

Malaysia and the Rome Statute: Panel Discussion during the Margins of the IHL Moot Court Competition at the International Islamic University Malaysia on 12 October 2019

*Dr. Jan Römer**

I. Introduction

For over ten years, Malaysia—including governmental officials—had been steeped in discussions on the ratification of the Rome Statute. Eventually, on 4 March 2019, the Malaysian government notified the United Nations of its accession to the Rome Statute indicating that the decision would enter into force six months later. This caused a highly controversial debate in Malaysia among many stakeholders, particularly in view of the Rulers' role as supreme commander of the armed forces and their immunity, and resulted in Malaysia's withdrawal on 29 April 2019. The International Humanitarian Law (IHL) Moot Court¹, co-organized by the International Islamic University Malaysia and the International Committee of the Red Cross (ICRC) and held on 12-13 October 2019, offered a great opportunity to reassess Malaysia's position on the Rome

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¹ This was the 16th edition of the IHL Moot Court in Malaysia that is organized annually.

Statute and to draw a roadmap. Dr Mohd Hisham Mohd Kamal and Dr Fareed Mohd Hassan accepted the invitation to a panel chaired by Dr Jan Römer, ICRC Regional Legal Adviser for East Asia.

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DR. FAREED MOHD HASSAN, LL.B. (Sha. & Civ.) Hons (USIM), MCL (IIUM) and Ph.D. (Aberdeen) is a Senior Lecturer at the Faculty of Shariah and Law, Universiti Sains Islam Malaysia (USIM). He completed his Ph.D. thesis entitled “National Prosecution Against Heads of State of Non-State Parties to the Rome Statute in Southeast Asia: Challenges and Prospects Under the Complementarity Principle” in May 2018. His research areas include international criminal law and international criminal justice system.

II. The History of War Crimes and Crimes Against Humanity and How It is Implemented in Malaysia by Dr Hisham

Dr Hisham began by describing the threshold for the commission of war crimes, and then explained that the criminalization of war crimes began in the nineteenth century. In the beginning, international law left to national courts the task of prosecuting and punishing perpetrators. Following the end of World War II, the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo were established, in 1945 and 1946 respectively, to punish war criminals. He recalled that a lot of progress happened in the

1990s when the Security Council established the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in 1993 and 1994 respectively. The permanent International Criminal Court (ICC) was established by the ICC Rome Statute in 1998. There are also other special criminal courts and tribunals for Sierra Leone, Lebanon and Cambodia.

Dr Hisham then described the threshold of crimes against humanity and explained that such crimes were criminalized for the first time by the Statutes of the IMT and of the IMTFE. He also explained that before 1945, only low-ranking servicemen were tried. Since 1945, high-ranking officers have also been tried by virtue of command or superior responsibility.

Dr Hisham then turned to the legal situation in Malaysia. With regard to the issue surrounding the withdrawal of Malaysia's consent to the Rome Statute which criminalizes war crimes, crimes against humanity and genocide, he was of the opinion that it would still be good for Malaysia to enact a law making the commission of such crimes anywhere in the world as crimes punishable in Malaysian courts.

He explained that Malaysia is a party to the Geneva Conventions and has enacted the Geneva Conventions Act in 1962, which sets forth war crimes committed during an international armed conflict. However, the Act does not cover violations of IHL during non-international armed conflicts. Even though Malaysia is not yet a party to Additional Protocol II to the Geneva Conventions, it is good practice to enact a statute to punish such violations.

Dr Hisham gave another example for the need to enact further penal provisions under domestic law: Malaysia has been a party to the Convention on Genocide since 1994 but has not criminalized acts of genocide. In the event that genocide is committed in Malaysia, for example, the perpetrator cannot be tried for genocide, but only for multiple murder. The classification of the crime as an ordinary crime demonstrates a tendency to misrepresent the very nature, hence, to belittle the seriousness of, the crime of genocide.

Dr Hisham concluded his lecture by underscoring how important it is for Malaysia to enact legislation criminalizing and punishing such heinous crimes for purposes of complying with its international obligations.

III. The Role of the Rulers of Malaysia as Supreme Military Commanders by Dr Fareed

Dr Fareed started by explaining that usually it should be uncontroversial to support the ICC and its founding treaty: the Rome Statute. He then explained the legal difficulties that Malaysia is currently facing.

He then clarified the role of the Malaysian rulers and what this means under the Rome Statute. Dr Fareed explained that Article 28 of the Rome Statute provides for the criminal responsibility of both a military commander and a civilian superior. For the discussion, he however only focuses on the criminal responsibility of a military commander, with special reference to the position of the Malaysian monarch as supreme commander of the Malaysian Armed Forces, as provided under Article 41 of the Malaysian Federal Constitution.²

Noting that Article 28(a) of the Rome Statute states that “a” military commander will be criminally liable for the alleged crimes committed by his/her subordinates, Dr Fareed explained that this means that *any* person who holds a position within the military will be held responsible for crimes committed by his or her subordinates. For Malaysia, the Yang di-Pertuan Agong (YDPA) or the monarch, being the supreme head of the Federation, holds a military position. Thus, he argued that, not only is the YDPA “a” military commander, His Majesty the YDPA is “the” military commander since he holds a position as “the” supreme commander of the Malaysian Armed Forces as provided under Article 41 of the Federal Constitution.

Dr Fareed further explained issues relating to the immunity of a head of State under Article 27 of the Rome Statute, a provision which sets aside any immunity that prevents the head of State from being held liable. He argued that this provision is not in line with the provision of the Malaysian Federal Constitution whereby the YDPA and other rulers are accorded with official immunity (*rationae materiae*). He also noted that in 1993, the Parliament has amended the Constitution to remove the YDPA and other rulers their Highnesses’ personal immunity (*rationae personae*). As such, their Highnesses can be sued or tried before the Special Court

² Malaysian Federal Constitution, Art. 41. “The Yang di-Pertuan Agong shall be the Supreme Commander of the armed forces of the Federation.”

established under Article 182 of the Constitution. However, their Highnesses can only be sued or tried based on their personal capacity, but not under their Highnesses' official capacity—neither as the Head of State nor as the Supreme Commander of the Armed Forces as stipulated under Articles 181 to 183 of the Constitution.³

³ Malaysian Federal Constitution, Art. 181 “(1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court established under Part XV”;

Art. 182. “(1) There shall be a court which shall be known as the Special Court and shall consist of the Chief Justice of the Federal Court, who shall be the Chairman, the Chief Judges of the High Courts, and two other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

(2) Any proceedings by or against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity shall be brought in a Special Court established under Clause (1).

(3) The Special Court shall have exclusive jurisdiction to try all offences committed in the Federation by the Yang di-Pertuan Agong or the Ruler of a State and all civil cases by or against the Yang di-Pertuan Agong or the Ruler of a State notwithstanding where the cause of action arose.

(4) The Special Court shall have the same jurisdiction and powers as are vested in the inferior courts, the High Court and the Federal Court by this Constitution or any federal law and shall have its registry in Kuala Lumpur.

(5) Until Parliament by law makes special provision to the contrary in respect of procedure (including the hearing of proceedings *in camera*) in civil or criminal cases and the law regulating evidence and proof in civil and criminal proceedings, the practice and procedure applicable in any proceedings in any inferior court, any High Court and the Federal Court shall apply in any proceedings in the Special Court.

(6) The proceedings in the Special Court shall be decided in accordance with the opinion of the majority of the members and its decision shall be final and conclusive and shall not be challenged or called in question in any court on any ground.

(7) The Yang di-Pertuan Agong may, on the advice of the Chief Justice, make such rules as he may deem necessary or expedient to provide for the removal of any difficulty or anomaly whatsoever in any written law or in the carrying out of any function, the exercise of any power, the discharge of any duty, or the doing of any act, under any written law, that may be occasioned by this Article; and for that purpose such rules may make any modification, adaptation, alteration, change or amendment whatsoever to any written law”;

He then discussed that since Malaysia subscribes to a dualist theory of international law, treaties are not automatically applied in the domestic legal system but must instead be incorporated into legislation by Parliament. Should Malaysia join and become a State party to the Rome Statute, the Parliament must pass legislation which can be called “the Rome Statute Act”, or amend existing legislation to incorporate all the provisions of the Rome Statute. This is pertinent since Article 120 of the Statute prohibits reservation from any of its provisions since the Rome Statute is a “take it all” or “not at all” treaty. However, such legislation must be in accordance with the Federal Constitution being the supreme law of the Federation as provided under Article 4(1) of its Constitution.

Upon inquiry by the chair on whether the rulers referred to have a rather “symbolic role” as supreme commander or if they indeed have “effective command and control, or effective authority and control” as required under Article 28 Rome Statute, Dr Fareed concluded that the role of the rulers is not just symbolic. In fact, it is clearly set forth in the legal system based on the Reid Commission—the drafters of the Malaysian Federal Constitution—which intended the YDPA to exercise powers militarily. This has been upheld by the Court of Appeal, though it was in the dissenting judgment in the case of *Armed Forces Council, Malaysia & Anor v Major Fadzil Bin Arshad* in 2012. Therefore, the YDPA and the rulers do have “effective command and control”.

Dr Hisham added that the government should have consulted all the Malay rulers who ascend to the position of Yang di-Pertuan Agong by rotation. A consultation with the Sultan of Johor would have been of special importance since he is the commandant of the Johor Military Forces. Further research is needed to better understand the implication of the involvement of these forces and the Sultan’s role as their commander, in view of the Rome Statute obligations, but it has been said that the Johore Military Forces, established in 1915, were involved in the Great War and the World War II.

Art. 183. “No action, civil or criminal, shall be instituted against the Yang di-Pertuan Agong or the Ruler of a State in respect of anything done or omitted to be done by him in his personal capacity except with the consent of the Attorney General personally”.

IV. Discussion

The chair noted that crimes against humanity can be committed in all times, whether at peacetime or during war, while war crimes can only be committed in the event of an armed conflict. As Malaysia presently enjoys a peaceful state of affairs, many may believe that the incorporation of war crimes in Malaysian legislation is less relevant. He asked Dr. Hisham to explain how it may be relevant for Malaysia to amend the existing Geneva Conventions Act 1962.

Dr Hisham mentioned a few reasons. First, Malaysia should be able to prosecute and punish war crimes wherever, and by whom, they are committed. This is an important message to the international community that Malaysia will never be a safe haven for perpetrators of war crimes and crimes against humanity.

Secondly, even though Malaysia is not a warmongering country, there is no guarantee that it will be safe from external aggression. War crimes may be committed by aggressors and even by the aggrieved. Sometimes, in order to repel aggression, the aggrieved may resort to desperate measures, including the commission of war crimes. Nevertheless, this should not go unpunished.

Upon a further question from the chair, Dr Hisham noted that Malaysia deploys peacekeeping troops, including to countries at war. The peacekeeping forces do not take side in the armed conflicts, and therefore have the status of civilians. This means that if they are attacked, the perpetrator commits a war crime. Thus, a better legal framework would increase the protection of Malaysia's peacekeeping forces.

Dr Hisham further explored the point that crimes against humanity can be committed during war and peacetime. This thus means that the absence of war does not make the crimes irrelevant. In fact, incidents that can be categorized as crimes against humanity have happened in Malaysia before, but the perpetrators have gone unpunished. The civilian population must be protected from such crimes, hence the need for the penal legislation.

The chair noted one case from Germany of a woman having gone to Northern Syria where she got married to a fighter, and with whom she held Kurdish slaves. One of them was tortured to death. In this case, even though she was not physically involved in fighting, she committed crimes

that have a nexus to the armed conflict in Syria and is now being tried for the commission of war crimes in Germany. Malaysia should also keep in mind that there are Malaysian nationals that are so-called Jihadis going to these places to fight, where they possibly commit war crimes.

The chair then asked Dr Fareed how, in his opinion, a thorough consultation process among all relevant stakeholders—including academics—could unfold, and how a roadmap should look like for Malaysia to eventually become a party to the Rome Statute. As for the process for Malaysia to accede to the Rome Statute, Dr Fareed noted that all relevant stakeholders must first be consulted—particularly the rulers, the military, and most importantly, the people. Views from these stakeholders must be taken into consideration before Malaysia accedes to the Rome Statute. Academics can play an important role in providing opinions and views in this process. Once these stakeholders have been thoroughly clarified and well-informed, and views from academics voiced out and considered, the responsible agencies, including the Parliament, may have the chance to table a bill to pass legislation for the Rome Statute to have force within Malaysia, and in accordance with its Constitution, following its accession to the same.

V. Conclusion

The chair found that the expectations for this panel were met. It set a new and constructive tone and clearly showed a roadmap that he summarized as follows:

- There is a need, owing to several reasons, for Malaysia to incorporate into its legal system the punishment of all war crimes, crimes against humanity and genocide;
- The process can be set in motion even before accession to the Rome Statute;
- Having a debate within Malaysian society on the role of the Rulers is of utmost importance, including on the scope of the latter's immunity; and
- Malaysia may eventually adhere to the Rome Statute, though the process requires significant amounts of time and effort.