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Our ref: 2023000822 EB/KSM/BQM(JY)

Date: 5 October 2023

Your ref: *please advise*

Sent by: Email only (cgunness@outlook.com)

Christopher Gunness
Myanmar Accountability Project

Dear Sir,

LEGAL OPINION ON POSSIBLE LEGAL ACTION AGAINST THE MYANMAR GOVERNMENT AND/OR ITS MILITARY OFFICIALS IN RESPECT OF ACTS OF GENOCIDE OR HUMANITY CRIMES COMMITTED AGAINST ETHNIC MINORITIES SUCH AS THE CHIN AND ROHINGYA POPULATION

We thank you for instructing us on the above.

Our opinion on the matter is set out below. This opinion is to be read with the 'Qualifications and Assumptions Sheet' attached as Appendix 1.

Instructions

I have been asked to consider if civil society organisations, or Chin or Rohingya survivors or victims may take legal action in the Malaysian courts against the Myanmar government and/or its military for genocide or crimes against humanity committed in Myanmar.

I answer as follows.

Previous cases of "universal jurisdiction"

1. Here, the claimants are looking to launch a legal action in the Malaysian courts over acts committed by persons in a foreign country. Unfortunately, there are no reported Malaysian cases on "universal jurisdiction" which are relevant to the factual circumstances and question posed.

Extra-territorial jurisdiction of the Malaysian courts

2. Save for limited circumstances not applicable here, the Malaysian courts do not have extra-territorial jurisdiction over acts committed in Myanmar. One limited circumstance under section 4(1)(h) of the Malaysian Penal Code provides that the Malaysian courts have extra-territorial jurisdiction over chapter VI, VIA and VIB offences committed "by any person who after the

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commission of the offence is present in Malaysia". Chapter VI, VIA and VIB relate to the offences of waging war against the Malaysian King and Rulers, terrorism, activities against parliamentary democracy and organised crime. There are no known cases where the offences have been used in relation to conduct against foreign governments, territories, or entities. The interpretation section 130A also relates parliamentary democracy as referring to the Malaysian parliament. The offences of activities against democracy were enacted at that time for a specific purpose by the then Malaysian government to curtail dissent, street protests and critique of its policies and conduct. Only perhaps that the section 126 offence is a distinct possibility to act on, but there needs to be evidence that Chin and Rohingya are autonomous governing "powers" at peace or in alliance with the Malaysian government.

Genocide Convention 1948

3. Malaysia is a party to the Genocide Convention 1948 (GC). However, Malaysia practises dualism, and international treaties can only operate in our national legal system once Parliament has transformed them through statute. Unfortunately, the GC has not been localised by domestic law. The Malaysian legislature has not given legal effect to the convention.

4. While we succeeded in our arguments to have the court apply the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) although there was no corresponding local law, our position rested on the amendment to article 8(2) of the Malaysian Federal Constitution. The said amendment incorporated a prohibition against "gender" discrimination. As such, the court agreed with us that the amendment had domestically incorporated CEDAW; see *Noorfadilla*. Subsequently, the Court of Appeal in *AirAsia* doubted the correctness of the decision in *Noorfadilla*, but I submit that it was *obiter dictum*.

5. Even if we are to argue that the GC is customary international law and it should be imported through section 3(1) of the Civil Law Act 1956, there is no specific offence of genocide (and its corresponding punishment) that the Malaysian prosecutor can apply. Section 3(1) allows the Malaysian courts to incorporate English law in the absence of any written law, provided that it is not contrary to Malaysian public policy. To that extent, customary international law, as applied by the English courts as part and parcel of the common law, can be imported.

6. But no criminal proceedings can be mounted under custom without reference to a specific offence or penal punishment for that offence under Malaysian law. In other words, the claimants cannot rely on custom to incorporate GC and pursue a criminal case. Article 7(1) of the Federal Constitution states that no person can be punished for an act which was not punishable by law when it was done. "Law" in article 7(1) includes written or statute law, common law, and any custom of usage having the force of law (as defined in article 160(2)). This provision will thus bar the importation of customary international law through section 3(1).

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7. This legal issue of what local Malaysian law we can enforce and use in the courts is a separate one from who can bring an action. The claimants must first establish there is a law under which they can proceed in the Malaysian courts. Once we can establish such a law – whether through statute or under common law (applying customary international law) – then the next question would be the legal standing of a party to sue. In civil cases, civil society organisations are able to sue if the courts are satisfied that the suit is a matter of public interest; it is not frivolous or an abuse of process; and the organisation has a real and genuine interest in the subject matter. Organisations usually sue as a party together with the survivors or victims of the alleged actions committed against the latter. In criminal matters, civil society organisations have lodged police reports and helped with the gathering of evidence. At times, representatives or experts from these organisations also appear as witnesses in the courts.

<u>The Geneva Conventions Act 1962</u>

8. In 1962, Malaysia enacted the Geneva Conventions Act (GenevaCA) to give legal effect to four conventions namely:

   (a) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (1st Convention);

   (b) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (2nd Convention);

   (c) Geneva Convention Relative to the Treatment of Prisoners of War 1949 (3rd Convention); and,

   (d) Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (4th Convention).

9. Section 3 of the GenevaCA provides that grave breaches of four provisions of the four conventions are offences punishable by the Malaysian courts. Any person may commit the offences – irrespective of citizenship or nationality – whether in or outside Malaysia. In the case of an offence committed outside Malaysia, a person may be investigated, charged, tried and punished in the Malaysian courts as if the offence had been committed in Malaysia. This means that section 3 provides an exception to the ordinary rule that Malaysian courts can only hear cases regarding acts committed within the jurisdiction of the Malaysian courts. The exception under the GenevaCA specifically states that *even if* the acts were committed outside of Malaysia, they would be treated as having been committed in Malaysia so as to clothe the Malaysian courts with jurisdiction. Ordinarily, and without section 3, the Malaysian courts would not be able to hear a case where the acts were committed in Myanmar. Section 3 states that acts committed in Myanmar under the Geneva CA are to be treated as having been committed in Malaysia.

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10. The four provisions are as follows:

    (a) article 50 of the 1st Convention;

    (b) article 51 of the 2nd Convention;

    (c) article 130 of the 3rd Convention; and,

    (d) article 147 of the 4th Convention.

    They are all similar. They relate to the acts of wilful killing, torture, inhuman treatment, unlawful deportation, among others.

11. The GenevaCA thus applies the principle of universal jurisdiction for these crimes and grants the Malaysian courts the right to exercise jurisdiction over Myanmar nationals suspected of committing them. However, the claimants must show that the Myanmar armed conflict under scrutiny is of an *international* nature, and not merely an internal conflict. This will depend on the evidence available.

12. While common article 3 of the said four Geneva Conventions has been incorporated into Malaysian law under the GenevaCA and applies only in the case of an armed conflict not of an international character (i.e. non-international armed conflict situation, or NIAC), no offences have been prescribed for them under Malaysian law.

13. There are two core elements that must be met for a NIAC situation to arise:

    (a) protracted armed violence is taking place, meaning that a certain level of intensity of armed violence is reached; and,

    (b) the actors taking part in it must exhibit a certain degree of organisation.

14. In *Tadić*, it was found that the fighting among various entities within the former Yugoslavia since 1991 exceeded the "intensity requirement" applicable to armed conflict. This was in relation to the question whether an armed conflict existed in Bosnia-Herzegovina between the government of Bosnia-Herzegovina and the Bosnian-Serb forces during the indictment period.

15. The Trial Chambers relied on indicative factors relevant to assess the "intensity" criterion, none of which are, by themselves, essential to establish that the criterion is satisfied. These factors included the number; duration and intensity of individual confrontations; the type of weapons and other military equipments used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the extent of material destruction; and the number of

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civilians fleeing combat zones. The involvement of the UN Security Council may also reflect the intensity of a conflict; see also *Ramush Haradinaj*.

16. For the second element in *Tadić*, it was found that both sides had the requisite level of organisation both at a political and military level; see also *Slobodan Milosevic*. Factors included the command structure and disciplinary rules and mechanisms of the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate, and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.

17. *Haradinaj* also states that the alleged crime does not need to have occurred at a time and place in which there was actual combat, so long as the acts of the perpetrator were "closely related" to hostilities occurring in the territories controlled by parties to the conflict.

18. The final requirement is that the victims took no active part in the hostilities at the time the offence was committed; see *Haradinaj*. The perpetrator must know or should have known the status of victims as persons taking no active part in the hostilities.

<u>Possible legal actions</u>

19. On the assumption that there is no evidence to show that the conflict is not of an international character, then the grave breaches route would not be available. If there is evidence that common article 3 was violated, a criminal complaint through lodging a police report is one option. However, a judicial remedy through the Malaysian court system will be unavailable as no offences have been prescribed for those violations. The remedies may have to be sought elsewhere.

20. In any case, it is not uncommon for police reports to be lodged for advocacy purposes particularly on matters of global human rights interest and even if the possible offences committed are unclear. There is no need to set out the criminal law provisions the claimants are going under as it is for the police and prosecutor to decide. For example, if section 126 of the Penal Code is a possibility, it can be a basis to be suggested in the report. This report can be lodged whether or not the perpetrator is in Malaysia. There are no costs implications (save for out-of-pocket disbursements), but there may be security risks to the claimants who are likely to be in Malaysia as refugees or asylum-seekers. Police may wish to take witness statements from the claimants and witnesses if they continue with the investigations.

21. The police may commence investigations and will refer the matter to the Public Prosecutor for further instructions. The Public Prosecutor (PP) is the Attorney General (AG) of Malaysia. If the PP

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does not allow the police to investigate or proceed in any way on the investigations including to arrest the perpetrators, the matter ends there. The claimants may have to file a separate judicial remedy application to compel the PP to instruct the police to go ahead. In practice, it is highly unusual for the Malaysian police to proceed against suspects who are not in Malaysia unless it is a high profile or public interest matter of grave importance. There is no hard and fast rule. Ideally, the perpetrators should be within the jurisdiction of the Malaysian courts in order for the police or PP to proceed.

22. There have been cases reported in the media where suspects have been charged and tried in absentia under section 425A of the Criminal Procedure Code. Section 425A however only empowers the court to proceed with a trial in the absence of the accused if the accused absconds *after* he or she is charged in court. If the PP, police or court wishes to do so, arrest warrants – both local and international – can be issued to arrest and extradite the accused to face trial. The court may wait until the arrest warrant is executed and the accused brought to court or proceed without the presence of the accused. However, the court cannot pass the death or life imprisonment sentences in the absence of the accused. Under sub-sections 3(1)(i) and (ii) of the Geneva CA, in the case of a grave breach of the conventions involving wilful killing of a protected person, it draws a sentence to imprisonment for life while any other offences are liable to imprisonment for a term not exceeding 14 years. It means that even if the court proceeds with the trial and pronounces judgment in the absence of the accused, the court cannot pass the life sentence. The conviction would be "incomplete" and the court has to wait until the accused is arrested and brought to court.

23. What this means is that section 425A may be inapplicable in a situation where a suspect has yet to be charged in court. One needs to be "charged" in court for section 425A to apply. To be charged in court, the suspect must be brought to or appears in court where the charge is read, and he or she pleads guilty or claims trial. Thus, in a situation where the perpetrator is outside of Malaysia, there can be no "charge" to be read. Rather, the practice has been for the PP to register the case with the courts for the purpose of seeking extradition of the perpetrator to Malaysia to face trial. If there is no application for extradition or the extradition does not succeed, then section 425A cannot be used by the PP to proceed with the trial in absentia.

24. There is another route, but it is more difficult. However, the claimants will be more in control of the litigation. It would entail filing a civil suit against the Malaysian government for its failure, neglect or refusal to refer Myanmar to the International Court of Justice (ICJ). Further or in the alternative, that the Malaysian government has failed, neglected or refused to act according to its GC obligations and legislate for genocide and related crimes in Malaysian law. In the latter, the suit will seek a declaration that the government has breached its GC obligation. It can also seek compensatory damages for the claimants although it may be difficult to succeed.

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25. The evidence required for both actions – criminal and civil – are roughly similar. However, the latter will be more focused on the legal obligations of the Malaysian government under the GC. The evidence collection process therefore can take place now once the identities of the claimants can be ascertained.

Further, I have been asked on 8 July 2023 to provide my opinion on further questions which I answer as follows.

Criminal complaint

26.

Q1: Whether extraterritorial jurisdiction exists over any of the relevant offences – and if so which offences?

A1: Further to our opinion above, the Malaysian courts have extra-territorial jurisdiction under section 2 of the Extra-Territorial Offences Act 1976. This jurisdiction covers any acts contrary to the provisions under the Official Secrets Act 1972 and Sedition Act 1948, or any offence under any other law, the commission of which is certified by the AG to affect the security of Malaysia.

However, the said jurisdiction only applies where the offences were committed by a citizen of Malaysia or a permanent resident of Malaysia, or committed on the high seas on board any ship or aircraft registered in Malaysia.

27.

Q2: Does the AG have the power to simply block an extra-territorial case? If so, is that an unfettered discretion?

A2: Yes, the AG has absolute power to prosecute offenders or discontinue criminal proceedings and investigations. Such power is not reviewable by the courts unless there has been a clear error of law or evidence of abuse of power or if the conduct is oppressive or vexatious; see *Karpal Singh* and *Hui Chin-ming*.

28.

Q3: What is the significance in practice of the fact that in theory the extra-territorial jurisdiction only exists if the perpetrator is in the country – is the prosecution simply going to refuse to act on this basis? Is there any process for challenging that if this is what happens?

A3: Ideally, the perpetrators should be on Malaysian soil. However, for certain high profile, public interest cases, the PP has pursued (by registration) cases against perpetrators who are outside

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of Malaysia. An arrest warrant will be issued and a request be made to INTERPOL to execute the warrant. Where an extradition treaty or arrangement exists, the government may seek the extradition of the perpetrator. Given there is no extradition treaty or arrangement between Malaysia and Myanmar, it is unclear how the government will practically secure the presence of an accused person who is located in Myanmar.

29.

Q4: If an investigation goes ahead, at what point does the process stop because the suspect is not present in the country? Can an arrest warrant be issued? Can assets be frozen or confiscated?

A4: As mentioned above, the process can continue even if the suspect is not in the country. The PP has absolute discretion to continue or otherwise. If the investigation establishes that an offence has occurred and it is a predicate offence under the Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA), any assets in Malaysia can be frozen and confiscated. Under AMLA, property – whether situated within or outside Malaysia – can be frozen for 90 days and seized for a total 12 months (including the freezing period) by an enforcement agency. In the meantime, the PP may apply to the High Court for an order prohibiting the person by whom the property is held or with whom it is deposited from dealing with the property.

The PP can choose to forfeit property either through a criminal prosecution or if there is no prosecution, by way of civil forfeiture proceedings.

<u>Civil case</u>

30.

Q5: Is there any basis in law for arguing that a government has committed a civil wrong under its domestic law by failing to implement a treaty obligation? What are the prospects of success (on a percentage basis)?

A5: Due to the strict separation of powers between the executive and judicial branches of the state, it will be an uphill task to argue that Malaysia has failed to incorporate a treaty into domestic law as the discretion for law-making lies with the former. It has been said that the courts should not interfere in when and whether Parliament should legislate or not. However, we have not tested in the courts whether the government should at least *consider* legislating the offence given the long passage of time and the seriousness of genocide as a crime against humanity. Therefore, the courts should give "anxious scrutiny" to the inaction by government to even consider legislation and be urged to find that such conduct has been unreasonable.

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31.

Q6: If we did win, what would be the likely result? Does it seem likely that Malaysia would then actually implement all of its treaty obligations? Or would it simply withdraw from treaties or pass a new domestic law to say that it is not obliged to implement treaty obligations? I.e. even if you won the litigation, would you get an outcome that is useful?

A6: If we succeed in the judicial review, the best the court can do is to order that the government consider legislating the offence of genocide. This may then take some time but at the very least, there is practically a positive step forward. However, once the offence is legislated it can only apply to offence committed from the time such offence is in force and cannot apply retrospectively.

32.

Q7: Who would be the claimant in this case?

A7: As mentioned above, civil society organisations could be the claimant if the courts are satisfied that the suit is a matter of public interest, it is not frivolous or an abuse of process, and the organisation has a real and genuine interest in the subject matter. Victims and survivors could also sue.

33.

Q8: How long would the case take to proceed? If it is thrown out, at what stage would this be likely to happen?

A8: A judicial review consists of two stages. The initial stage is called the "leave stage" where the court will sieve out frivolous or vexatious cases. The AG will likely argue that the proposed action should not be granted leave to continue to the second stage. The second stage is where the merits and substance of the matter is to be heard. The case will likely be thrown out at leave stage. The case could take from 3 to 9 months for disposal.

34.

Q9: What are the rules in Malaysia about costs? Do costs follow the cause (i.e. loser pays – the system used in most of the world in most civil litigation as far as I know)? And if so, what happens if the claimant is impecunious? Is there costs risk for MAP? What scale of costs might that be?

A9: The rules about costs are be found in Order 59 of the Rules of Court 2012. Generally, the courts will order costs in the cause, meaning the losing party will have to pay costs of the litigation. However, in public interest cases, the courts have on occasions ordered no costs against the losing party; see for example *The Speaker of Dewan Undangan Negeri of Sarawak*

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Datuk Amar Mohamad Asfia Awang Nassar). When costs are awarded and the winning party wishes to enforce costs against impecunious litigants, there are times where bankruptcy proceedings are taken out. There is a risk that costs may be ordered against the MAP unless we can show it is a matter of public interest. It would nevertheless be difficult to enforce costs orders against MAP which is not an organisation based in Malaysia.

The amount of costs for proceedings in the High Court is at the discretion of the court. For judicial review proceedings costs may range from RM15,000 to RM40,000.

35.

Q10: Some further careful cost-benefit analysis is warranted on this civil case idea and it would be good to have your thoughts. Related to that: would a win result in changes that would help the victims?

A10: As mentioned above, a win in the civil suit will only have the court order the government to consider legislating for genocide. And only criminal acts post-legislation can be prosecuted. If we are referring to victims who have suffered to date, a win will not assist them directly.

I trust this opinion has been of assistance. Do let me know if you have any queries. Thank you.

Sincerely,
for *AmerBON*

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APPENDIX I

Qualifications and Assumptions Sheet

The opinion rendered above dated 5 October 2023 is subject to the following qualifications and assumptions:

1. Our advice is given with respect to the laws of Malaysia in effect as of the date of our letter and is given on the basis that our advice will be governed by and construed in accordance with those laws and we express no opinion on any law of a jurisdiction outside of Malaysia.

2. Our advice is furnished based on such facts or information provided and we are not aware of any changes or modifications to such facts, information or assumptions which may affect our advice in any manner whatsoever.

3. Our advice is furnished based on the assumption that the background information furnished to us is and continues to be complete and correct and no relevant matter or information was withheld from us, whether inadvertently or otherwise.

4. The making of the above assumption indicates that we have assumed that each matter which is the subject of the assumption is true, correct and complete in every way. The fact that we have made the assumption in our advice does not imply that we have made any enquiry to verify an assumption or are aware of any circumstances, which would affect the correctness of any assumption. No assumption is limited by any other assumption.

5. We have not made any investigation into and take no responsibility for the accuracy, truth or completeness of the facts, information or assumptions provided to us or relied on or used by us in furnishing our advice, which has been furnished to us by any person.

6. Our advice only addresses the queries set out in the instructions given and we have not considered other documents or matters which may be related or are in connection with those queries, and any comment which we may make on related matters are purely for purposes of highlighting the issue addressed.

7. We express no opinion about factual matters, in particular, such matters which we have not verified and are not expressing an opinion on, and we do not assume any responsibility for the accuracy, fairness or completeness thereof (whether express, implied or incorporated by reference to another document contained in any of the facts or information furnished to us).

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