



Interim Report of the Malaysian Bar on BERSIH 3.0 rally held on 28 April 2012

Part A. Introduction

1.1 About 78 Members of the Bar and some pupils-in-chambers, including the Office Bearers of the Malaysian Bar, volunteered to be part of the monitoring team. The BC Monitoring Team to monitor the assembly on 28 Apr 2012 was coordinated by Roger Chan Weng Keng and Siti Zabedah Kasim, both members of the BC Human Rights Committee ("BCHRC"). The monitors donned chamber attire and wore a "Pemerhati" tag while on duty. They were divided into six teams, headed by a team leader, and were stationed in six assembly points as announced by Bersih 3.0, namely: KLCC, Masjid Jamek, Central Market (*Pasar Seni*), *Jalan Sultan*, Brickfields and National Mosque (*Masjid Negara*).

1.2 It was unfortunate that unlike last year and despite a similar request this year, the Inspector General of Police did not recognise and allow members of the Bar monitoring team the freedom of movement (including to be behind police lines) to observe the Bersih 3.0 rally.

1.3 Members of the monitoring team who observed Bersih 2.0 and now Bersih 3.0, were unanimous in their view that:

- (i) The rally was peaceful until around 3pm when the police opened fire with their water cannons and teargas;
- (ii) The use of force by the police without any obvious provocation or cause, was far worse indiscriminate, disproportionate and excessive;
- (iii) Police brutality was more widespread;
- (iv) There was a concerted effort by the police to prevent and stop any recording of their actions and conduct;
- (v) Police fired tear gas directly at the crowd and their firing pattern was to box in the participants rather than allowing them to disperse quickly;

- (vi) After which there were pockets of retaliatory behaviour exhibited by the participants of the rally to the wrongful use of force by the police;
- (vii) The police were observed taunting and mocking the crowd;
- (viii) When items were thrown by some of the participants at the police, the police stooped to return like for like; and
- (ix) The police personnel were not wearing and displaying their police identification number on their uniform.

1.4 After the arrest of 512 persons, the Bar's urgent arrest team appeared at Pulapol where all the arrested persons were being detained, and were refused access to these persons. This is contrary to Article 5(3) of the Federal Constitution which obliges the enforcement authorities to allow an arrested person to consult and be defended by a legal practitioner of his choice, and section 28A(2)(b) of the Criminal Procedure Code obliging a police officer, before commencement of any form of questioning or recording of any statement, to allow as soon as may be, an arrested person to communicate or attempt to communicate and consult with a legal practitioner of his choice.

1.5 It is incomprehensible, if not a reflection of the sheer incompetence or arrogance of the police force that it has not learnt from its past mistakes in the management of assemblies of peoples exercising their constitutional right, so well documented and analysed by Suhakam in its two reports and the pending ongoing Inquiry¹.

1.6 This complete absence of any will and desire on the part of the police to transform itself from a force of harm to a force of protection and facilitation, reinforces the urgent need for the police force to be changed by force of statute through the establishment of an independent and credible external mechanism for its oversight. This will be achieved through the Independent Police Complaints and Misconduct Commission (IPCMC) envisaged

¹ Report of SUHAKAM public inquiry into Bandar Mahkota Cheras incident (27 May 2008) http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30237&folderId=26457&name=D_LFE-4804.pdf, and Report of SUHAKAM public inquiry into the KLCC "Bloody Sunday" incident (28 May 2006) http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23908&folderId=26457&name=D_LFE-705.pdf

by the Royal Commission on the Enhancement of the Management and Operations of the Police.

1.7 The Malaysian Bar will extend its full co-operation to the authorities in its investigation of the day's events.

Part B. Everyone in Malaysia has the Right to be Free from Excessive and/or Unlawful Physical Acts of Violence or Mental Abuse by Law Enforcement Officials

A. *International human rights law*

(i) The Universal Declaration of Human Rights, 1948 (UDHR)

2.1 Article 3 provides as follows:

“Everyone has the right to life, liberty and security of person.”

2.2 In connection therewith, Article 5 specifically states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

2.3 In the event of violations of fundamental rights, Article 8 provides that everyone has the right to an effective remedy by competent national tribunals for redress of those violations.

(ii) The International Covenant on Civil and Political Rights, 1976 (ICCPR)

2.4 Based on provisions of the UDHR, the ICCPR reaffirmed the rights set out therein.

2.5 Article 6(1) provides as follows:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

- 2.6 In connection therewith, Article 7 specifically states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment².
- 2.7 Article 9(1) reinforces the right to liberty and security of the person³.
- 2.8 No derogation from Articles 6 and 7 may be made under the ICCPR⁴. There appears to be no specific prohibition of derogation from Article 9. However, any attempted derogation may only be permitted in a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. Measures taken must only be to the extent strictly required by the exigencies of the situation⁵. This demonstrates the elevated importance of the right guaranteed under Article 9.
- 2.9 Article 2(3) outlines remedies which must be provided to any person whose rights have been violated:

“Each State Party to the present Covenant undertakes:

- (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the*

² See also United Nations Human Rights Committee, General Comment No. 7 (*“Article 7: The prohibition of torture and cruel, inhuman or degrading treatment or punishment”*), 16th Session (1982) and replaced by United Nations Human Rights Committee, General Comment No. 20 (*“Article 7: The prohibition of torture or cruel, inhuman or degrading treatment or punishment”*), 44th Session (1992).

³ See also United Nations Human Rights Committee, General Comment No. 8 (*“Article 9: The right to liberty and security of the person”*), 16th Session (1982).

⁴ Article 4(2) of the ICCPR. See also United Nations Human Rights Committee, General Comment No. 6 (*“Article 6: The right to life”*), 16th Session (1982).

⁵ Article 4(1) of the ICCPR. See also United Nations Human Rights Committee, General Comment No. 5 (*“Article 4: Derogations during a state of emergency”*), 13th Session (1981) and replaced by United Nations Human Rights Committee, General Comment No. 29 (*“Article 4: Derogations during a state of emergency”*), 72th Session (2001).

legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

(iii) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (CAT)

2.10 Article 16 provides that each State Party shall undertake to prevent in any territory under its jurisdiction acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture⁶ when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person.

2.11 Article 10⁷ makes it obligatory for each State Party to ensure that law enforcement personnel are trained and educated regarding the prohibition against acts of cruel, inhuman or degrading treatment or punishment, and that rules or instructions issued in regard to the duties and functions of any such person contain the same.

2.12 Article 12⁸ states that each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that acts of cruel, inhuman or degrading treatment or punishment has been committed in any territory under its jurisdiction.

2.13 Article 13⁹ provides that any individual who alleges he has been subjected to acts of cruel, inhuman or degrading treatment or punishment has the right to

⁶ “Torture” as defined in Article 1 of the CAT. It is submitted that the term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against all forms of physical or mental abuse, inflicted for whatever reason, if any. Any other interpretation would render the provision meaningless.

⁷ Read with Article 16 of the CAT.

⁸ Read with Article 16 of the CAT.

⁹ Read with Article 16 of the CAT.

complain, and to have his case promptly and impartially examined by competent authorities.

2.14 Whilst Malaysia has not ratified the ICCPR or the CAT, it is nevertheless submitted that the prohibition of torture or other cruel, inhuman or degrading treatment or punishment has achieved the eminence of customary international law¹⁰ and is therefore applicable by virtue of this fact; if not, at the very least constituting high persuasive authority for the recognition of these rights in Malaysia¹¹.

B. National constitutional law

(iv) The Federal Constitution (FC)

2.15 Article 5(1) provides as follows:

“No person shall be deprived of his life or personal liberty save in accordance with law.”

2.16 Article 5(1) of the FC was interpreted in ***PP v Tengku Mahmood Iskandar (1973) 1 MLJ 128*** at page 128:

“The record, to my mind, reads more like pages torn from some mediaeval times than a record made within the confines of a modern civilization. The keynote of this whole case can be epitomised by two words — sadistic

¹⁰ See *Filartiga v Peña-Irala* 630 F.2d 876 (2d. Cir. 1980) and Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987).

¹¹ In the context of native land rights in Australia, Brennan J. in *Mabo & Ors v The State of Queensland (No. 2)* 175 [1992] CLR 1 at page 42 said:

“Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.”

This decision was followed by the Malaysian High Court in *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591 and which was subsequently affirmed on appeal in *Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors* [2005] 6 MLJ 289.

brutality — every corner of the case from beginning to the end, devoid of relief or palliation. I have searched diligently amongst the evidence, in an attempt to discover some mitigating factor in the conduct of the respondent, which would elevate the case from the level of pure horror and bestiality; and ennoble it at least upon the plane of tragedy. I must confess, I have failed. It is said in Criminal Appeal No. 31 of 1972 that the complainants were involved in smuggling goods into this country. Were they 10 times involved, or were they 100 times involved, that did not justify the respondent to inflict brutal third-degree practices on the three of them. The law is sedulous in giving them the right to a fair trial and to be defended by counsel. Those fundamental rights must always be kept inviolate and inviolable, however crushing the pressure of incriminating proof. Cases are never tried in police stations, but in open courts to which the public has access. The rack and torture chamber must not be substituted for the witness stand. That right is enshrined in our Constitution — “No person shall be deprived of his life, or personal liberty save in accordance with law.” That fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law. All this reduces to the minimum the possibility of arbitrariness and oppression.”

- 2.17 The Court of Appeal in the case of **Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261** further held at page 288:

“In my judgment, the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such

an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning.

Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure."

- 2.18 The FC was drafted with the purpose of granting everyone adequate protection against the abuse of State powers, and it is to be interpreted as a "living document". Article 5(1) must therefore be read broadly¹², embodying

¹² In *Dato' Menteri Othman Bin Baginda & Anor v Dato' Ombi Syed Alwi Bin Syed Idrus [1981] 1 MLJ 29*, Raja Azlan Shah LP said at page 32:

*"In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs v Fisher [1979] 3 All ER 21*). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129, 136*.*

It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted. One of its main features is the enumeration and entrenchment of certain rights and freedoms. It is in the light of this kind of ambulatory approach that we must construe our Constitution."

See also *Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor [1992] 1 MLJ 697*.

the idea of “law” within it as including rules of natural justice and equity¹³ consonant with internationally accepted customs and usages of civilised nations¹⁴ such as the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

2.19 In essence, everyone in Malaysia should enjoy in their daily lives the right to be free from excessive and/or unlawful physical acts of violence or mental abuse by law enforcement authorities.

Part C. Proper Use of Force by Enforcement Agencies

3. There are at least three instructive documents on use of force by enforcement officials which prescribes the proper, and limits to, use of force by enforcement officials:

- (i) United Nations Code of Conduct for Law Enforcement Officials¹⁵ (UNCC);
- (ii) United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UNBPUFF); and
- (iii) Amnesty International guidelines.

3.1 The following provisions of UNCC are relevant:

¹³ See Article 160(2) of the FC. In *Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64*, Lord Diplock said at page 71:

“In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to “law” in such contexts as “in accordance with law”, “equality before the law”, “protection of the law” and the like, in their Lordships’ view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the “law” to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords “protection” for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.”

This statement was applied in the Malaysian context in *S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204*. See also *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261*.

¹⁴ See *The Paquete Habana [1900] 175 U.S. 677 (20 S.Ct. 290)*.

¹⁵ Adopted by the United Nations General Assembly Resolution 34/169 (1979). See also the United Nations Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials adopted by the United Nations Economic and Social Council Resolution 1989/61. As a member of the United Nations, Malaysia is obliged to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion (Article 3 United Nations Charter). This duty was reaffirmed by the World Conference on Human Rights, “*Vienna Declaration and Programme of Action*” (1993) adopted by the United Nations General Assembly Resolution 48/121 (1993) and the World Summit Outcome (2005) adopted by the United Nations General Assembly Resolution 60/1 (2005).

“Article 1

Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession. ...

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons. ...

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. ...

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment. ...

Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required. ...

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them. ...”

3.2 The principles which may be culled from the above are as follows:

- “Human rights-based policing” is a core aim of law enforcement officials in carrying out their duties and responsibilities¹⁶.
- The rights and dignity of victims and suspects of crimes must be safeguarded without discrimination consistent with international human rights principles such as those enunciated in the UDHR, ICCPR and CAT.
- The use of force including the discharge of weapons (lethal or non-lethal) or firearms must be the exception rather than the rule. It should be a means of last resort, not a measure of first instance.
- Law enforcement officials are to effectively secure medical attention and services for all those in need of the same.
- Any violations of the Code should be reported for effective remedies to be taken.

3.3 The following provisions of UNBPUFF are relevant¹⁷:

“Principle 2

Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

¹⁶ See also Amnesty International, “*Malaysia: Towards Human Right-Based Policing*”, AI Index: ASA 28/001/2005 and Amnesty International, “*10 Basic Human Rights Standards for Law Enforcement Officials*”, AI Index POL 30/04/98.

¹⁷ Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990).

Principle 3

The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

Principle 4

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

Principle 5

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;*
- (b) Minimize damage and injury, and respect and preserve human life;*
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;*
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment. ...*

Principle 7

Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

Principle 8

Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

Principle 9

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Principle 10

In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

Principle 11

Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;*
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;*
- (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;*
- (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;*
- (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;*

(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Principle 12

As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

Principle 13

In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

Principle 14

In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9. ...

Principle 26

Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders. ...”

3.4 Amnesty International has elaborated on the said Principles, and the key provisions are reproduced herein¹⁸:

“Basic Standard 3:

Do not use force except when strictly necessary and to the minimum extent required under the circumstances. The implementation of Basic Standard 3 involves, among other things, that Police officers, in carrying out their duty, should apply non-violent means as far as possible before resorting to the use of force. They may use force only if other means remain ineffective or without any promise of achieving the necessary result. Basic Standard 3 must be implemented in accordance with Basic Standard 4 and 5.

Whenever the lawful use of force is unavoidable, police officers must:

- Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved*
- Minimize damage and injury, and respect and preserve human life*
- Ensure that all possible assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment*
- Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment*
- Where injury or death is caused by the use of force by police officers, they shall report the incident promptly to their superiors, who should ensure that proper investigations of all such incidents are carried out.*

Basic Standard 4:

Avoid using force when policing unlawful but non-violent assemblies. When dispersing violent assemblies, use force only to the minimum extent necessary.

Everyone is allowed to participate in peaceful assemblies, whether political or non-political, subject only to very limited restrictions imposed in conformity with the law and which are necessary in a democratic society to protect such interests as public order and public health.

¹⁸ See Amnesty International, “10 Basic Human Rights Standards for Law Enforcement Officials”, AI Index POL 30/04/98.

The police must not interfere with lawful and peaceful assemblies, otherwise than for the protection of persons participating in such an assembly or others.

The implementation of Basic Standard 4 involves, among other things:

- In the policing of assemblies that are unlawful but non-violent, police officers must avoid the use of force. If force is indispensable, for example to secure the safety of others, they must restrict such force to the minimum extent necessary and in compliance with the other provisions in Basic Standard 3*
- Firearms shall not be used in the policing of non-violent assemblies. The use of firearms is strictly limited to the objectives mentioned in Basic Standard 5*
- In the dispersal of violent assemblies police officers may use force only if other means remain ineffective or without any promise of achieving the intended result. When using force police officers must comply with the provisions in Basic Standard 3*
- In the dispersal of violent assemblies police officers may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary to achieve one of the objectives mentioned in Basic Standard 5 and in accordance with the provisions in Basic Standard 3 and Basic Standard 5.*

Basic Standard 5:

Lethal force should not be used except when strictly unavoidable in order to protect your life or the lives of others. The use of firearms is an extreme measure which must be strictly regulated, because of the risk of death or serious injury involved. The implementation of Basic Standard 5 requires, among other things, that police officers must not use firearms except for the following objectives and only when less extreme means are insufficient to achieve these objectives:

- In self-defence or in defence of others against the imminent threat of death or serious injury*
- To prevent the perpetration of a particularly serious crime involving grave threat to life*
- To arrest a person presenting such a danger and resisting the police officer's authority, or to prevent his or her escape*

In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Police officers must identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the officers at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

Rules and regulations on the use of firearms by police officers must include guidelines that:

- Specify the circumstances under which police officers are authorized to carry firearms and prescribe the types of firearms and ammunition permitted*
- Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm*
- Prohibit the use of any firearms or ammunition that cause unnecessary injury or present an unnecessary risk*
- Regulate the control, storage and issuing of firearms and ammunition, including procedures for ensuring that police officers are accountable for firearms and ammunition issued to them*
- Provide for warnings to be given, if appropriate, when firearms are to be discharged*
- Provide for a system of reporting and investigation whenever police officers use firearms in the performance of their duty. ...”*

3.5 Amnesty International notes that in the United States of America, police guidelines on the use of force state that *“officers may use only the minimum amount of force which is necessary to achieve a legitimate purpose (e.g. effect an arrest or prevent the commission of an offence) when other options are not available or have been exhausted. NYPD guidelines set out the following five stages through which force can progress: (1) verbal persuasion; (2) unarmed physical force; (3) force using non-lethal weapons (e.g. pepper spray or mace); (4) force using impact weapons (e.g. police batons); and (5) deadly force, which may be used only when an officer or another person’s life is in direct danger. The guidelines also state that flashlights, radios and handguns are not designed as impact weapons and make clear that they should not be used as such in most circumstances. Police regulations also state that any officer at the scene of a police incident has an obligation to ensure that the law and*

regulations are complied with, and to intervene if the use of force against a subject becomes excessive. The guidelines note that failure to do so constitutes an offence under the law as well as departmental policy.”¹⁹

3.6 The 5 stages expressed above correspond with the degree of force necessary in any given situation faced by the authorities. It would be a welcome addition to our Malaysian law enforcement procedures, and should be inculcated as part of law enforcement officials’ training and education.

Part D. Comparative Jurisdiction Analysis of Crowd Control and Use of Non-lethal Force by Enforcement Officials

4. It would be pertinent to examine some of the practices and legislation in other jurisdictions dealing with crowd control.

A. UNITED STATES OF AMERICA (USA)

4.1 Case study: District of Columbia

1. The District of Columbia enacted the groundbreaking First Amendment Rights and Police Standards Act of 2004 (2004 Act)²⁰, which took effect on 13 April 2005, declaring the District of Columbia’s official policy of First Amendment protests. The 2004 Act was enacted in direct response to an investigation conducted on the Metropolitan Police Department’s handling of a number of anti-globalisation protests held between the years 2002-2004 including the IMF/World Bank demonstration in Pershing Park in September 2002²¹.
2. The 2004 Act includes landmark provisions preserving a permit process for demonstrations but clarifying that individuals do not require “permission” in order to exercise their First Amendment rights, setting out policies on managing crowds in

¹⁹Amnesty International, *“United States of America: Police brutality and excessive force in the New York City Police Department”*, AI Index: AMR 51/036/1996.

²⁰ A copy of the First Amendment Rights and Police Standards Act of 2004 is in our “Bundle of Annexures” at Tab 2.

²¹ See the Report and Recommendations of the Police Complaints Board to the Mayor Anthony A. Williams, The Council of the District of Columbia and the Chief of Police, *“Monitoring of Anti-War and Anti-Globalization Protests September 2005”* (20 December 2005).

demonstrations, and places particular emphasis on communication and voluntary compliance.

3. The following are some key features of the 2004 Act:

3.1 *Police crowd management policy*

- (a) Section 107 of the 2004 Act requires the police to first seek and enforce restrictions through voluntary compliance, and then only after exhausting that avenue, to seek to enforce restrictions by the issuance of citations and arrests.
- (b) Section 107 goes on to provide that in the event violence or disorderly conduct ensues, the police are to respond by dispersing, controlling and arresting the persons engaging in such violent or disorderly conduct and not by issuing a general order for dispersal, thus allowing the First Amendment assembly to continue.
- (c) Section 107 further provides that the police may only issue a general order to disperse where a significant number or percentage of the assembly participants fail to adhere to the imposed restrictions, the voluntary compliance measures set out above have failed, a significant number or percentage of the participants are engaging in, or are about to engage in, unlawful disorderly conduct or violence, or a public safety emergency has been declared by the Mayor that is not based solely on the fact that the First Amendment assembly is occurring and the Chief of Police determines that the public safety concerns that prompted the declaration require that the First Amendment assembly be dispersed.
- (d) Section 108 forbids the use of police lines to substantially encircle or entrap demonstrators unless there is probable cause to believe that a significant number of people have committed unlawful acts, and the police have identified and decided to arrest the specific violators; or a police line is necessary to protect the safety of the demonstrators.

- (e) Section 109 requires the police to display their names and badge numbers with enhanced visibility at all times.
- (f) Section 116 prohibits the use of riot gear unless there is a danger of violence, and prohibits the use of chemical irritants to disperse an assembly unless public safety and security is endangered.

B. AUSTRALIA

4.2 Victoria²²

1. The legislation currently in force is the Unlawful Assemblies & Processions Act 1958 (Vic) (1958 Act)²³. Its provisions include:
 - (a) Section 5 which makes it unlawful for “persons to assemble together riotously and tumultuously and to the disturbance of the public peace”. The section goes on to indemnify those trying to disperse such a riotous assembly in the event that a person assembled for such a purpose is injured, maimed or killed in the dispersal of the riot.
 - (b) Section 6 which allows for a warning to disperse to be read by a Magistrate in respect of any prohibited meeting or assembly. The time given to disperse is 15 minutes.
2. It is noted that although the 1958 Act is in force, Victoria adopts what is called the “Cooperative Model” when dealing with assemblies and processions²⁴. The “Cooperative Model” involves a cooperative planning process which is conducted under the auspices of the City of Melbourne Public Authorities Team which includes the following:
 - (a) Victoria Police;

²² For a full discussion of the position in Victoria, see the Parliamentary Redundant Legislation Subcommittee Report, “*Review of the Unlawful Assemblies and Processions Act, 1958*” (1999), a copy of which is in our “Bundle of Annexures” at Tab 3.

²³ A copy of the Unlawful Assemblies & Processions Act 1958 (incorporating amendments as at 1 July 2004) is in our “Bundle of Annexures” at Tab 4.

²⁴ See the Parliamentary Redundant Legislation Subcommittee Report, “*Review of the Unlawful Assemblies and Processions Act, 1958*” (1999) at page 20 onwards of which relevant portions are summarised in our report herein.

- (b) Vic Roads;
 - (c) City of Melbourne Council; and
 - (d) Any other relevant authorities.
3. The Team meets once a month to consider applications to hold assemblies and demonstrations. The process involves extensive discussions between protest organisers and bodies likely to be affected by public gatherings. It is aimed at protecting the right of peaceful assembly and at the same time, minimise the disruption caused to the rest of society.
 4. The primary responsibility of the police is prevent disorder and maintain the peace. They have specially appointed officers and units to deal with assemblies and processions. For example there is an industrial liaison officer, a Superintendent, who liaises with unions in relation to industrial action, a Chief Inspector who manages a special unit with statewide responsibility for ensuring demonstrations are handled equally and a “Region 1” Special Events Office which has particular responsibility for assemblies and processions around Parliament House.
 5. Police officers at assemblies are guided by the Chief Commissioner’s Instructions 8/97: Policing at Crowd Control Situations:
 - “5. *Members [of Victoria Police] must report to a supervisor all reliable information concerning any event that may become or is a crowd control situation. Of particular importance is information about people acting as organisers, their plans, the numbers involved and the group they represent.*
 - 8. *The Operations Commander has the overall role of effectively and efficiently commanding, controlling and coordinating the entire operation or incident... The Operations Commander must:*
 - *Cause contact to be made with the organisers, leaders or management of all parties involved, to ascertain their intentions*

and to advise on Force policy and the police role. This may require the appointment of a liaison officer...

9. *In some crowd control situations, it may be necessary to appoint a liaison officer... The function of the liaison officer is to contact organisers, leaders or management of all parties involved, to ascertain their intentions and to advise on Force policy and the police role.*
15. *District Commanders must notify Major Incident Planning Unit if it appears the crowd control situation may cross over District boundaries or that the District cannot provide adequate resources.*
17. *In all cases, the Major Incident Planning Unit is available to provide assistance in the planning and coordination of crowd control situations.*
24. *The policing of crowd control situations may involve violent confrontation with participants. Where possible, both confrontation and the use of force should be avoided. Where force cannot be avoided, use only the minimum amount reasonably necessary.*
25. *Only in cases of urgency can members apply the use of force without authority. In all other cases, any use of force must be specifically authorised...*
26. *Forward Commanders should ensure the minimal use of force by:*
 - *Maintaining liaison with all parties involved.*
 - *Keeping parties advised of any developments which may influence the outcome of the situation.*
 - *Informing participants of potential use of force.*
 - *Adopting a policy of containment.*
 - *Exercising tact and restraint.*
 - *Ensuring arrests are made as a last resort.*
 - *Adopting a low key approach.*

28. *When contemplating the use of force, members must be aware of their legislative and common law powers. In a crowd control situation, the member must believe:*
- *On reasonable grounds that the reasonable use of force is necessary to prevent or stop an offence;*
 - *Any force used is not disproportionate to the objective sought to be achieved;*
 - *The offence sought to be prevented is an indictable offence or the lawful arrest of the person is required; and*
 - *The person to be arrested has committed or is suspected of committing an offence. (s. 462A Crimes Act 1958).*
29. *Police members also have a common law duty to prevent breaches of the peace. This includes taking whatever action is reasonable in the circumstances to prevent the occurrence or continuation of a breach of the peace...*
30. *In some crowd control situations it may be necessary to make arrests. If so, the following guidelines should be followed:...*
- *Minor offences should be ignored in the interests of containing the overall situation however, appropriate action must be taken to prevent conduct involving violence to people or damage to property.*
50. *A riot is defined as where three or more persons assemble together in a riotous or tumultuous manner.*
51. *Take prompt action when any persons in a crowd control situation are armed with weapons of any description or resort to violence. In addition to taking action to prevent a breach of the peace, police may have the situation declared as a riot. This is done by having a magistrate read aloud the riot proclamation at that situation, set out in the Unlawful Assemblies and Processions Act 1958."*

6. It has been acknowledged by the police that the model was working reasonably well, continuously refined over the years.
7. The City of Melbourne Council is responsible for advising the police and other relevant public authorities of event details. The Council does not give actual approval for these events to take place. Rather they acknowledge in writing their occurrence in writing and assists with event logistics. The public is also informed and notified of these events by leaflet distribution, telephone, word of mouth or by other authorities such as the police and the Public Transport Corporation. The Council does however impose general conditions regulating the conduct of such events.

C. Kashmir

4.3 In report written by Jeffrey Stern on 12.2.2010 on use of tear gas in Kashmir, according to the Inspector General of Kashmir's police force, the policemen are trained to fire tear gas shells in a parabolic way and not directly²⁵.

D. Egypt

4.4 In the Report on Peace Keeping in Demonstrations and Public Disorder Situations by the Egyptian Initiative for Personal Rights on December 2011, it states that tear gas should not be excessively used and should never be used in enclosed spaces or fired directly at protesters²⁶.

E. Philippines

4.5 The relevant provisions of the Philippines National Police Manual are²⁷:

- (i) Tear gas, water cannon, and reasonable force shall be used only when all other peaceful and non-violent means have been exhausted [Section 2(e)].

²⁵ http://afpak.foreignpolicy.com/posts/2010/02/12/tear_gas_in_kashmir.

²⁶

http://eipr.org/sites/default/files/reports/pdf/security_guidelines_for_crowd_control_en.pdf.

²⁷ <http://pnppro10.org/downloads/POP.pdf>.

(ii) Tear gas, smoke grenades, water cannons, or any similar anti-riot device shall be used only when the public assembly is attended by actual violence or serious threats of violence, or deliberate destruction of property [Section 3(b)].

(iii) Tear gas may be utilised to break up formations or groupings of demonstrators who continue to be aggressive and refused to disperse despite earlier efforts [Section 8(c)].

Part E. Observations of the Monitoring Team

1. Observations regarding participants

(i) Peaceful rally participants

5.1 Monitors reported that the participants behaved in a peaceful and calm manner during the rally as early as between 9.00am to around 2.30pm at all of the six points. Participants chanted “Bersih”, “Hidup Rakyat” and occasionally sang “Negaraku”. The participants also followed instructions given by police or any private management companies, especially when participants were asked to move from gathering in front of private properties.

5.2 At the intersection of Jalan Tun Perak, Jalan Tunku Abdul Rahman (Jalan TAR) and Jalan Raja, (at about 12pm to 1pm) in front of Dataran Merdeka, a group of policemen were walking through the crowd to enter into the Dataran Merdeka barricade. The crowd made a path to allow them to walk.

5.3 Around 12.15pm, in the vicinity of the Masjid Jamek LRT Station, on Jalan Tun Perak, monitors observed the participants were in a buoyant mood with a lot of cheering and clapping going on. The participants dressed in green and yellow, held a vast array of banners, balloons and flowers. Overall, it seemed more a carnival-like atmosphere with a lot of people laughing, smiling and chatting. Some were standing and some were sitting on the road.

5.4 Monitors observed that participants stopped walking when they approached police barricades. Participants would stand in front of the barricades for a while, with some participants took photographs with the police force in the background, and then participants in many occasions sat in front of the police barricades.

(ii) Unruly behaviour by rally participants

5.5 At around 12.50pm near the roundabout on Jalan Kinabalu, some of our monitors heard some rally participants calling the police officers “sampah” as they passed the police line. The police officers, however, did not pay heed to what was said by the participants.

5.6 Around 12pm to 1pm, participants at the intersection of Jalan Tun Perak, Jalan TAR and Jalan Raja, booed and jeered at police officers but there was no retaliation by the police. Some police officers took pictures of the crowd surrounding them.

5.7 Between 12pm and 2pm, PDRM and DBKL constantly drove their vans, cars and trucks along Jalan Tun Perak through the middle of the crowd. A small number of participants (mostly in yellow t-shirts) at times threw things at the vehicles, including cans, empty plastic bottles, and other items, and at other times, the crowd cheered them.

5.8 Around 2.50pm, near the barricades at Dataran Merdeka, some of our monitors observed rally participants shouted “masuk, kita masuk”. The police force then sprayed water cannon and fired tear gas towards the participants. The monitors, who were trapped within the crowd of participants then heard a group of participants yelling “undur, undur..”. However, some of the participants kept on shouting “masuk, kita masuk.”

5.9 Between 3.30pm and 4.00pm, around Coliseum Restaurant on Jalan Tunku Abdul Rahman (Jalan TAR), some of our monitors observed participants of the rally taunting the police officers and FRU team especially after police launched tear gas and fired water cannons. Some of the participants also hurled “anjing, anjing” and also “anjing kurap” to the police and FRU officers.

5.10 Around 4.00pm, a monitor observed after police fired tear gas and water cannon, the crowd and lingering protestors had retaliated by throwing rubbish at the police from atop the Masjid Jamek LRT Station. After Chua Jui Meng and some lawyers managed to

convince the police to retreat and allow the protestors to leave, the lingering protestors continued to retaliate against the police by throwing bottles and rubbish against the police. The lingering protestors hurled rubbish and debris at the police whilst the police returned the same.

2. Observations regarding the police force

(i) Cooperative

6.1 Between 9.00am and 2.30pm, majority of the BC monitors observed the police force (including the FRU team) appeared unperturbed by the participants, and some were courteous towards the participants. On occasions when the police officers did not allow the participants and/or the BC Monitors to pass a certain pathway, police officers informed the participants and the participants would follow the instructions.

6.2 Around 12.00pm, around KLCC – between Jalan P. Ramlee and Jalan Raja Chulan, crowd marched towards the direction of Jalan Tun Perak. Along the way, traffic police gave full cooperation and managed the traffic for the crowd to march. Monitors observed there was no disturbance at all.

(ii) Unprofessional conduct by the police force towards participants and BC Monitors – uncooperative, rude and hostile

6.3 Around 3pm, in the area of the Dewan Bandaraya Kuala Lumpur (DBKL) building, a monitor saw a police officer grabbed a young Malay man in yellow Bersih t-shirt by his neck, when the man tried to resist, another police officer came up and began kicking the man on the legs and abdomen. The police officer then dragged the man away and blood was seen on his t-shirt.

6.4 Around 3pm – 3.30pm, when police force fired tear gas and deployed water cannons around the Jalan Kinabalu roundabout, the area was cordoned off and created a no exit possibility when tear gas was fired.

6.5 Around 3.30pm in the vicinity of the Masjid Jamek LRT Station, a monitor witnessed 7 policemen jumped on one lone Chinese male participant and kicked him non-stop before dragging him away. Some of the protestors at the Masjid Jamek LRT station started to throw

bottles and rubbish at the police officers below them. Whilst the monitors were safely behind the shutters of the Wisma Kraftangan building, monitors started taking photographs. Upon seeing this, police officers threatened and shouted at the monitors and verbally abused them.

6.6 Around 3.40pm, in front of Wisma Kraftangan, Jalan Tun Perak, police officers were trying to arrest some of the participants. One Malay male (around 30 years old), wearing a yellow Bersih t-shirt fell down in the middle of the road of Jalan Tun Perak (in front of OCBC Bank) after being chased by police officers. He was suddenly surrounded by around 5 – 6 police officers who then beat him.

6.7 At about 3.45 to 4pm, the police had started another round of arrests and chased after the protestors who were at Lorong Melayu next to OCBC and who were sheltering at the LRT Station. The arrested protestors were dragged and handled roughly. One protestor was punched in the stomach by a policeman in front of OCBC Bank (the first police officer was reprimanded and stopped by another policeman). A police officer threatened and abused a monitor and demanded of her camera. She refused and was backed up by other members of monitoring team. The said police officer then retreated. There was also harassment made towards the media and the photographers by the police.

6.8 Around 3.45pm, at the intersection between Lorong Tuanku Abdul Rahman and Jalan Melayu, near Blue Sky Hotel, a monitor saw a participant throw a rock towards the police but no one was injured. Soon after, both police and rally participants started throwing objects at each other including rocks and helmets.

6.9 Around 3.45pm, area Masjid Jamek LRT Station, Masjid Jamek LRT station. Monitors were prevented from going towards Burger King restaurant and were asked by police officers to move back. FRU trucks were parked in front of Masjid Jamek LRT Station. Media personnel (wearing Media tags) were observed saying that they were kicked out from the vicinity of Burger King restaurant by police officers. The monitors were informed by some of the members of the media that the police threatened to take away their cameras and destroy their media cards. They were also scolded for taking pictures. A monitor tried asking the police officer there to let the monitor pass as they wanted to go back to Bar Council building, but the police officer refused. One very irate police officer came towards us and

started screaming for the monitors and media personnel to move further back. The monitors backed off towards Dataran Merdeka. After a while, they inched their way down Jalan Tun Perak towards Burger King again. At some point, the police personnel from Dataran Merdeka were pushing them forward and those in front of Burger King were pushing them back.

6.10 A monitor observed around 4.00 pm, at the Masjid Jamek LRT Station, after police fired tear gas and water cannon, some participants had retaliated by throwing rubbish at the police from atop the Masjid Jamek LRT Station. After Dato' Chua Jui Meng and some lawyers managed to convince the police to retreat and allow the protestors to leave, the lingering protestors continued to retaliate against the police by throwing bottles and rubbish against the police. The lingering protestors hurled rubbish and debris at the police whilst the police return the same.

6.11 Around 4pm – 4.30pm, at the Central Market area, a participant approached a monitor saying he was shot at his abdomen by what is suspected to be plastic gun. He was wounded and bleeding. The participant claimed the police shot at him even though he was not protesting and was prepared to disperse.

6.12 Around 4.30pm, near OCBC Bank, Jalan Tun Perak - some protestors were arrested by the police officers. A monitor took a few pictures evidencing the same. One of the police officers came to her and shouted "Padamkan!" very loudly at her. She refused to respond and a monitor responded "dia peguam!" The police officer then walked away from her.

6.13 Some of the policemen had their names and numbers on the uniform. However, a majority of them had no such identification on their uniforms.

(iii) Indiscriminate and excessive use of tear gas and water cannons

Supplementary Interim Report to be distributed shortly.

3. Refusal of access by arrested persons to lawyers

6.14 Lawyers from Bar Council Legal Aid Centre arrived at PULAPOL at approximately 5.40pm and until the last batch of protestors were released at around 5.00am, the lawyers were not allowed to see the protestors. None of the police officers at the gate would even

speak to the lawyers to try and negotiate allowance of access. Instead, the lawyers were told that that they were waiting for orders from Bukit Aman to allow the lawyers in. The requests, demands and pleas of the lawyers fell upon deaf ears and a row of stonewall silence. Yet, members of the media were allowed in to see the detainees and so too members of the Human Rights Commission of Malaysia (SUHAKAM). At one stage, the police also tried to erect barbed wire at the front entrance but later decided not to. Attempts to confirm whether or not certain people were detained, for the benefit of family members outside, were also met with silence and inaction.

Dated this 1st day of May 2012.