



ASIA JUSTICE COALITION SECRETARIAT

LETTER TO THE MUTUAL LEGAL ASSISTANCE INITIATIVE

21 September 2022

The Asia Justice Coalition (the Coalition) secretariat welcomes movement on the draft Mutual Legal Assistance Treaty (MLA Treaty or the Treaty).

Founded in 2018, the Asia Justice Coalition is a network of 12 organizations across Asia whose purpose is to improve the legal landscape in Asia to ensure justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law. The secretariat, which supports the Coalition, notes that the State-to-State cooperation envisioned by the draft treaty will assist in reducing barriers to appropriate prosecution of atrocity crimes within our region—a central facet of the Coalition’s broader purpose.

To this end, the secretariat fully supports:

- State Party obligations to criminalize and provide sufficient jurisdiction for domestic prosecution as given in draft Articles 4 and 5—crucial for the success of this Treaty in our region as Asia still lags behind in Rome Statute ratification and criminalization of atrocity crimes beyond grave breaches;
- The expansion of the principle of *aut dedere aut judicare* in draft Article 7 to all crimes included in the Treaty, which supports States’ more active role in addressing impunity as well as may locate justice for victims ‘closer to home’; and
- Broadly, the Initiative’s State-led process, and civil society engagement within it, as an opportunity for Asian jurisdictions to centre cooperation for international justice *within* the region and build on existing mechanisms and regional expertise to do so.

The secretariat adds our voice to calls by other non-governmental organizations¹ that the MLA Initiative to address the following:

- The inclusion of the crimes of torture and enforced disappearance be incorporated into Article 2. These atrocity crimes have been recognized as attaining *jus cogens*² and accountability for such acts is equally relevant in Asia³ as the current stand-alone crimes of war crimes, crimes against humanity, and genocide;
- Removal of draft Article 21(2)(b) which provides a vague discretionary refusal of mutual legal assistance on the basis of ‘sovereignty, security, *ordre public*, or other essential interests’. Without diminishing the importance of international legal principles, political use of ‘sovereignty and non-interference act as practical and rhetorical hurdles’⁴ to prioritising justice for atrocities in our region; and
- Inclusion of an additional paragraph in Article 60 to provide: ‘Each State Party shall take the necessary measures to ensure that the following rights of victims are also safeguarded: (a) the right to receive information on an ongoing investigation, prosecution or judicial proceedings in a language they understand; (b) the right to access support services when needed.’ Victim/survivor engagement—including

¹ Amnesty International et al, ‘Joint NGO Letter to the Core-Group and Co-Sponsoring States to the Mutual Legal Assistance (MLA) Initiative’, 24 September 2020, <https://www.amnesty.org/en/wp-content/uploads/2021/05/IOR5131232020ENGLISH.pdf>.

² Report of the International Law Commission, Seventy-first Session, ‘Chapter V: Peremptory Norms of General International Law (Jus Cogens)’, UN Doc A/74/10, <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>; and International Committee of the Red Cross, Customary IHL Database, ‘Practice Relating to Rule 98: Enforced Disappearance,’ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule98_sectiona.

³ See Human Rights Watch, ‘Myanmar: Security Forces Torture Rohingya Returnees’ 21 August 2018, <https://www.hrw.org/news/2018/08/21/myanmar-security-forces-torture-rohingya-returnees>; Fortify Rights, ‘Myanmar: New Evidence and Findings of Post-Coup d’État Crimes Against Humanity’ 24 March 2022, <https://www.fortifyrights.org/mya-inv-2022-03-24/> (report including alleged enforced disappearance).

⁴ Asia Justice Coalition secretariat, ‘Avenues To Accountability: Universal Jurisdiction and Asia—Convening Note’, July 2022, <https://www.asiajusticecoalition.org/projects/universal-jurisdiction-convening-series--avenues-to-accountability%3A-universal-jurisdiction-and-asia>.

This letter shall be attributed to the Asia Justice Coalition secretariat.

Its contents may not necessarily reflect the position of a specific Member and/or all Members of the Coalition.

engagement beyond survivor participation in proceedings as witnesses—is vitally important for achieving holistic justice.⁵

The secretariat further recommends:

- Incorporating the war crime of starvation into the definition of ‘war crime’ in Article 2(5)(e)(xii) rather than in Annex E, given its relevance in the region;⁶
- Including in draft Article 5bis that international cooperation shall not be refused on the ground that a State Party had not criminalized the relevant Treaty crimes at the time the conduct was committed, permitting retrospective requests from/to jurisdictions that did not previously have atrocity crimes incorporated within their domestic systems;
- Interrogating whether excluding requests for charges related to ‘political opinion’, which the secretariat supports as an explicitly discriminatory ground for mandatory assistance refusal in draft Article 21(1)(a) and draft Article 35(1)(a), will be sufficient to prevent States from utilising the Treaty terms for undue prosecution of human rights defenders under terrorism or sedition charges;⁷ and
- Ensuring that draft Article 59 includes obligations on State Parties to ensure the protection of victims, witnesses, and others not solely within the Requesting and Requested State but also through any third States through which they, or their information, may transit.

Asian civil society and non-governmental organizations will be fundamental in ensuring Treaty ratification and implementation, as well as identifying how the Treaty can support local solutions. We welcome further discussion and encourage convening Asian civil society on these and further issues.

The secretariat stands ready to assist.

⁵ Centre for Peace and Justice, ‘Ensuring Rohingya Victim Participation and Community Engagement in International Justice Processes—Briefing Paper’ September 2020, <https://cpi.bracu.ac.bd/wp-content/uploads/2022/04/Briefingpaper-RohingyaVictimParticipationandC.pdf>; Burmese Rohingya Organisation UK, ‘“We Need Justice From Argentina Court”—Women Rohingya Genocide Survivors Get Their Day In Court’, 18 August 2021, <https://www.brouk.org.uk/we-need-justice-from-argentina-court-women-rohingya-genocide-survivors-get-their-day-in-court/>.

⁶ Amnesty International, ‘Myanmar: Forced Starvation of Rohingya Highlights Danger of Premature Returns’, 6 March 2018, <https://www.amnesty.org/en/latest/news/2018/03/myanmar-forced-starvation-of-rohingya-highlights-danger-of-premature-returns/>.

⁷ UN News, ‘Myanmar Junta’s Execution of Four Democracy Activists Condemned by UN’ 25 July 2022, <https://news.un.org/en/story/2022/07/1123172>; International Commission of Jurists, ‘Danger in Dissent: Counterterrorism and Human Rights in the Philippines’, January 2022, https://www.icj.org/wp-content/uploads/2022/01/ICJ_PhilippinesRedTagging_270122.pdf.