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*Permanent Representative of Malaysia
Geneva*

Date: 10 October 2017

Mr. David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Ms. Annalisa Ciampi

Special Rapporteur on the rights to freedom of peaceful assembly and of association

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Office of the High Commissioner for Human Rights

GENEVA

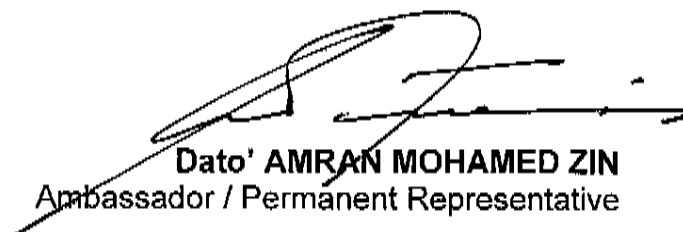
Madame/Sirs,

I wish to refer to your Joint Communication in Reference: AL MYS 2/2017 dated 28 March 2017, and hereby transmit in the ANNEX of this letter the response of the Government of Malaysia concerning the conviction and sentencing of Ms. Lena Hendry, a former Program Manager at Pusat Komunikasi Masyarakat (Pusat KOMAS), on the screening of a documentary film entitled "No Fire Zone: The Killing Fields of Sri Lanka" on 3 July 2013.

2. I further wish to clarify that, in reference to paragraph 5 of your Joint Communication, the Government of Malaysia had already provided its reply to the communication in Reference MYS 3/2014 in a letter from the Permanent Representative of Malaysia dated 14 August 2014. In that letter, MYS 3/2014 was referred to as "AL G/SO 214 (67-17) Assembly & Association (2010-1) G/SO 214 (107-9) dated 5 May 2014".

3. In thanking you for your understanding and cooperation, I express my sincere hope that the attached response from the Government of Malaysia will be fully taken into account.

Please accept the assurances of my highest consideration.


Dato' AMRAN MOHAMED ZIN
Ambassador / Permanent Representative

Copy to: Chief of Special Procedures Branch
Office of the High Commissioner for Human Rights
GENEVA

ANNEX

**RESPONSE FROM THE GOVERNMENT OF MALAYSIA
TO THE JOINT COMMUNICATION CONCERNING THE CASE OF
MS. LENA HENDRY, A FORMER PROGRAM MANAGER AT PUSAT KOMAS,
FOR SCREENING A DOCUMENTARY FILM IN 2013**

1. The Government of Malaysia notes that the joint communication in reference MYS 2/2017 dated 28 March 2017 was mainly premised on new information regarding the conviction and sentencing of Ms. Lena Hendry on the basis of provisions in the Film Censorship Act 2002 [Act 620] ("Film Censorship Act") as stated in paragraph 6 of said communication, as follows:

- *"On 21 February 2017, Ms. Hendry was convicted by the Kuala Lumpur Magistrate's Court for the "circulation, distribution, display, production, sale, hire or possession" of film material that the government-appointed Board of Censors had not approved. The penalty for this crime is up to three years imprisonment or fine of up to RM30,000 (approximately USD 7,200)."*
- *"On 22 March 2017, Ms. Hendry was sentenced to a fine of RM10,000 (approximately USD 2,260)."*

2. The Government of Malaysia notes that the Special Rapporteurs had expressed grave concern at the conviction and sentencing of Ms. Lena Hendry, that allegedly are in violation of international human rights standards on freedom of expression. The Government also notes that the Special Rapporteurs had reiterated concern that this alleged form of judicial harassment has a chilling effect on public debate, human rights advocacy and the civic space in Malaysia, and may negatively affect the work of NGOs defending human rights.

3. The response and comments by the Government of Malaysia on the issues and allegations raised in the joint communication are hereby submitted in the interest of fairness and transparency, and are based on official records and information after due consultation with the relevant Malaysian authorities. The responses to the relevant issues and allegations mentioned in the Joint Communication are explained in the subsequent paragraphs.

Additional information regarding the case

4. The Government of Malaysia wishes to inform the Special Rapporteurs that the so-called "private screening" as alleged was in fact a public screening as it was held at the Kuala Lumpur and Selangor Chinese Assembly Hall. This was the crux of the charge under section 6(1)(b) of the Film Censorship Act that was preferred against Ms. Lena Hendry.

5. As to the parliamentary screening, it was never made known by Ms. Lena Hendry during police investigations that there was such a screening. In fact, she refused to answer any questions put to her during the investigation. The first time the parliamentary screening was ever mentioned was when she was giving evidence at the defence stage in the Magistrate's Court.

6. It was also mentioned in paragraph 4 of the joint communication that *"Ms. Hendry challenged the constitutionality of sections 6(1)(b) and 6(2)(a) of the Film Censorship Act 2002, which she argued imposed an unreasonable restriction on her right to freedom of expression as guaranteed by article 10(1)(a) of the Federal Constitution. On 10 April 2014, the High Court dismissed the constitutional challenge."* The Government of Malaysia wishes to add that the constitutionality issue was also referred to the Federal Court, the highest court in Malaysia, whereby it was dismissed.

Compatibility of Ms. Lena Hendry's conviction with Malaysia's obligations under international human rights law

7. Ms. Lena Hendry was convicted for committing an offence under section 6(1)(b) of the Film Censorship Act, and sentenced under section 6(2)(a) of the Film Censorship Act. Section 6 of the Film Censorship Act states:

"Unapproved film or film-publicity material

6. (1) *No person shall—
have in his possession or in his custody or under his control; or
circulate, exhibit, distribute, display, manufacture, produce, sell or hire,
any film or film-publicity material which has not been approved by the
Board.*

(2) *Any person who contravenes subsection (1) commits an offence
and shall be liable on conviction—
in respect of any film, to a fine of not less than five thousand ringgit and
not more than thirty thousand ringgit or to imprisonment for a term not
exceeding three years or to both; or
in respect of any film-publicity material, to a fine of not less than one
thousand ringgit and not more than ten thousand ringgit.*

(3) *This section shall not apply to any film or film-publicity material
in respect of which a certificate of exemption has been issued under
subsection 8(3) so long as any conditions subject to which the
certificate is issued are complied with."*

8. In Ms. Hendry's case, she was charged and sentenced under the Film Censorship Act after being given a fair trial and accorded due process of law.

9. The Government of Malaysia reaffirms its continuous adherence to the underlying philosophy and norms as laid down in the Universal Declaration of Human Rights (UDHR) as long as they are not inconsistent with the Federal Constitution, the supreme law of Malaysia and national legislation.

10. The Government of Malaysia believes that certain rights are not absolute rights under international law and therefore, the Government must balance these rights that international law has recognised with the rights of others whilst maintaining the social balance, peace and harmony in the society. In particular, the Government of Malaysia adheres to Articles 19 and 20 of the UDHR on the individual's right to freedom of opinion and expression and rights to freedom of peaceful assembly and of association. Nonetheless, the Government maintains its understanding that these

rights are not absolute by virtue of the limitations outlined in Article 29(2) of the UDHR in which "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

11. The Government of Malaysia would like to emphasize that the right to freedom of opinion and expression and right to freedom of peaceful assembly and of association are guaranteed and protected under Article 10(1) of the Federal Constitution. Nonetheless, these rights are not absolute. For the purposes of the good and orderly conduct and behaviour of people as well as security of the country, Article 10(2) of the Federal Constitution imposes certain restrictions on the exercise of such rights.

12. As regards the right to freedom of speech and expression, Article 10(2)(a) of the Federal Constitution states that "*Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against any contempt of court, defamation or incitement to any offence*".

13. In respect of the right to peaceful assembly, Article 10(2)(b) of the Federal Constitution specifies that Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order. Likewise, under Article 10(2)(c), Parliament may by law impose the restrictions based on the same grounds plus the grounds of morality in respect of the right to form association.

14. In light of the above, the Government of Malaysia emphasizes that the limitations set out in the UDHR are reproduced with modifications under Malaysian laws governing the rights to freedom of opinion and expression as well as freedom of peaceful assembly and association. These include, but are not limited to, the Film Censorship Act and Peaceful Assembly Act 2012 [Act 736] whereby Parliament imposes restrictions on the exercise of such rights on the grounds of security, public order, morality and protection of the rights and freedoms of others pursuant to Article 10(2) of the Federal Constitution.

15. Similar restrictions and limitations set forth in Article 29 of the UDHR can be seen in Articles 19(3)(a) and (b) of the International Covenant on Civil and Political Rights (ICCPR) whereby the right to hold opinion is subject to certain restrictions provided by law for purpose of respect of the rights and reputations of others, protection of national security, public order, public health or morals. Therefore, the Government of Malaysia underscores that the enjoyment of the right to freedom of opinion and expression which is embedded in the ICCPR is not absolute and subject to certain limitations or restrictions as determined by law. In this respect, although Malaysia is not yet a State Party to ICCPR, the Government of Malaysia remains committed towards meeting its commitments to ensure freedom of opinion and expression provided that exercise of such freedom is in accordance with the applicable domestic laws, rules and regulations.

16. With regard to the sanctions that include severe criminal sanctions and deprivation of liberty, as per the recommendations made by the Special Rapporteurs in Reports A/66/290 (paragraph 18) and A/HRC/23/34 (paragraph 31), particularly on the recommendation that "*What may be morally objectionable (from one point of view) may not necessarily be legally inadmissible or condemnable. Criminal sanctions should be the very last resort measures only, to be applied in strictly justifiable situation.*", the Government of Malaysia would like to highlight that the punishment for an offence of circulating, exhibiting, distributing, displaying, manufacturing, producing, selling or hiring any film or film-publicity material which has not been approved by the Board of Censors under section 6(2)(b) of the Film Censorship Act is either imprisonment for a maximum term of three (3) years or fine of a maximum amount of RM30,000.00.

17. Ms. Hendry had claimed trial to the charge under section 6(2)(b) of the Film Censorship Act and was thereafter convicted by the Magistrate's Court. Prior to making judgment, the Magistrate's Court had evaluated all evidence produced both by the prosecution and the defence as well as the relevant laws, authorities and judicial precedent. Consequently, the Magistrate's Court sentenced Ms. Hendry to a fine of RM10,000.00 upon conviction.

18. The Court had carefully considered all the evidence and decided to impose the penalty based on the gravity of the offence. Hence, the Government maintains that the conviction of Ms. Hendry under the Film Censorship Act is compatible with Malaysia's commitments under the international human rights instruments such as the UDHR and ICCPR relating to the right to freedom of opinion and expression.

Compatibility of provisions under the Film Censorship Act with Malaysia's obligations under international human rights law, particularly on the rights to freedom of opinion and expression

19. The Film Censorship Act was enacted by Parliament due to grave concerns of the existence of obscene or illicit films which are contrary to the ethical, cultural, moral and religious values of the multi-racial Malaysian society.

20. The Government of Malaysia believes that the impact and effect of the distribution and sale of obscene or illicit films will not only damage the character and moral of the people, but also undermines efforts towards creating a harmonious society that subscribes to religious and moral values. Thus, the Film Censorship Act provides for control over and enforcement on the activities of possession, circulation, display, exhibition and production of obscene film or film which has not been approved by the Board of Censors established under this Act.

21. The Government of Malaysia wishes to inform that films are viewed as playing an important part in national development, security, social justice, racial unity and public behaviour. In this regard, the Government of Malaysia strives to ensure the suitability of a film for the viewing of the general public to curb negative and extreme elements that could potentially affect four (4) aspects, namely security and public order, religion, socio-culture, as well as decorum and morality of the Malaysian society, as spelled out in the Guidelines on Film Censorship.

22. The Government of Malaysia highlights that the High Court, in dismissing Ms. Hendry's application to challenge the constitutionality of sections 6(1)(b) and 6(2)(a) of the Film Censorship Act on 11 April 2014, stated among others that section 6(1)(b) of the Film Censorship Act is not a provision to prohibit all kinds of films but rather a procedure which is required to be adhered to before distribution or display of the films. The films should be censored prior to public display and this is intended to protect the interest of the public, of national security and public order.

23. The Film Censorship Act has been drafted to provide control over and enforcement on the activities of possession, circulation, display, exhibition and production of obscene film or film which has not been approved by the Board of Censors established under this Act. In this regard, the Government of Malaysia wishes to emphasize that the Act represents limited restriction of the right to freedom of speech and expression which is clearly allowed under the Article 10(2) of the Federal Constitution, and in consonance with Article 19 of the ICCPR and Article 29 of the UDHR.

24. The Government of Malaysia reiterates that in exercising freedom of speech and expression, consideration should also be given to the interests of society and the country. The rights need to be exercised responsibly by not undermining unity, public well-being and national security. The sovereignty of other foreign countries should also be respected. Thus, the provisions of the Film Censorship Act are compatible with Malaysia's commitments under international human rights law particularly with standards on the right to freedom of opinion and expression.

25. The Government of Malaysia appreciates that Articles 1, 2, 6(b) and (c) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration) provide that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, and that everyone has the right to publish, impart or disseminate views, information or knowledge on all human rights and fundamental freedoms, as well as to hold opinions on the observance of all human rights and fundamental freedoms and to draw public attention to those matters. Nonetheless, the Government of Malaysia underscores that the Declaration recognizes under Article 17 that everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Measures which have been taken to ensure that human rights defenders in Malaysia are able to carry out their legitimate work in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort

26. The Government of Malaysia has taken various steps to further strengthen fundamental freedoms in Malaysia, thus providing the civil society, including human rights defenders an enabling environment to carry out activities without fear of harassment, stigmatization or criminalization of any kind.

27. Among the measures taken by the Government in demonstrating its seriousness and commitment to protect human rights in Malaysia was the abolition in 2011 of the Internal Security Act 1960 [Act 82], which was enacted for the purpose of curbing acts such as subversion and action prejudicial to public order.

28. The promotion and protection of the right to freedom of assembly in Malaysia has also been reaffirmed. The Peaceful Assembly Act 2012 [Act 736] (Peaceful Assembly Act") was promulgated to breathe life to Article 10 of the Federal Constitution to enhance the implementation of the right to assemble peaceably as guaranteed by the Federal Constitution.

29. Prior to the enactment of the Peaceful Assembly Act, the right of citizens to assemble was governed by the Police Act 1967 [Act 344]. The Peaceful Assembly Act is seen as a significant progress in terms of human rights elements especially from the perspective that it allows citizens to organize assemblies and participate in assemblies peaceably and without arms subject only to restrictions deemed necessary or expedient in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons. A salient feature of the Peaceful Assembly Act that is noteworthy is that there is no requirement to apply for a licence. What is required is notification of the assembly and in addition the organizer has the right to appeal against the restrictions and conditions imposed on the assembly to the Minister.

30. Another measure taken was the establishment of the Human Rights Commission (SUHAKAM) *vide* the Human Rights Commission of Malaysia Act 1999 [Act 597]. SUHAKAM serves as one of the avenues for the civil society, including human rights defenders, to voice any grievances or complaints regarding infringement of human rights. SUHAKAM's function, among others, is to inquire into complaints regarding infringement of human rights. In this regard, SUHAKAM has also conducted several public inquiries to look into matters involving allegations of infringement of human rights, and had engaged with the Royal Malaysian Police on several occasions.

31. The Government of Malaysia understands that a State must be able to justify that certain limitations satisfy the test of legality, necessity, reasonableness and legitimate purpose. The Government of Malaysia thus emphasizes that the measures taken are intended solely for the purpose of facilitating the exercise of the right to freedom of opinion and expression and the right to freedom of peaceful assembly in Malaysia which is in tandem with international standards. The national law does not prohibit any individual from exercising his rights to freedom of opinion and expression and to form, join or participate in any association but rather provides a framework for the authorities to monitor if such rights are misused for purposes prejudicial to or incompatible with the interest of the security of the country, public order or morality.

32. The Government of Malaysia wishes to reiterate that the actions taken by the Malaysian authorities against Ms. Lena Hendry were in accordance with Malaysia's domestic laws, which are measures in light of its sovereign responsibility in regulating matters relating to the right to freedom of opinion and expression within its territory, as recognized by international law. In this regard, there is no validity in the alleged violation of international human rights standards on freedom of opinion and

expression in Malaysia, particularly on the conviction and sentencing of Ms. Hendry under the Film Censorship Act.

33. The Government of Malaysia gives its assurance that the right to freedom of opinion and expression and the right to freedom of peaceful assembly and of association shall continue to be observed in accordance with the Federal Constitution and other domestic laws of Malaysia. Malaysia is committed to the protection, promotion and implementation of human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create conditions conducive for this purpose in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms.

**Permanent Mission of Malaysia to the United Nations Office
and other International Organisations
GENEVA**

10 October 2017