated among members of the UMNO General Assembly, containing graphic allegations against Anwar of corruption, as well as accusations of sodomy.<sup>24</sup> In the wake of the distribution of this booklet, then Prime Minister Mahathir Mohamad dismissed Anwar on September 2, 1999. Mahathir claimed that Anwar's firing was the result of corruption allegations made in the booklet in conjunction with sodomy allegations made by his former speechwriter, Dr. Munawar Anees, and his adoptive brother, Sukma Darmawan Sasmia Atmadja.<sup>25</sup>

Eighteen days later on September 20, Anwar was arrested by police at his home under the Internal Security Act, taken into custody, and held in solitary confinement for nine days. On the first day of his solitary confinement, he was blindfolded and severely physically beaten by the then Inspector-General of Police Rahim Noor, sustaining head injuries.<sup>26</sup> Medical treatment was only provided on the fifth day. On September 28, Anwar was charged with sodomizing his wife's driver and for corruption in attempting to interfere with the police investigation of the sodomy allegation. When he appeared in the Sessions Court in response to these charges, he showed visible signs of physical injury, including a black eye. Anwar was denied bail and remained in custody to stand trial.<sup>27</sup>

Anwar's corruption trial took place from November 1998 to April 1999, at which time he was ultimately convicted and sentenced to six years in jail. During the time of Anwar's trial, then Prime Minister Mahathir publicly declared Anwar guilty of sodomy and corruption several times, despite Anwar having yet to be convicted.<sup>28</sup> From June 1999 to July 2000, Anwar stood trial for the sodomy charges. He was again convicted and sentenced to an additional nine years in jail. Anwar unsuccessfully appealed the corruption conviction in Malaysia's Court of Appeal in 2001. In July 2002, he lost his final appeal against the corruption conviction in the Federal Court of Malaysia. In September 2004, Anwar was able to successfully appeal his sodomy conviction to the Federal Court of Malaysia and he was released from prison after six years of detention.<sup>29</sup> During Anwar's time in prison, Amnesty International labeled him a "prisoner of

<sup>22</sup> Rowan Callick, *Malaysia's Retreat From Modernity*, THE AUSTRALIAN, Feb. 18, 2015.

<sup>23</sup> Akil Yunus, *Wan Azizah makes return to Parliament*, THE STAR, May 18, 2015.

<sup>24</sup> 50 REASONS WHY ANWAR CANNOT BECOME PRIME MINISTER, posted on TODAYMALAYSIA.

<sup>25</sup> Mark Trowell QC, THE TRIAL OF ANWAR IBRAHIM: SODOMY II (2012), at 62-63, [hereinafter *Trowell: Sodomy II*].

<sup>26</sup> Noor was later convicted for assaulting Anwar. *Rahim Noor's Confession: Black Eye and Blacker Deeds*, ALIRAN MEDIA, Mar. 1, 1999.

<sup>27</sup> *Trowell: Sodomy II*, *supra* note 25, at 64-5.

<sup>28</sup> Kasra Naji, *Malaysia's Anwar Found Guilty on Corruption Charges*, CNN, Apr. 14, 1999.

<sup>29</sup> *Trowell: Sodomy II*, *supra* note 25, at 66-7.

conscience” and, along with Human Rights Watch, openly questioned the fairness of his trial and discussed the lack of impartiality in Malaysia’s judicial system.<sup>30</sup>

#### **4. Current Detention of Anwar Ibrahim and Further Legal Proceedings**

After the first sodomy trial, Anwar continued to actively engage with the Malaysian political opposition and to be an outspoken critic of the undemocratic means by which the ruling party exercised power. In March 2008, Anwar’s political team hired 23-year-old Mohd Saiful Bukhari to serve as an intern. Three months into his internship, on June 24, Saiful was invited to meet with Prime Minister Najib, and on the next day Saiful met privately with a senior police officer in a hotel room in Kuala Lumpur. On June 28, Saiful presented himself at a local hospital, claiming that he had been raped by Anwar two days prior – the day after he met with the senior police officer.<sup>31</sup> He was examined at the hospital and rectal swabs were taken. Doctors did not find any injuries consistent with forcible anal penetration. Notwithstanding the lack of medical evidence, Saiful filed a police report formally accusing Anwar of sodomy. The rectal swabs were later collected from the hospital by Deputy Superintendent of Police Jude Pereira, who kept them in a filing cabinet in his office for 42 hours before sending them out for analysis.

On July 15, 2008, Anwar was arrested for sodomy. He was formally charged for the offense of sodomy on August 7, 2008, and released on bail. From the very beginning of the legal proceedings, the Government of Malaysia displayed a blatant bias against Anwar. The defense team tried unsuccessfully to challenge reoccurring due process violations; for example, the defense petitioned to have the charges dropped for lack of medical evidence and to compel the prosecution to disclose documents and witness lists. The trial commenced in the High Court on February 3, 2010. Throughout the case, Anwar’s due process appeals were ignored and dismissed by the judges at all levels. Additionally, during the High Court proceedings, multiple concerns were raised about the lack of evidence and the integrity of the rectal swabs analyzed. These concerns were later raised by the defense on appeal to the Court of Appeal and the Federal Court, but such concerns were either completely ignored or otherwise inadequately dealt with.

On January 9, 2012, in a surprising and apparent last-minute change of heart, Anwar was acquitted of the sodomy charge by Justice Zabidin of the High Court because the trial judge questioned the reliability of the prosecution’s evidence, and thus he could not be satisfied of Anwar’s guilt. However, that acquittal was immediately appealed, and two years later, on March 4, 2014, the Court of Appeal reversed the acquittal and sentenced Anwar to five-years imprisonment. The Federal Court affirmed the sentence on February 10, 2015, relying on its conclusions that Saiful was a credible witness and that the prosecution’s evidence corroborated

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<sup>30</sup> *Malaysia: Double Injustice Heaped on Anwar Ibrahim*, AMNESTY INT’L, Apr. 17, 2003; *Human Rights Watch Monitors Second Anwar Trial*, HUMAN RIGHTS WATCH, Jun. 11, 1999.

<sup>31</sup> Mark Trowell QC, *Report on the prosecution appeal against the acquittal of Datuk Seri Anwar bin Ibrahim on a charge of sodomy observed on behalf of the Inter- Parliamentary Union (IPU) at the Court of Appeal*, COMM. ON THE HUMAN RIGHTS OF PARLIAMENTARIANS, Putrajaya, Malaysia, Feb. 10 2015 [hereinafter 2015 IPU Report] at 7-8.

the allegations.<sup>32</sup> Anwar was taken into custody that day at the Federal Court. One week later, on February 17, 2015, Amnesty International designated Anwar Ibrahim as a prisoner of conscience.<sup>33</sup>

Despite assurances from Malaysian Home Minister Ahmad Zahid Hamidi that Anwar would be treated humanely, he was initially held from February 10, 2015 in solitary confinement in a bare cell, with a thin foam mattress on a low bed, a bucket for bathing, and a squat toilet. The cell, located in Sungai Buloh Prison in Selangor, was extremely hot and humid with no form of ventilation or fan, thus Anwar was forced to sleep on the floor where it was somewhat cooler. As he continues to suffer from a chronic back and spinal injury from a prior beating at the hands of Malaysian police, sleeping on the floor caused extreme and unnecessary pain. Additionally, the cell had both insects and rodents.

On March 2, 2015, after public pressure, Malaysian prison authorities moved Anwar to the medical wing of the prison where the physical conditions of his cell were improved. However, his health condition has not improved. From his original weight of 72 kg, Anwar has lost 6 kg and is now down to about 66 kg; already a cause for concern, this drastic weight loss is very worrisome should Anwar lose even more weight. He has dark stool, which is suspected to be melena and is indicative of bleeding in the intestines, thus requiring urgent medical assessment and treatment. Anwar's blood pressure has been irregular and was recently as high as 163/108, despite Anwar being on medication. He has also been denied access to the vitamins and supplements that he was taking prior to his detention. On top of all this, he is suffering from a full thickness tear of his right shoulder capsule (from an injury which took place a year ago) that still causes him pain and discomfort now in detention. This injury requires an MRI scan, treatment, and possibly even surgery, for a full recovery.

After repeated requests from his lawyer and further public pressure, Anwar was finally admitted to a hospital on June 2, 2015 for check-up, observation, and medical treatment. His transfer to a hospital was approved by Home Minister Ahmad Zahid Hamidi four weeks after the prison doctor and prison authorities requested it. Anwar's family has also requested that a doctor of his choice examine him while he is in the hospital, but they have yet to receive a response.

In detention, Anwar has also faced constant psychological torture by the prison authorities; he has been harassed several times an hour by prison guards who come by his cell to take pictures of him and to see what he is doing. Anwar has been denied writing materials for the first month of his detention. Even though now he has been given access to books and writing materials, such access is delayed through bureaucratic processes. Even his lawyers' files are searched to see if notes or messages are being carried through to him. Such harassment makes the work much more difficult for his lawyers, who are handling his various legal matters and litigation in court.

In Anwar's current state of solitary confinement, he has no one to talk with; even the prison guards around his cell have been instructed not to talk to him. Requests to allow Anwar's

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<sup>32</sup> *Id.* at 2-3.

<sup>33</sup> *Malaysia: Free Prisoner of Conscience Anwar Ibrahim*, AMNESTY INT'L, Feb. 17, 2015.

family to see him have been turned down repeatedly. When Anwar's family members do get to see him (usually once every three weeks), they are restricted to "no contact" visits, during which they are only permitted to see each other from behind a glass panel.

After his conviction, Anwar requested a royal pardon from King Abdul Halim of Kedah. On March 16, 2015, Anwar's request for a royal pardon was denied and Anwar thus officially lost his seat in parliament.<sup>34</sup> On April 30, 2015, Anwar filed an application at the Federal Court requesting that a new panel of judges review his sodomy conviction and five-year sentence on the grounds of injustice.

Finally, on May 6, 2015, Anwar filed an originating summons in response to the Election Commission Chairman Abdul Aziz's statements on April 27 and 29 that Anwar was not eligible to vote in the recent Permatang Pauh by-election because he was currently in prison. Anwar's counsel claimed that he was unfairly denied his constitutional right to vote under Article 119 of the Malaysian Constitution, which entitles a person to vote regardless of his imprisonment. Anwar named the Election Commission, its Chairman Abdul Aziz, and the Malaysian Government as defendants.<sup>35</sup>

## B. Legal Analysis

For the reasons set forth below, the detention of Anwar Ibrahim constitutes an arbitrary deprivation of his liberty<sup>36</sup> under Categories II and III as established by the United Nations Working Group on Arbitrary Detention (Working Group).

### 1. Category II: Substantive Fundamental Rights

An arbitrary detention falls under Category II when such detention results from the exercise of fundamental rights protected by international law.<sup>37</sup> These fundamental rights include the right to freedom of opinion and expression<sup>38</sup> and the right of political participation.<sup>39</sup>

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<sup>34</sup> *Anwar Ibrahim: Malaysian Jailed Opposition Leader Denied Royal Pardon*, BBC, 1 Apr. 2015.

<sup>35</sup> M Mageswari, *EC and govt. ordered to file affidavit over Anwar's right to vote*, THE STAR, May 25, 2015.

<sup>36</sup> An arbitrary deprivation of liberty is defined as any "depriv[ation] of liberty except on such grounds and in accordance with such procedures as are established by law." International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, at art. 9(1) [hereinafter *ICCPR*]. Such a deprivation of liberty is specifically prohibited by international law. *Id.* "No one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 9 (1948) [hereinafter *Universal Declaration*].

"Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law." Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment, at Principle 2, G.A. Res. 47/173, Principle 2, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) [hereinafter *Body of Principles*].

<sup>37</sup> Specifically, a Category II deprivation of liberty occurs, "[w]hen the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20, and 21 of the Universal Declaration of Human Rights and, and insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26, and 27 of the International Covenant on Civil and Political Rights." Office of the High Comm'r for Human Rights, United Nations, Fact Sheet No. 26: The Working Group on Arbitrary Detention, pt. IV(B) [hereinafter *Fact Sheet No. 26*].

<sup>38</sup> *Universal Declaration*, *supra* note 36, at art. 19; *ICCPR*, *supra* note 36, at art. 19(1).

<sup>39</sup> *Universal Declaration*, *supra* note 36, at art. 21; *ICCPR*, *supra* note 36, at art. 22(1).

Anwar Ibrahim's detention is arbitrary under Category II because it resulted from his exercise of these fundamental freedoms, as detailed below.

Although Malaysia has not signed or ratified<sup>40</sup> the International Covenant on Civil and Political Rights (ICCPR), the Working Group applies the Universal Declaration of Human Rights (UDHR), which is interpreted through the ICCPR and the Body of Principles Regarding Any Form of Detention or Imprisonment. In addition, certain provisions of the UDHR are binding as customary international law. The Working Group has also always been willing to "rely heavily" on international legal principles to adjudicate individual cases because it issues opinions rather than judgments.<sup>41</sup>

#### **a. The Malaysian Government Detained Anwar Ibrahim Because He Exercised His Right to Freedom of Opinion and Expression**

Freedom of opinion and expression are protected by Article 19 of the UDHR<sup>42</sup> and Article 19(1) of the ICCPR.<sup>43</sup> Freedom of expression includes the "freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."<sup>44</sup> In addition to the requirements of international law, the Malaysian Constitution protects the right to freedom of expression, providing that "every citizen has the right to freedom of speech and expression."<sup>45</sup>

Freedom of expression includes the right to express a dissenting political opinion.<sup>46</sup> The charge of sodomy brought against Anwar was a pretext for the curtailment of his right to freedom of opinion and expression as an opposition leader. Anwar has openly voiced his opinions on numerous occasions, including serious concerns about undemocratic practices in Malaysia, and specifically about Prime Minister Najib and his ruling UMNO party. The following examples are a small illustration of Anwar's public expression:

In a 2006 interview with *Bloomberg*, Anwar openly condemned UMNO's new economic agenda, highlighting the corruption and preferential treatment that was built into government

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<sup>40</sup> *Status of Ratification of the Principal International Human Rights Treaties*, as of Mar. 18, 2015, available at <http://indicators.ohchr.org>.

<sup>41</sup> Jared M. Genser & Margaret Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and Practice*, 39 COLUM. HUM. RTS. L. REV. 101, 114 (2008).

<sup>42</sup> *Universal Declaration*, *supra* note 36, at art. 19.

<sup>43</sup> *ICCPR*, *supra* note 36, at art. 19(1).

<sup>44</sup> *Universal Declaration*, *supra* note 36, at art. 19 ("Everyone shall have the freedom of opinion and expression; this rights includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"); *See also ICCPR*, *supra* note 36, at art 19(2) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice").

<sup>45</sup> CONSTITUTION OF MALAYSIA, art. 10(1)(a); *See also* <http://www.slideshare.net/nurulirdanazzira/malaysian-legal-system-the-restriction-freedom-of-expression>.

<sup>46</sup> *Human Rights Committee General Comment No. 34 (2011) on Article 19: Freedom of Expression*, Sep. 12, 2011 (adopted at 102<sup>nd</sup> session July 11-29, 2011), CCPR /C/GC/34 at ¶ 11.

policy.<sup>47</sup> Anwar urged the government to address the recurring budget deficit since 1999, which he blamed on excessive government spending,<sup>48</sup> and he proposed a new nondiscriminatory subsidy policy to replace the existing system of cronyism.<sup>49</sup>

In 2007, Anwar helped organize a mass rally to protest against corruption in the electoral system. Working with the Coalition for Clean and Fair Elections, or *Bersih* (meaning *clean* in Malay), Anwar attended and spoke at the rally. The demands made during the demonstration had been recorded earlier in a Joint Communiqué that defined the long-term objectives and working goals, which included more print and broadcast media for opposition parties.<sup>50</sup>

Also that year, outside the country, the Government of Malaysia complained to the BBC for featuring individuals that it deemed to be “failed” opposition leaders, including Anwar.<sup>51</sup> The Malaysian Minister of Information questioned BBC’s coverage, asking “why focus on people who have been rejected?” and ludicrously claiming that BBC “did not accord respect to the democratic decision of the Malaysian people in their rejection of the opposition political parties.”<sup>52</sup>

On April 18, 2008, Anwar addressed some 40,000 supporters who came out to celebrate the expiration of his political disqualification, telling them that “we will rule the country someday . . .” before the police shut down the rally.<sup>53</sup> When Anwar was sworn in to his Parliamentary seat later that year, he declared “the prime minister has lost the mandate of the country and nation.”<sup>54</sup>

Anwar also participated in two subsequent rallies for *Bersih* in 2011 and 2012. He challenged UMNO opposition to the *Bersih* demands, asking “Why can’t UMNO conduct free and fair elections? . . . If they conduct free and fair elections, the fear is that they will lose.”<sup>55</sup>

In response to these and many other comments, the Malaysian Government has targeted and persecuted Anwar in an attempt to discredit his image and silence him. This pattern can be clearly seen in Anwar’s first sodomy trial, and continues with his current trial and detention.

While freedom of opinion and expression is not absolute, as states may impose narrow limitations, Anwar’s expression does not fall within these exceptions. Article 19(3) of the ICCPR allows for a narrow limitation on the right to freedom of opinion and expression that is

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<sup>47</sup> Judy Mathewson & Kathleen Hays, *Malaysia’s Anwar Says He Plans to Run for Parliament*, BLOOMBERG, Nov. 30, 2006.

<sup>48</sup> Anwar Ibrahim, *Malaysian Opposition’s Economic Policies*, REUTERS, Sep. 8, 2008.

<sup>49</sup> *Id.*

<sup>50</sup> *The Formulation of the Joint Communiqué*, Bersih 2.0, last visited Mar. 20, 2015, <http://www.bersih.org/about-bersih-2-0/>.

<sup>51</sup> Jalil Hamid & Clarence Fernandez, *Malaysia Protests to BBC After Anwar Coverage*, REUTERS, Apr. 25, 2007.

<sup>52</sup> *Id.*

<sup>53</sup> Vijay Joshi, *Malaysia Police Halt Anwar Speech*, FOX NEWS, Apr. 18, 2008.

<sup>54</sup> Roman Bose, *Anwar Back with Power in his Sights*, THE AGE, Aug. 29, 2008.

<sup>55</sup> Boo Sy-Lyn, *Umno Fear Losing Power in Fair Polls*, MALAYSIAN INSIDER, Jun. 12, 2011.

“necessary [f]or the respect of the rights or reputations of others; [or] . . . [f]or the protection of national security or of public order (*ordre public*), or of public health and morals.”<sup>56</sup> The Human Rights Committee has also emphasized the narrowness of this limitation.<sup>57</sup> The Malaysian Constitution allows Parliament to impose limits, if necessary, in the interest of national security, public order, or morality, or on issues relating to the position of the National Language, the special status of Malays and natives of any of the states of Sabah and Sarawak, and the legitimate interest of other communities and the sovereignty of the rulers.<sup>58</sup> Anwar’s expression does not fall within these highly narrow confines justifying limitation by the Government of Malaysia because his expression of opinions is not a danger to the rights or reputations of others, nor a threat to national security, public order, or public health and morals.

Many international actors have criticized the Malaysian Government for persecuting Anwar and curtailing his freedom of opinion and expression. Richard Bennett, Amnesty International’s Asia Pacific Director, issued a statement saying that the charges “are clearly politically motivated and a blatant attempt by the Malaysian authorities to silence and undermine a critical voice.”<sup>59</sup> Upon announcement of the final guilty verdict, Amnesty International issued another statement that the decision “will have [a] chilling effect on freedom of expression.”<sup>60</sup> Human Rights Watch called the conviction a “major setback for human rights in Malaysia,”<sup>61</sup> and Karim Lahidji, President of the International Federation for Human Rights (FIDH), described the verdict as a “disgraceful conclusion.”<sup>62</sup> The *Washington Post* observed that the Government’s case against Anwar Ibrahim was “as morally reprehensible as it was farcical.”<sup>63</sup>

Even though Anwar was exercising his right to freedom of opinion and expression, which is guaranteed under international and Malaysian law, he was sentenced to five years in jail on unsubstantiated allegations. Furthermore, because all of the evidence employed by the Malaysian Government in its cases against Anwar is fundamentally flawed and based on pre-textual allegations, Anwar’s imprisonment amounts to nothing more than an attempt to silence multi-party democracy in Malaysia. As such, Anwar’s current detention is in direct violation of the international human right to freedom of expression and opinion, thus rendering his detention arbitrary under Category II.

### **b. The Malaysian Government Detained Anwar Ibrahim Because He Exercised the Right to Freedom of Political Participation**

The Malaysian Government’s arrest and detention of Anwar is also punishment for exercising his right to take part in public affairs and to be elected without unreasonable

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<sup>56</sup> ICCPR, *supra* note 36, at art. 19(3).

<sup>57</sup> General Comment 34, *supra* note 46, at ¶ 23.

<sup>58</sup> CONSTITUTION OF MALAYSIA, *supra* note 45, at art. 10(2–4).

<sup>59</sup> *Malaysia: End Persecution of Anwar Ibrahim and Other Government Critics*, AMNESTY INT’L, Oct. 27, 2014.

<sup>60</sup> *Malaysia: Anwar Verdict Will Have Chilling Effect on Freedom of Expression*, AMNESTY INT’L, Feb. 10, 2015.

<sup>61</sup> *Malaysia: Anwar’s Conviction Sets Back Rights*, HUMAN RIGHTS WATCH, Feb. 10, 2015.

<sup>62</sup> *Malaysia: Anwar Ibrahim Sentenced to Five Years in Prison*, FIDH, Feb. 10, 2015.

<sup>63</sup> *Malaysia’s political backslide*, THE WASHINGTON POST, Feb. 11, 2015.

restrictions, as protected by Article 21 of the UDHR<sup>64</sup> and Article 25 of the ICCPR.<sup>65</sup> According to the Human Rights Committee, this right allows “[c]itizens . . . [to] take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring the freedoms of expression, assembly and association.”<sup>66</sup> Moreover, this right depends on the ability of individuals to run for office. As the Human Rights Committee has noted:

The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates . . . Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence, or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person’s candidacy.<sup>67</sup>

In addition, the Working Group’s jurisprudence supports this right; a violation of Article 25 occurs where individuals are detained solely for exercising their right to freedom of association and the right to take part in the conduct of public affairs.<sup>68</sup>

Anwar’s current detention is in response to his continued exercise of his right to participate in the conduct of public affairs as a member and leader of the opposition *Pakatan Rakyat* or People’s Front (PR) coalition. After Anwar was released from his first unjust detention in September 2004, following six years in jail, he re-immersed himself in Malaysian politics and quickly rose to be the de facto leader of the *Parti Keadilan Rakyat* or People’s Justice Party (PKR), one of the three main opposition parties.<sup>69</sup> He was also leader of the opposition coalition comprising these three parties. Anwar could not hold any formal posts in the PKR party while his five-year ban on political participation was in effect, but he was given the title of de facto leader.<sup>70</sup> As the ban was scheduled to expire in April 2008, Anwar announced his candidacy for Parliament in November 2006. However, the elections were moved up to March – a decision that drew heavy criticism because it was believed that the purpose was to further prevent Anwar from serving in an official capacity.<sup>71</sup> Nevertheless, Anwar remained

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<sup>64</sup> *Universal Declaration*, *supra* note 36, at art. 21 (“(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”)

<sup>65</sup> *ICCPR*, *supra* note 36, at art. 25 (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”)

<sup>66</sup> *Human Rights Committee General Comment No. 25 (1996)*, CCPR/C/21/Rev.1/Add.7 at ¶ 8.

<sup>67</sup> *General Comment 25*, *supra* note 66, at ¶ 15 (emphasis added).

<sup>68</sup> See, e.g., *Tran Thi Thuy, et al. v. Vietnam*, Opinion No. 46/2011, Adopted Sept. 2, 2011, ¶¶ 21, 22, 26.

<sup>69</sup> *Anwar Ibrahim: A Timeline of Political Turmoil*, AUSTRALIAN BROADCASTING CORP, Feb. 10, 2015.

<sup>70</sup> Janet Moredock, *Anwar Ibrahim: Malaysian Politician*, ENCYCLOPEDIA BRITANNICA (last updated Oct. 10, 2013).

<sup>71</sup> See, e.g., *Malaysian PM Dissolves Parliament*, BBC (Feb. 13, 2008) (Another advantage for Mr. Badawi of holding the election next month is that charismatic opposition figure Anwar Ibrahim cannot stand for office).

engaged with the political opposition, campaigning actively for the PR.<sup>72</sup> The PR ended up with an historic win in which the opposition secured over one-third of the seats of Parliament, denying BN the two-thirds majority needed to make constitutional changes.<sup>73</sup> Later that year, Anwar easily won his own Parliamentary seat in a by-election, receiving 31,195 of the estimated 47,000 votes cast – more than twice those cast for his UMNO opponent.<sup>74</sup>

It is in part because of the success of the opposition under Anwar’s leadership that the Malaysian Government has persecuted Anwar. The Malaysian Government considers Anwar a threat to its hold on power, and therefore the Government created and tried Anwar on false allegations of sodomy, in an attempt to silence him and prevent him from participating in politics. Yet Anwar’s political following remained strong, despite the attempts to discredit his image. When Anwar was surprisingly acquitted by the High Court in 2012 for a lack of credible evidence, the Malaysian Government refused to accept the decision of the High Court and immediately appealed the judgment. Anwar’s political message was still influential despite the ongoing trial. This was made clear during the 2013 general election in which the opposition won approximately 53 percent of the popular vote, putting Prime Minister Najib’s hold on power in question. This significant accomplishment most certainly played a role in the Court of Appeal’s decision to move up Anwar’s appeal so that he would be barred from running in a key by-election (discussed in detail below). The Malaysian Government saw Anwar as a threat because of his political work, and as such the Government wanted to move forward with unjustly prosecuting him as quickly as possible. Furthermore, because of the final guilty verdict by the Federal Court, Anwar has been barred from Parliament and is unable to continue serving as a Member of Parliament and Leader of the Opposition. Through the Court of Appeal’s determination of guilt and the Federal Court’s affirmation of that verdict, the Malaysian Government not only discriminated against Anwar on the basis of his political participation, but also directly and unlawfully interfered with his ability to exercise the right to political participation.

In addition to concerns about freedom of expression and the lack of an independent judiciary, international organizations have been openly critical of the highly political motivations of Anwar’s trial, conviction, and imprisonment. Phil Robertson, Deputy Asia Director for Human Rights Watch, characterized the Malaysian Government as “trying to knock out the opposition using the courts and weaken them [the opposition] further so that they cannot cause problems.”<sup>75</sup> Sam Zarifi, Asia-Pacific Regional Director for the International Commission of Jurists, questioned the timing and speed of the case, saying “[a]ll this suggests very strongly that there is a political motive.”<sup>76</sup>

It is a violation of international law that the Malaysian Government denies Anwar his right to freedom of political participation, and this also renders his detention arbitrary under Category II.

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<sup>72</sup> Moredock, *supra* note 70.

<sup>73</sup> *Malaysia*, FREEDOM HOUSE.

<sup>74</sup> Eileen Ng, *Anwar Heads for Parliament After Election Victory*, SIDNEY MORNING HERALD, Aug. 27, 2008.

<sup>75</sup> Ron Corben, *Malaysia Judiciary Criticized Over Anwar Ibrahim Verdict*, VOICE OF AMERICA, Mar. 10, 2014.

<sup>76</sup> *Id.*

## 2. Category III: Due Process Rights

The Working Group considers a deprivation of liberty to be a Category III arbitrary detention “[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.”<sup>77</sup> Additionally, the Working Group will look to the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Body of Principles).<sup>78</sup> Because the Malaysian Government violated numerous procedural requirements under both international and domestic law in this case, the continued detention of Anwar is arbitrary under Category III.

### a. The Malaysian Government Failed to Provide Anwar Ibrahim an Independent and Impartial Tribunal

Article 10 of the UDHR establishes that every individual “is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>79</sup> This same right is established in Article 14(1) of the ICCPR, which affords individuals “a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>80</sup>

#### i. *Saiful Meets with Prime Minister Najib and Senior Police Before Making Allegations*

Throughout Anwar’s trial, the Malaysian judiciary repeatedly demonstrated a lack of independence and impartiality; however, the collusion between the judiciary and the executive branch has been especially troubling. The first instance that raises serious concern was a meeting between the alleged victim, Saiful, and Prime Minister Najib on June 24, 2008 – a mere two days before Saiful accused Anwar of sodomy. Initially, Prime Minister Najib denied knowing Saiful, but was later forced to admit to the meeting after a photo was produced of Saiful with a staff member at the Deputy Prime Minister’s office.<sup>81</sup> At a news conference on July 3, Prime Minister Najib claimed that he met with Saiful in his “capacity as a leader and [Saiful] as an ordinary citizen who wanted to tell [the Prime Minister] something.”<sup>82</sup> Furthermore, the following day Saiful met privately with senior police officer Mohd Rodwan, who had been involved in the earlier sodomy trial and had allegedly planted fabricated DNA evidence against

<sup>77</sup> *Fact Sheet No. 26*, *supra* note 37, pt. IV(B).

<sup>78</sup> *Body of Principles*, *supra* note 36.

<sup>79</sup> *Universal Declaration*, *supra* note 36, at art. 10.

<sup>80</sup> *ICCPR*, *supra* note 36, at art. 14(1) (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....”)

<sup>81</sup> *Report on the Trial of Datuk Seri Anwar bin Ibrahim in the High Court of Malaysia observed on behalf of the Inter-Parliamentary Union (IPU)*, COMM. ON THE HUMAN RIGHTS OF PARLIAMENTARIANS 7, CL/1987/12(b)-R.2, Oct. 4, 2010 [hereinafter 2010 IPU Report].

<sup>82</sup> 2010 IPU Report, *supra* note 81, at 8.

Anwar.<sup>83</sup> It was not until after these two meetings that Saiful went to the hospital and filed a police report alleging that Anwar sodomized him. The fact that the Prime Minister of Malaysia and a senior police officer both met privately with a young (23-year-old) alleged victim of a crime, prior to his filing a complaint with the police, raises serious questions. It strongly suggests that Saiful was somehow influenced or coerced into making false accusations. This special relationship between Saiful and Prime Minister Najib, about which the Prime Minister initially lied, fundamentally undermines the credibility of Saiful's allegations, as does the timing of Saiful's meetings with the Prime Minister and police. The Malaysian Courts' complete failure to take that relationship and the suspicious timing into consideration illustrates the clear lack of an independent judiciary.

### *ii. Saiful's Affair with Prosecutor During Trial*

The controversy involving the alleged victim and the prosecution did not end with these initial concerns of conspiracy. During the trial, it was revealed that Saiful was engaged in a romantic affair with a female junior prosecutor in July 2010. She was removed from the prosecution team, but not before the situation had escalated to the extent that it raised concerns about the relationship fundamentally undermining the integrity and impartiality of the trial. Anwar's defense team filed a police complaint requesting an investigation into whether the two violated the Official Secrets Act<sup>84</sup> by exchanging confidential prosecution documents, and also applied to have the sodomy charge struck on the basis that the trial had been compromised. High Court Justice Zabidin dismissed the application, accepting without question the prosecution's claims that the junior prosecutor did not have access to key documents and that Saiful had no influence over her actions.<sup>85</sup> The dismissal was appealed to the Court of Appeal and the Federal Court, both of which refused to hear an appeal despite the obvious issues raised. The Courts' refusals to consider the serious implications and due process abuses created by Saiful's affair illustrate that the Malaysian Government failed to provide Anwar with an independent and impartial tribunal.

### *iii. High Court Judge Refuses to Disqualify Himself Despite Bias Against Anwar*

Zabidin had similarly dismissed an earlier application at the start of trial to strike the sodomy charge for abuse of process on the basis that there was a lack of medical evidence. That application was also appealed to and dismissed by both the Court of Appeal and the Federal Court. The fact that the case was able to move forward without any corroborating medical evidence, particularly in light of both Saiful's meeting with the Prime Minister and his affair with a member of the prosecution, strongly suggests there was an ulterior motive behind the prosecution of Anwar, and further illustrates that the Malaysian judiciary lacked impartiality at every level of Anwar's case.

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<sup>83</sup> *Trowell: Sodomy II*, *supra* note 25, at 88.

<sup>84</sup> Malaysian Official Secrets Act of 1972, § 8(1–2) (relating to any person who has in his possession or controls any official secret, and communicates it, and any person who receives any official secret).

<sup>85</sup> *Trowell: Sodomy II*, *supra* note 25, at 168.

Concerned about the independence of Zabidin, Anwar's defense team made multiple requests for him to disqualify and recuse himself from the trial. The first request came after Zabidin refused to cite an UMNO-owned Malay newspaper for contempt of court when it published pictures taken at the condominium where the alleged act took place.<sup>86</sup> Not only had the newspaper defied a court order barring the media from entering the condominium, but it had also improperly suggested in the headlines that Saiful had been sodomized repeatedly, which Saiful himself did not claim in his testimony. Zabidin refused to disqualify himself despite the fact that his actions demonstrated a clear bias against Anwar.

The defense again requested that Zabidin recuse himself after he made intimidating remarks to defense lawyer Karpal Singh during legal arguments over the disclosure of highly relevant but previously undisclosed medical notes.<sup>87</sup> When Karpal reminded Zabidin that the world was watching, Zabidin responded that Karpal could himself be cited for contempt for raising concerns about the fairness of the trial. Zabidin later withdrew his comment, but refused to disqualify himself even though he blatantly and publicly intimidated defense counsel not to raise due process concerns. It was not sufficient that Zabidin's comments were technically withdrawn because the threat of a contempt citation had been made, casting a pall over the entire legal defense. Anwar's defense appealed to the Court of Appeal, which again dismissed the recusal request. Justice Zabidin's clear bias and his consistent refusal to address blatant due process abuses are further proof that the Malaysian Government failed to provide Anwar with an independent and impartial tribunal.

#### *iv. Conflict of Interest and Incompetence of Lead Prosecutor*

The decision of the Attorney General to appoint Muhammad Shafee Adbullah as Chief Prosecutor for the appeal demonstrates further that the Malaysian Government failed to act independently and impartially, as Shafee's connections to the ruling party and the key prosecution witness Jude Pereira (the investigating officer) reveal both a conflict of interest and an obvious bias against Anwar. Shafee is directly linked to Prime Minister Najib, serving as his private confidante and lead counsel for UMNO, which highlights the political nature of his appointment.<sup>88</sup> Additionally, Shafee was the chairman of an inquiry panel that determined Pereira was an unreliable witness in another case. (That determination certainly calls into question Pereira's credibility in Anwar's case as well, especially given allegations that Pereira tampered with DNA evidence, discussed below.) Even though Shafee first judged Pereira to be an unreliable witness in one case, in this case he insisted the officer was reliable and was even the key witness. Shafee, however, claimed that there was no conflict of interest because Pereira was a witness to the present case, not a party. Shafee's professionalism was further under scrutiny in October 2012, when the Advocates and Solicitors Disciplinary Board of the Malaysian Bar council found him guilty of misconduct for violating the Legal Profession Publicity Rules 2001 and fined him 5,000 ringgit (US \$1,500). Anwar's defense team raised concerns on several occasions about the conflict of interest posed by Shafee's close ties to the

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<sup>86</sup> *Id.* at 120.

<sup>87</sup> *Id.* at 158.

<sup>88</sup> Mark Trowell QC, THE PERSECUTION OF ANWAR IBRAHIM: THE FINAL PLAY (2015), at 233 [hereinafter *Trowell: the Final Play*]

Prime Minister and his personal conflicting positions about Pereira’s credibility; however, those petitions were dismissed as an abuse of process made to delay the Government’s appeal.

Shafee’s connections and the fact that the Courts refused to address the concerns raised by the defense further illustrate that the Malaysian Government failed to provide Anwar with an independent and impartial tribunal.

These concerns were further validated after the Federal Court convicted Anwar, when Shafee made public, vitriolic attacks against Anwar and also participated in a public campaign organized by the ruling UNMO party, which sought to demonstrate that Anwar was guilty as charged.

#### *v. Due Process Violations of the Court of Appeal’s Decision*

Under the ICCPR, “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.<sup>89</sup> When the Court of Appeal made its decision to reverse the High Court’s acquittal, it did so with egregious violations of due process that fundamentally interfered with Anwar’s right to be tried by a fair, impartial, and independent judiciary.

First, the timing of the appeal raises concerns. It was moved up one month from April 7-10, 2014 to March 6-7, illegally and on extremely short notice. This occurred despite the fact that defense lawyer Karpal Singh’s office had been informed by phone in mid-February to hold the former dates open for the appeal, and despite the defense lawyers telling the Court that they were unavailable on the new dates because of previously scheduled court dates. Even more problematic, the Court of Appeal had previously issued a stay of appeal (on February 12) pending disposal of a distinct matter concerning the witness Pereira to the Federal Court. In fact, Anwar was supposed to have until March 6, 2014, to file the petition of appeal in that matter. Instead, on March 4, the Pereira appeal was illegally struck off, thereby lifting the Court of Appeal stay and making it possible for the Court to hear the case on March 6-7.

The context of the new timeframe is extremely relevant because the new dates led up to the eve of the March 11 nomination deadline for the Kajang by-election, from which Anwar would have been disqualified from contesting if found guilty. Moving the appeal to the new dates not only interfered with Anwar’s right to prepare a defense by shortening the amount of time available to his defense team, but it also demonstrated – given the deadline for the by-election nomination – that the date was changed in order to ensure Anwar would be ineligible to run in the election and that the outcome was pre-determined by the Court.<sup>90</sup>

Second, aside from the timing of the appeal, additional due process abuses undermined the fairness and called into question the independence of the three-judge appeal panel. During both days of the appeal, the proceedings extended beyond normal hours until 6:00-7:00pm (whereas usually the Court will adjourn for the day at 5:00pm for the day). According to the Malaysian Bar, concluding proceedings late is “not unheard of, [but] it is nevertheless rare” – providing further evidence that the appeal process in this case was not conducted in a typical

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<sup>89</sup> ICCPR, *supra* note 36, at art. 5.

<sup>90</sup> Trowell: *the Final Play*, *supra* note 88, at 265-269.

fashion. On Friday, March 7, the second day of the appeal, the panel rushed quickly through only 90 minutes of deliberation and rendered a unanimous decision, signed by all three judges<sup>91</sup> – an astounding haste for the conclusion of a case that had been ongoing for nearly six years and an appeal that had only begun the day before.

Third, the judges rejected Anwar’s request to adjourn for one week before mitigation and sentencing. This was a reasonable request given that Anwar needed to obtain a medical report for use in considering the sentence to be imposed. Instead, the Court of Appeal gave Anwar’s defense team one hour to prepare and, in doing so, the Court denied itself relevant medical information “pertaining to the particulars or peculiarities” of Anwar’s medical condition. This has proven to be highly concerning in light of the conditions under which Anwar has been detained to date, which are exacerbating the pre-existing conditions from which he suffers as a result of age and his prior detention. At 7:00pm, the proceedings concluded, and Anwar was sentenced to five-years imprisonment. The Court of Appeal’s haste in scheduling, the speed at which the appeal was heard and the judgment was rendered, and the insistence on completing the mitigation and sentencing in a single day were, at the very least, extremely unusual. Paired with the context of the by-election nomination deadline the following Tuesday, these aspects of the proceedings collectively reveal that the Court of Appeal was not acting on its own accord; rather, the Court was influenced by political pressure and therefore was not acting as a fair, impartial, and independent judiciary.

*vi. Prime Minister’s Office Released Pre-Written Statement After Guilty Verdict*

The lack of an independent judiciary was reaffirmed as the legal proceedings in the case drew to a close with the final appeal to the Federal Court of Malaysia. A few moments after the Federal Court issued its judgment on conviction, and even before the appeal by the prosecution or the sentence had been heard, Prime Minister Najib’s office issued a statement asking for “all parties to respect the legal process and judgment . . . Malaysia has an independent judiciary and there have been many rulings against senior government figures.”<sup>92</sup> Given that the statement was posted almost immediately after the judgment on conviction was released without even waiting for the sentencing decision, Prime Minister Najib’s office must have known the outcome of the case before the judgment was released. Under Malaysian law, the Federal Court lacks authority to provide the judgment to one side in advance of the ruling, and doing so thus reaffirms the lack of an independent judiciary.

*vii. International Condemnation of the Lack of an Independent Judiciary*

This detention is the most recent act of the Malaysian Government in a long-running campaign to repress the political opposition in Malaysia and to silence Anwar in particular. Human Rights Watch described Anwar’s conviction as “a political vendetta,”<sup>93</sup> Amnesty

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<sup>91</sup> *Id.* at 259-261.

<sup>92</sup> Eileen Ng, *Anwar Ibrahim’s Sodomy Conviction Upheld; Court Sentences Opposition Leader to 5 Years in Prison*, THE WORLD POST, Feb. 11, 2015.

<sup>93</sup> *Malaysia: Anwar’s Conviction Sets Back Rights*, HUMAN RIGHTS WATCH, Feb. 10, 2015.

International said it was a “deplorable judgment, and just the latest chapter in the Malaysian authorities’ relentless attempts to silence government critics,”<sup>94</sup> and FIDH added that it was “the disgraceful conclusion of a politically motivated trial.”<sup>95</sup> UN High Commissioner for Human Rights spokesperson Rupert Colville expressed “disappointment” about the decision, which raised “concerns about the fairness of the judicial process.”<sup>96</sup>

Foreign governments have also weighed in with concern. The US Embassy in Kuala Lumpur said it was “deeply disappointed and concerned . . . regarding the rule of law and independence of the courts,”<sup>97</sup> and Australia – traditionally a close ally of Malaysia – issued a statement from the Office of the Minister of Foreign Affairs expressing that it was “disappointed . . . and deeply concerned.”<sup>98</sup> Hugo Swire, the United Kingdom’s Minister for State for the Foreign and Commonwealth Office, said “[Anwar’s] case raises worrying questions about the independence of the judiciary and rule of law in Malaysia.”<sup>99</sup> A spokesperson of the European Union said the “conviction of opposition leader Anwar Ibrahim raises serious questions regarding due process of law.”<sup>100</sup> Other countries – including Canada, New Zealand, Germany, and Switzerland – similarly concluded that the verdict had sufficiently raised serious questions about the independence of the Malaysian judiciary.<sup>101</sup> Even within Malaysia, entities are questioning the Courts’ process and decision; the Malaysian Bar Council expressed concern over the “glaring anomalies” in the trial.<sup>102</sup>

### **b. The Malaysian Government Interfered with Anwar Ibrahim’s Right to Prepare a Defense and Withheld Key Evidence from the Defense**

Under the ICCPR, a defendant must be allowed “to defend himself in person or through legal assistance of his own choosing.”<sup>103</sup> In practice, this means that “[t]he accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair.”<sup>104</sup> Furthermore, “the accused must have adequate time and facilities for the preparation of his defense.”<sup>105</sup> What constitutes “adequate time” depends on the circumstances of each case, but “the facilities must include

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<sup>94</sup> *Malaysia: Anwar Verdict Will Have Chilling Effect on Freedom of Expression*, AMNESTY INT’L, Feb. 10, 2015.

<sup>95</sup> *Malaysia: Anwar Ibrahim Sentenced to Five Years in Prison*, FIDH, Feb. 15, 2015.

<sup>96</sup> *UN Rights Office ‘Disappointed’ to See Malaysian Opposition Leader Prison Sentence Upheld*, UN NEWS CENTRE, Feb. 10, 2015.

<sup>97</sup> *U.S. Embassy Statement on the Conviction of Anwar Ibrahim*, EMBASSY OF THE U.S. KUALA LUMPUR MALAYSIA, Feb. 10, 2015.

<sup>98</sup> *Media Release: Anwar Ibrahim Final Appeal*, AUSTRALIAN MINISTER OF FOREIGN AFFAIRS, Feb. 10, 2015.

<sup>99</sup> *Hugo Swire Concerned by Imprisonment of Malaysian Opposition Leader*, FOREIGN & COMMONWEALTH OFFICE, Feb. 10, 2015.

<sup>100</sup> *Statement by the Spokesperson on the Conviction of Malaysian Opposition Politician Anwar Ibrahim*, EU, Feb. 10, 2015.

<sup>101</sup> *Condemning the Persecution of Anwar Ibrahim – Malaysian Progressives in the UK*, MALAYSIAN INSIDER, Feb. 23, 2015.

<sup>102</sup> *Id.*

<sup>103</sup> *ICCPR*, *supra* note 36, at art. 14(3)(d).

<sup>104</sup> Office of the High Comm’r for Human Rights, United Nations, General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), Apr. 13, 1984 at ¶11 [hereinafter *General Comment 13*].

<sup>105</sup> *ICCPR*, *supra* note 36, at art. 3(b).

access to documents and other evidence which the accused requires to prepare his case.”<sup>106</sup> In addition, the ICCPR specifically guarantees a defendant the right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”<sup>107</sup>

In this case, the Malaysian Government continuously denied Anwar the right to defend himself by interfering with his ability to challenge the improper conduct of the judiciary, limiting the time available to prepare a defense, withholding key prosecution evidence, and illicitly manipulating key alibi witnesses for the defense.

*i. Interfered With His Ability to Challenge the Improper Conduct of the Judiciary*

As discussed above, Anwar and his lawyers were consistently denied the right to challenge the improper conduct of the judiciary – including that of the High Court judge, the lead prosecutor, and the Court of Appeal. All petitions, requests, and appeals related to due process abuses were summarily ignored and dismissed or were otherwise inadequately addressed.

*ii. Limited the Time Available to Prepare a Defense*

In addition, and also discussed above, the shortened timeframes at the Court of Appeal – including the unreasonable one-hour period given to the defense for mitigation and sentencing preparation – fundamentally interfered with the defense team’s ability to act diligently on behalf of Anwar. Collectively, these procedural abuses constitute a violation of the international norms of due process.

*iii. Withheld Key Prosecution Evidence*

Anwar’s defense team was denied access to key prosecution evidence from the trial’s inception. The first application to compel disclosure of evidence – including samples taken, slides, notes, and documents relating to the medical and DNA evidence and the prosecution’s witness list – was made before the start of proceedings in June 2009. While the High Court judge ordered disclosure, the prosecution immediately appealed to the Court of Appeal, which reversed that order. The Federal Court upheld the Court of Appeal’s decision and refused to order pre-trial disclosure. Therefore, when the proceedings began, the defense team did not have access to the relevant and material information necessary to present Anwar’s defense. Anwar’s expert witnesses were particularly hampered by the lack of access to the exhibits or notes relating to the testing of the DNA samples.

After the proceedings were underway, the High Court judge refused a second application for disclosure of evidence, this time including Saiful’s police statement. This document would have been probative of the validity of Saiful’s claims regarding what happened on the day of the alleged incident. This is especially true in light of Saiful’s questionable credibility, due not only to his earlier meetings with Prime Minister Najib and a senior police officer, but also to the lack

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<sup>106</sup> General Comment 13, *supra* note 104, at ¶9(3)(b).

<sup>107</sup> ICCPR, *supra* note 36, at art. 14(3)(e).

of medical evidence supporting Saiful's sodomy allegation. On appeal, the Court of Appeal again refused to grant the defense access to the documents.

In its third application for disclosure, the defense requested access to all medical notes and reports that were made by the doctors who examined Saiful. These documents were relevant to show the lack of medical evidence, as all four examining doctors concurred that there was no evidence of anal penetration. This evidence was also relevant to the question of whether Saiful informed the first examining doctor, Dr. Osman, that he had been sodomized with a plastic implement, which Dr. Osman had noted in his report. The court never considered this information, and Dr. Osman was later baselessly determined to be an "untruthful" witness. Judge Zabidin of the High Court completely ignored the relevance of the requested documents and refused their disclosure, saying that there was no provision or legal basis for the defense to be supplied with documents.

By continuously refusing to provide Anwar with the information necessary to build his defense, the Malaysian Government interfered with Anwar's right to prepare a defense. This further illustrates that Anwar's detention is arbitrary under Category III.

#### *iv. Interference With Defense Witness Testimony*

Troubling incidents of government interference with Anwar's defense witnesses – including with his alibi witnesses – ultimately prevented Anwar from presenting his defense. There is clear evidence that the Malaysian police harassed and intimidated individuals who were meant to be key alibi witnesses, thereby manipulating testimony or altogether preventing witnesses from testifying. For example, the police interrogated the owner of the condominium (where the alleged act was said to have occurred) for more than 30 hours before he was scheduled to be called by the defense to testify. He was so intimidated by that interrogation that he did not testify. The defense identified a maid who had been working at the condominium at the time as an alibi witness, but she could not be located when it was time for her testimony. The Court never gave a reason for her absence.<sup>108</sup>

Additionally, the High Court judge refused to compel testimony from available witnesses. The defense had summoned Prime Minister Najib for questioning related to the June 2008 meeting with Saiful before the allegations were lodged. This testimony would have provided answers to several of the crucial questions raised, and Saiful himself had already testified to the meeting earlier in the proceedings. Justice Zabidin refused to enforce the summons on the absurd basis that the defense had "failed to show the relevancy and materiality" of Prime Minister Najib's testimony to the trial, thereby ignoring the fact that the testimony could reveal the purpose of the meeting and whether there was bias or motivation for Saiful to make false allegations.

Through police intimidation of alibi witnesses as well as the Courts' refusals to compel testimony, the Malaysian Government interfered with Anwar's right to prepare a defense and thereby rendered his trial unfair and his detention arbitrary.

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<sup>108</sup> *Trowell: Sodomy II*, *supra* note 25, at 215.

### **c. There Was No Valid Evidence to Find Anwar Ibrahim Guilty of Sodomy**

As Anwar has consistently maintained, there is absolutely no physical evidence to corroborate Saiful's allegation of sodomy, and the allegation itself is highly questionable and inconsistent. In determining Anwar's guilt, the Malaysian courts handpicked statements from unreliable prosecution witnesses. At the same time, the Courts erroneously "rejected or ignored the evidence that raised serious doubts about the reliability of so-called independent evidence and the credibility of the complainant,"<sup>109</sup> even when that evidence came from the same prosecution witness on whom the Courts relied in finding Anwar guilty. This included problematic DNA evidence from Saiful's rectal swab, a lack of evidence of penile penetration, evidence relating to the location of the alleged incident, and whether lubricant was used.

The doubts raised by the individual pieces of evidence (or lack thereof) should have seriously called into question Saiful's credibility and the truthfulness of his allegation. Taken collectively, there is an overwhelming lack of credible evidence against Anwar. A fair and impartial judiciary, especially one applying the criminal standard of proof – "beyond a reasonable doubt" – could not have concluded that Anwar was guilty. Therefore, the guilty verdict can only be characterized as a miscarriage of justice, unfair, and utterly prejudicial against Anwar.

To be clear, it is understood that the Working Group will not substitute itself for a domestic fact-finder in its work. Here, however, the key facts of this case are not in dispute. Instead, the prosecution and the Courts tried to explain their way around these indisputable facts, which is something else entirely.

#### *i. Problematic DNA Evidence from Saiful's Rectal Swab*

The only evidence that could have truly corroborated Saiful's allegations would have been positive DNA evidence from a rectal swab taken after the alleged incident. Without establishing this evidence beyond a reasonable doubt, the Malaysian courts should not have found Anwar guilty of sodomy. However, Anwar was found guilty despite the numerous questions and concerns regarding the reliability of the DNA, which were sufficient to cast at least a reasonable doubt on the evidence. These included concerns that the DNA sample was not properly stored and was tampered with, that the sample was taken too late, that the sample was improperly examined, and that the sample contained multiple DNA profiles.

Pursuant to hospital protocol, the DNA sample taken from Saiful's anus during his hospital examination was put into a clearly marked container and then placed in a clear, plastic, heat-sealed, tamper-proof bag. Officer Pereira was then instructed to place the samples in a freezer (to prevent degradation) until they were sent to the chemist for evaluation.<sup>110</sup> Instead, Pereira cut open the tamper-proof bag, claiming later that he was merely following standard

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<sup>109</sup> Senior Aussie Lawyer Says Judges in Anwar Trial Ignored Evidence, MALAYSIAN INSIDER, Feb 14, 2015.

<sup>110</sup> Trowell: *Sodomy II*, *supra* note 25, at 193.

operating procedure because he wanted to put the containers into individual envelopes and re-label them.<sup>111</sup> Pereira compromised the integrity of the DNA evidence by opening the plastic bag, as he could have easily opened the containers, tampered with the DNA evidence, and resealed the containers with the existing tape. In his reasoning for initially acquitting Anwar, Judge Zabidin of the High Court wrote “by cutting open the plastic bag confidence in the integrity of the samples was gone.”<sup>112</sup> The Court of Appeal, however, dismissed this reasoning and the defense’s similar arguments, agreeing instead with the false claims of the prosecution and even repeating Pereira’s claim that he was following standard procedures.<sup>113</sup>

To make matters worse, after Pereira cut into the plastic bag and re-labeled the DNA samples, he blatantly ignored instructions to keep the samples in the police freezer.<sup>114</sup> Instead, Pereira placed them in his personal steel cabinet and kept them there for 42 hours.<sup>115</sup> Pereira gave no explanation for the breach of standard operating procedure, and the Court did not consider this in its decision.

By the time the DNA samples were finally received by the chemists for evaluation, a total of 98 hours (over four days) had passed since the alleged sodomy.<sup>116</sup> Expert witnesses, including those called by the prosecution, accepted that improperly-stored semen samples – such as those not stored in a freezer – would suffer degradation, which means that the results of testing would be compromised and unreliable.<sup>117</sup> Two expert witnesses for the defense testified that semen collected even 36 hours after ejaculation could be compromised.<sup>118</sup> In this case, the DNA semen samples taken from Saiful’s anus were not only improperly stored but were also tested long after the 36-hour cut-off. Therefore, the samples should have significantly degraded, possibly to a point that would render them unusable. However, the samples that were analyzed and subsequently presented as evidence were in pristine condition and showed no signs of degradation – which, according to scientific expertise, was impossible.<sup>119</sup> Furthermore, the pristine condition of the samples when they were analyzed demonstrates a clear inconsistency in the prosecution’s narrative, and it raises the question of whether these samples were in fact taken from the complainant. The prosecution did not attempt to explain this glaring inconsistency, and the Courts again did not consider the lack of degradation to be a material fact. Instead, the concerns of the defense witnesses and the findings of expert testimony were ignored and the chemist’s report was accepted without question.<sup>120</sup>

However, the chemist’s report raised further concerns on its own about the reliability of the evidence. The Differential Extraction Process, which was used to separate sperm cells from non-sperm cells in the rectal swab, was incomplete. This raises the possibility that the matched

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<sup>111</sup> *Id.* at 194.

<sup>112</sup> *Id.*

<sup>113</sup> *Trowell: the Final Play*, *supra* note 88, at 260.

<sup>114</sup> *Trowell: Sodomy II*, *supra* note 25, at 193.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 181.

<sup>117</sup> *Trowell: Sodomy II*, *supra* note 25, at 194.

<sup>118</sup> *Id.* at 237-238.

<sup>119</sup> *Id.* at 262.

<sup>120</sup> *Id.* at 194-195.

DNA did not come from sperm cells, but rather from other, non-sperm cells, such as those that could be collected from the surface of a personal device.<sup>121</sup> Additionally, the puzzling presence of a third person's DNA<sup>122</sup> in the sample taken from Saiful's rectum suggested that Saiful "had either been penetrated to ejaculation by another male, or someone had contaminated the sample by handling it."<sup>123</sup> The prosecution was not asked to explain these inconsistencies, and the Court ignored the serious deficiencies and flaws in the chemist's DNA report, focusing only on the presence of matched DNA in erroneously finding Anwar guilty.

The manner in which the DNA evidence was collected, mishandled, analyzed, and interpreted fundamentally undermined its credibility, yet the Courts nevertheless relied on this evidence in order to find Anwar guilty. Therefore, the decision of the Malaysian courts was completely unfounded and unsubstantiated, and violated Anwar's right to be tried by a fair, impartial, and independent judiciary, making his detention arbitrary under Category III.

### *ii. Lack of Evidence of Penile Penetration*

There was absolutely no credible evidence that Saiful actually experienced penile penetration, which is a necessary element of the act of sodomy.<sup>124</sup> The first doctor who examined Saiful came to this conclusion, as did three specialists who independently examined Saiful on the same day.<sup>125</sup> The medical reports endorsed by all four doctors unequivocally state that conclusion.<sup>126</sup>

Additionally, the first doctor reported that Saiful told him he had been sodomized with a plastic implement, not a penis.<sup>127</sup> Saiful denied making that statement, and the High Court never considered the question.<sup>128</sup> Moreover, the prosecution sought to dismiss the first doctor's testimony<sup>129</sup> by claiming that he was untruthful, without explanation and despite the fact that his report was recorded contemporaneously to the examination and his testimony was highly probative. Both the lack of credible evidence against Anwar as well as the High Court's willingness to ignore that fact violated Anwar's right to be tried by a fair, impartial, and independent judiciary, thus making his detention arbitrary under Category III.

### *iii. Doubts About the Location of the Alleged Event*

In his testimony, Saiful claimed that the alleged sodomy occurred on a carpet in Apartment 1 of a condominium.<sup>130</sup> There was no carpet in Apartment 1, yet Saiful identified the

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<sup>121</sup> *Resolution (CASE N° MAL/15 - ANWAR IBRAHIM) Adopted Unanimously by the IPU Governing Council at its 194th Session*, GOVERNING COUNCIL OF THE INTER-PARLIAMENTARY UNION, Mar. 20, 2014 [hereinafter 2014 IPU Resolution].

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Trowell: Sodomy II*, *supra* note 25, at 84.

<sup>125</sup> *Id.* at 263-264.

<sup>126</sup> *Id.* at 84.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 268-269.

<sup>129</sup> *Id.*

<sup>130</sup> *Trowell: the Final Play*, *supra* note 88, at 351.

carpet from another apartment in the complex as the same one where the alleged event took place.<sup>131</sup> The prosecution did not introduce the carpet into evidence, nor did it attempt to explain whether the carpet had been moved after the alleged incident. Further complicating Saiful's testimony, an UMNO-backed Malay newspaper printed a photo with a caption stating that Saiful had pointed to a bed as the location of the alleged sodomy.<sup>132</sup> The High Court refused to hold the newspaper in contempt, claiming that the evidence about the bed had been given in open court – which directly contradicted Saiful's testimony about the carpet.<sup>133</sup> The Federal Court chose to completely disregard this evidence, erroneously claiming that it was not material.<sup>134</sup> This decision prejudiced Anwar both because it was a missed opportunity to discredit Saiful as a witness and because the evidence was not considered when determining whether the alleged event actually took place. The Courts' refusals to consider Saiful's contradictory statements further illustrate that Anwar was not tried by a fair, impartial, and independent judiciary, making his detention arbitrary under Category III.

#### *iv. Questionable Introduction of Lubricant Into Evidence*

During his testimony, Saiful surprised the defense when a deputy prosecutor handed him a tube of lubricant and Saiful identified it as the lubricant used during the alleged act.<sup>135</sup> Until then, the defense was unaware that Saiful was claiming lubricant had been used, or that the tube existed.<sup>136</sup> Saiful told the Court that Anwar had asked him to bring the lubricant with him to the condominium apartment.<sup>137</sup> The independent court observer, Mark Trowell, noted that this claim contradicted Saiful's previous testimony on the record, in which he stated that he did not know why Anwar had asked him to come to the apartment.<sup>138</sup>

Furthermore, Saiful explained that the tube was not tendered as evidence because he had offered the tube to Pereira, but Pereira turned it down. Even if the alleged sodomy did occur, it is extremely unlikely that Pereira would turn down this piece of evidence, as he is an experienced police officer who would have recognized the importance of the lubricant and would have accepted the tube as evidence. Instead, Saiful explained that Pereira told him he would collect it later.<sup>139</sup>

The Courts' handling of the questions and doubts raised by the actions of both Saiful and Pereira is yet another example of how Anwar was not tried by a fair, impartial, and independent judiciary, making his detention arbitrary under Category III.

### **d. The Malaysian Government's Ongoing Denial of Medically Appropriate Detention Conditions for Anwar Ibrahim Constitutes**

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<sup>131</sup> *Id.*

<sup>132</sup> Trowell: *Sodomy II*, *supra* note 25, at 121.

<sup>133</sup> *Id.*

<sup>134</sup> Trowell: *the Final Play*, *supra* note 88, at 351.

<sup>135</sup> Trowell: *Sodomy II*, *supra* note 25, at 119.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 120.

<sup>139</sup> Trowell: *the Final Play*, *supra* note 88, at 351.

## Cruel, Inhuman, and Degrading Treatment

Article 5 of the UDHR and Article 7 of the ICCPR both state that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”<sup>140</sup> Principle 24 of the Body of Principles further elaborates that “medical care and treatment shall be provided whenever necessary” to persons who are detained or imprisoned.<sup>141</sup>

The Malaysian Government’s treatment of Anwar during his current detention has violated these international standards. After repeated requests from his lawyer and public pressure, Anwar was finally admitted to a hospital on June 2, 2015, for a check-up, observation, and medical treatment. Malaysian Home Minister Ahmad Zahid Hamidi finally approved Anwar’s transfer to the hospital four weeks after the prison doctor and prison authorities requested it. Anwar’s family has also requested that a doctor of Anwar’s choice examine him while he is in the hospital, but they have not received an answer.

Prior to his transfer to Kuala Lumpur Hospital, Anwar was held by the Prison Department of Malaysia at the Sungai Buloh Prison, M20 in Sungai Buloh, Selangor. Despite assurances from the Malaysian Home Minister that Anwar would be treated humanely, he was originally held in solitary confinement in a bare cell infested with rodents and insects. His cell contained a thin foam mattress on a bedframe, a bucket for bathing, and a squat toilet. It was extremely hot and humid with no form of ventilation or fan, thus Anwar was forced to sleep on the floor where it was somewhat cooler. He continues to suffer from a chronic back and spine injury as a result of a prior beating at the hands of Malaysian police.<sup>142</sup> This causes him constant, unnecessary pain every time he has to bend over or stand up from a sitting position, which was exacerbated by his sleeping on the floor.<sup>143</sup> Additionally, it was incredibly painful for Anwar to go to the bathroom on the low toilet because it required serious bending of his back. Repeated requests for a bed, a medically-appropriate mattress, a normal toilet, and a table and chair were denied for weeks.<sup>144</sup> On March 2, 2015, after a month in these deplorable conditions, Anwar was moved by Malaysian authorities to the medical wing of the prison, where a bed with a mattress, a sitting toilet, and a small table and chair have been provided. Unfortunately, the move to the medical wing of the prison did not improve the worrisome health conditions of 67-year-old Anwar.

Anwar is now down to 66 kg from his original weight of 72 kg, a drop of 6 kg, which could present a serious threat to his health should he continue to lose weight. He has dark stool, which is suspected to be melena, is indicative of bleeding in the gut, and requires urgent medical assessment and treatment. Anwar’s blood pressure has been irregular and was recently as high as 163/108 despite being on medication. He has been denied access to the vitamins and supplements that he was taking prior to his detention.<sup>145</sup> On top of all this, he is suffering from a

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<sup>140</sup> *Universal Declaration*, *supra* note 36, at art. 5; *ICCPR*, *supra* note 36, at art. 7.

<sup>141</sup> *Body of Principles*, *supra* note 36, at Principle 24.

<sup>142</sup> *Rahim Noor’s Confession: Black Eye and Blacker Deeds*, ALIRAN, Mar. 1, 1999.

<sup>143</sup> *Anwar’s Jail Conditions ‘Endangering’ His Health*, FMT NEWS, Feb. 16, 2015.

<sup>144</sup> *Id.*

<sup>145</sup> *Denied His Vitamins & 3-Kilos Thinner, Anwar Still Insists ‘Reform Agenda’ Must Go On*, MALAYSIA CHRONICLE, Mar. 14, 2015.

full thickness tear of his right shoulder capsule (from an injury which took place a year ago) that still causes him pain and discomfort now in detention. For a full recovery, this injury requires an MRI scan, treatment, and possibly even surgery.

Anwar was finally hospitalized from June 2-5 at the Kuala Lumpur Hospital, where medical checks revealed a polyp growth on his kidney. Physiotherapy for his shoulder injury will be provided in prison by a visiting physiotherapist. Hospital authorities said that Anwar is not suffering from any “acute” disease; however, concerns remain as to whether his bodyweight will continue to deteriorate and pose risks to his overall health.

Anwar is also facing constant psychological torture by the prison authorities. He is harassed every few hours by prison guards who come by his cell to take pictures of him and to see what he is doing. It is unknown where or to whom these pictures are sent. Anwar has protested repeatedly against this reprehensible behavior, but to no avail. In Anwar’s current state of solitary confinement, he has no one to talk with; even the prison guards around his cell have been instructed not to talk to him. He is only permitted to talk to his lawyers, who are only allowed to visit twice weekly. Anwar’s visits with his family members have been extremely limited; he is only allowed to see them only once every three weeks, which has taken a great toll on him and his family. Requests to allow Anwar’s family to see him have been turned down repeatedly by prison authorities. When Anwar’s family members do get to see him, they are restricted to “no contact” visits, during which they are only permitted to see each other from behind a glass panel and communicate through a telephone.

The Malaysian Government’s original withholding of medically-appropriate detention conditions for Anwar and its continued perpetration of psychological abuse constitute cruel, inhuman, and degrading treatment that could result in serious injury or death. It is reasonable to conclude that the purpose of this mistreatment is to inflict pain on Anwar in order to try and break his spirit and his will to fight his wrongful conviction.

**V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN.**

Anwar’s team of lawyers have filed an application to the Federal Court under Rule 137 of the Federal Court Rules seeking a review of their decision on conviction and sentence. However, based on previous Federal Court decisions, the jurisdiction to be exercised under Rule 137 is extremely limited – the application has to show actual bias or a lack of jurisdiction on the part of the tribunal, or some wholly exceptional circumstances in order to obtain the remedy of a review. A date has not yet been fixed for the hearing of this review. However, given the facts described above regarding the Federal Court hearing of Anwar’s appeal of this conviction, and given that the review will be heard by a panel of judges mostly lower in seniority to the panel that convicted him, Anwar’s prospects of succeeding in such a review remain remote.

Anwar’s family asked for a Royal Pardon from the Malaysian King, but this request was

denied. As the decision of the King is final, it cannot be challenged further in a court of law.

**VI. FULL NAME AND ADDRESS OF THE PERSON(S) SUBMITTING THE INFORMATION (TELEPHONE AND FAX NUMBER IF POSSIBLE)**

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