

Myanmar: Legal Memorandum on Ministry of Transport and Communications Order to Block Access to Specific Websites

29 June 2020

Summary of advice

Blocking access to specific websites engages a wide range of human rights concerns, but the memorandum will particularly analyze how the Ministry of Transport and Communications (MOTC) order to block access to specific websites in March 2020 infringes on the person's right to freedom of expression and information. In the context of the COVID-19 pandemic, the MOTC order also undermines the right to health of all persons in Myanmar. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Myanmar is a party, the right to health guarantees access to health information. The MOTC order effectively hinders access to health information by blocking legitimate sources of such information.

Based on limited information provided to the ICJ, we recommend the following cumulative remedies available under Myanmar law to question the lawfulness of the MOTC order:

First, a complaint can be filed with the Myanmar National Human Rights Commission (MNHRC) to request it to investigate the matter under the 2014 Myanmar National Human Rights Commission Law (MNHRC Law). This option may be successful to facilitate the disclosure of the following: (i) the full list of websites ordered to be blocked, (ii) the exact grounds cited by the MOTC for banning access to each of the websites; (iii) the factual circumstances justifying the ban; and (iv) the "emergency situation" under Section 77 of the Telecommunications Act presumably invoked by the MOTC to justify the Order. Given the MNHRC's restrictive interpretation of Section 37 of the MNHRC Law, it may be best to first file a complaint with the MNHRC before any action is filed in court. In this way, Section 37 of the MNHRC Law would not prevent the MNHRC from looking into the matter.

Second, an application for a writ of mandamus may be filed with the Union Supreme Court pursuant to Sections 18(c), 296 and 378 of the 2008 Myanmar Constitution, The Application of Writs Act 2014¹ (2014 Writs Law) and the Procedural Rules and Regulations for Application of Writs² (2013 Writs Rule). Alternatively, a declaration suit may be filed against the MOTC or relevant public officer under the Specific Relief Act. However, notice must first be made to the relevant minister (if the suit will be filed against a government department) or to the public officer (if the suit is against that individual officer).

I. Background

Between 19 and 30 March 2020, the MOTC ordered major telecommunication service providers to take down 2,147 websites found by it to have disseminated "fake news," adult content, and child sexual abuse content.³ It is not clear whether the "fake news" mentioned here refers to COVID-19-related misinformation and/or some other, although telecommunication service provider Telenor mentioned COVID-19 in other portions of the

¹ Act no. 24/2014.

² Union Supreme Court Notification no. 117/2013.

³ Telenor, "Press Release: Blocking of 230 websites in Myanmar based on directive from authorities," 30 March 2020, <https://www.telenor.com.mm/en/article/blocking-230-websites-myanmar-based-directive-authorities> (Accessed 22 April 2020)

press release. Director General U Myo Swe of the Directorate of Communications publicly stated that access to these websites was being blocked for spreading misinformation on COVID-19.⁴ Section 77 of the Telecommunications Law authorizes the MOTC, in case an “emergency situation arises to operate for the public interest,” to direct a telecommunications licensee to suspend a service or “intercept or not to operate any specific form of communication.” The MOTC did not disclose the full list of websites whose access would be blocked pursuant to the MOTC Order. As of 1 April 2020, media outlets of the Rakhine and Karen ethnic communities, including *Voice of Myanmar*, *Narinjara News*, *Karen News*, *Mekong News* and several Rohingya news sites appeared to be among the websites to which access was blocked, thereby depriving certain communities of their frequently relied upon news sources in the time of COVID-19.⁵ The blocking of Rakhine-based and Rohingya news websites also coincides with the ongoing internet shutdown in Rakhine and Chin states.⁶

II. Discussion

Human Rights Impact

Blocking access to specific websites in the time of COVID-19 engages a wide range of human rights concerns. The right to freedom of expression, including the right to access and share information, is most directly engaged in this respect, as is freedom of association, given that many associations are formed and maintained through the internet and social media. These rights are also necessarily interrelated with other human rights. Particularly in the context of the present COVID-19 pandemic, it is worth calling special attention to the right to health, given that online services are indispensable to access humanitarian aid, healthcare, and information critical to prevent and manage the spread of COVID-19. This memorandum will highlight the right to freedom of expression and right to health – though the blocking of access to specific websites has an impact on the full range of human rights.⁷

1. International Human Rights Law

Right to freedom of expression

The rights to freedom of expression and information is protected under general international human rights law, particularly under article 19 of the International Covenant on Civil and

⁴ Frontier Myanmar, “Operators split as Telenor rejects govt order to block ‘fake news’ sites,” 27 March 2020.

⁵ International Commission of Jurists, “Myanmar: Government must lift online restrictions in conflict-affected areas to ensure access to information during COVID-19 pandemic,” 10 April 2020. Karen Human Rights Group, “Statement on COVID-19 and Blocking of Ethnic News Websites,” 9 April 2020; Joint Civil Society Statement on Myanmar government’s orders to block over 200 websites, April 2020, <https://www.apc.org/en/pubs/joint-civil-society-statement-myanmar-governments-orders-block-over-200-websites> (Accessed 6 May 2020)

⁶ International Commission of Jurists, “Myanmar: Year-long Internet shutdown must be brought to an end,” 20 June 2020; International Commission of Jurists, “Myanmar: Government must lift online restrictions in conflict-affected areas to ensure access to information during COVID-19 pandemic,” 10 April 2020.

⁷ Although telecommunication service providers must comply with the applicable regulations and directives ordered by government authorities,⁷ they must also keep in mind that companies are enjoined by the UN Guiding Principles on Business and Human Rights to respect human rights. This means that businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁷ Though the UNGPs are not a direct source of legal obligation, they partly reflect elements of international human rights law, particularly in regard to the State obligations to protect.. In connection with the responsibility of businesses, they nonetheless prescribe how businesses should operate in a manner that would uphold the human rights of stakeholders. In this case, telecommunication service providers can support the complaint, either by joining the complaint before the MNHRC, helping the plaintiff in building the case, or joining public statements expressing concern over the measure. Significantly, under Section 22, one of the powers and duties of the MNHRC is to consult with business enterprises as may be appropriate. This reasonably contemplates the human rights concerns arising from the issuance of the MOTC Order, and which telecommunication service providers are constrained to implement.

Political Rights (ICCPR) and as part of customary international law. It is also set out in the Universal Declaration of Human Rights (UDHR), and has been universally affirmed by all States, including Myanmar, in the 1993 Vienna Declaration and Programme of Action and numerous resolutions of UN bodies.

While Myanmar has not yet become party to the ICCPR, the formulation of freedom of expression contained in article 19, including the scope of permissible restrictions, is generally recognized as the authoritative iteration of the right under general international law. Article 19 of the ICCPR provides:

Article 19. 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 19 of the ICCPR tracks and clarifies the original iteration of the right under article 19 of the UDHR, which includes the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The authoritative interpretation of the scope of article 19 of the ICCPR is contained in General Comment 34 of the UN Human Rights Committee⁸

As evidenced in article 19(3), the right is subject to certain restrictions, but these may only be exercised exceptionally under narrowly circumscribed conditions. In particular, limitations must be:

- 1) provided for by law, in accordance with the principle of legality, meaning they must clearly and expressly define the scope of the limitation measures
- 2) for the purpose of advancing a legitimate aim, which is restricted to any of the following: the respect of the rights or reputations of others; the protection of national security; the protection of public order; or the protection of public health or morals
- 3) necessary and proportionate to achieving the legitimate aim.

Applying these standards to the case at hand, it is clear that the right to freedom of expression is engaged in respect of the taking down of content, or indeed of any regulation of content online.⁹ In July 2018, the UN Human Rights Council adopted by consensus a resolution affirming that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the Universal

⁸ UN Human Rights Committee, CCPR/C/GC/34, General Comment no. 34: Article 19: Freedoms of opinion and expression (2011)

⁹ UN Human Rights Committee, CCPR/C/GC/34, General Comment no. 34: Article 19: Freedoms of opinion and expression (2011) para 12, 15, 43. See

<https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Factsheets.aspx>

Declaration of Human Rights and the International Covenant on Civil and Political Rights.”¹⁰ Similarly, the UN Special Rapporteur on freedom of expression made an unequivocal clarification in 2011 that:

By explicitly providing that everyone has the right to express him or herself through any media, the Special Rapporteur underscores that article 19 of the Universal Declaration of Human Rights and the Covenant was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression. Hence, the framework of international human rights law remains relevant today and equally applicable to new communication technologies such as the Internet.¹¹

Any order to remove or otherwise restrict online content would have to be justified and must meet the three-part test outlined above, or else it contravenes international law and standards on freedom of expression.

First, regarding the question of legality, the term “emergency situation” under Section 77 of the Telecommunications Law is not clearly defined under that law. The ICJ previously analysed the incompatibility of Section 77 with international human rights law and standards on freedom of expression and information.¹² The question as to the legality of Section 77 itself puts into question the validity of the MOTC order. In addition, the MOTC did not identify the “emergency situation” being invoked to justify the order. This cannot be left to be presumed because the legality of the order must be ascertained against the claimed purpose. According to Telenor, the order was meant to address misinformation, adult content and content depicting child sexual abuse.¹³ Without complete and credible government information, it is difficult to ascertain whether the affected websites are being restricted access due to “misinformation” relating to COVID-19 or another category.

Second, as to the claimed purpose itself and its legitimacy, this is difficult to assess, for reasons of lack of clarity noted above. Certain forms of “misinformation” could adversely impact, for example, the rights and reputation of others or public health, but such purposes and the scope of the measure would have to be set out explicitly. Protection of the rights of the child and other rights is certainly a legitimate purpose. As to restriction of “adult content”, this term would have to be better defined to assess its legitimacy, as not all of what is sometimes classified as adult content is subject to legitimate restriction.

Third, even accepting the terms as legitimate purposes, the means adopted to address the alleged misinformation, adult content, and child sexual abuse would not be necessary and proportionate to those aims. Instead of a blanket ban on website access, the MOTC order must have directed the removal of specific content, with sufficient justification, and in accordance with a legitimate purpose defined in accordance with domestic law. The measure

¹⁰ UN Human Rights Council, ‘The promotion, protection and enjoyment of human rights on the Internet’, 4 July 2018, UN Doc No. A/HRC/38/L.10/Rev.1 (‘A/HRC/38/L.10/Rev.1’), p3; This reiterated the same principle expressed in an earlier 2016 resolution, which had also been adopted by consensus by the UN Human Rights Council.

¹¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011, para 21; See also United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, ‘Joint Declaration on Freedom of Expression and the Internet’, 1 June 2011 (‘Joint Declaration on Freedom of Expression and the Internet’), para 1a. Available at: <https://www.osce.org/fom/78309?download=true>

¹² International Commission of Jurists, “Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia” (2019), pp. 140-141, 149-150 (The lack of independent judicial oversight of authorities tasked to enforce these powers is also a problem); International Commission of Jurists, “Myanmar: Year-long Internet shutdown must be brought to an end,” 20 June 2020.

¹³ Telenor, “Press Release: Blocking of 230 websites in Myanmar based on directive from authorities,” 30 March 2020, <https://www.telenor.com.mm/en/article/blocking-230-websites-myanmar-based-directive-authorities> (Accessed 22 April 2020)

appears overbroad in blocking access to the website altogether, as opposed to removing allegedly problematic content on the website.

The right to freedom of expression, like the great majority of rights, must be enjoyed by all persons without discrimination, including regardless of citizenship status.

Right to health

Myanmar is a party to the ICESCR and the Convention on the Rights of the Child (CRC), both of which guarantee the right to health. As with almost all human rights,¹⁴ the right to health is guaranteed to all persons without discrimination and regardless of citizenship status.

In a recently published briefing paper, the ICJ discussed the scope and nature of Myanmar's obligations on the right to health under the ICESCR:¹⁵

As with other human rights, the right to health must be guaranteed to all persons. This is affirmed in Article 2 of the ICESCR, which contains the bedrock principle of non-discrimination, an obligation of immediate effect. Article 2 requires States to prohibit discrimination on the grounds of race, color, sex, language, nationality, religion, political or other opinion, national or social origin, property, birth, disability, age, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation, and other status.¹⁶ This means that access to healthcare as well as health resource allocation should not be made to depend on any of these grounds; the right to health must be protected equally.

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While the full realization of the right to health may be achieved progressively within the maximum of Myanmar's available resources, many aspects of this right are of immediate effect.¹⁷ This means that States must ensure them immediately. These "core obligations" of immediate effect are the following:

- (a) To ensure the right to access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services; and
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.¹⁸

¹⁴ Exception is Article 25 of the ICCPR on political rights.

¹⁵ International Commission of Jurists, "COVID-19 and Human Rights: Upholding the Right to Health in Myanmar's Conflict Areas" (2020).

¹⁶ ICESCR, article 2(2); Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20 (2009).

¹⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 30-31; International Commission of Jurists, "Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioners Guide," (2014), p. 36-40.

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 43, 29; See, generally, International Commission of Jurists, "Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioners Guide," (2014); Article 5 of the ICESCR allows limitations to the right to health under narrow circumstances. Any such limitation must be provided by law, compatible with the nature of these rights under the ICESCR and solely for the purpose of promoting the general welfare in a democratic society. Any

Healthcare must be available, accessible, acceptable and of an adequate quality.¹⁹

State measures to combat public health emergencies such as COVID-19 must be understood as measures to comply with their obligations to ensure the right to health.²⁰ This means that Myanmar must actively consider the standards under the right to health, including the obligation of non-discrimination and equal protection, in the development of its policy and practical responses to COVID-19. The Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body that provides authoritative interpretations of the ICESCR's provisions, urges States to combat COVID-19 using a human rights framework.²¹

Access to information in a time of a global pandemic is key to upholding the right to health of all persons in Myanmar:

The right to freedom of expression and to seek, receive and impart information are protected under international human rights law. They must not only be guaranteed in their own right, but also in order for people to be able to enjoy the right to health. Access to healthcare under the ICESCR requires: physical,²² economic²³ and, importantly for the present purposes, *information accessibility* without discrimination. Information accessibility obliges States to ensure access to health-related education and information, and that everyone can seek, receive and share information and ideas concerning health issues.²⁴ It includes a duty to promote and facilitate access to healthcare through the provision of information about the right to health and health-related information. It also includes abstaining from the enforcement of discriminatory practices as a State policy as well as from "censoring, withholding or intentionally misrepresenting health-related information" and "preventing people's participation in health-related matters."²⁵

In the context of COVID-19, the CESCR recommends that information about the pandemic must be provided by the State on a "regular basis, in an accessible format and in all local and indigenous languages." This is because "accurate and accessible information" is crucial to "reduce the risk of transmission of the virus" and fight COVID-19-related disinformation. Affordable Internet services and the necessary technology must also be made available so that students can continue with their education through online learning programs.

limitations of rights must be necessary and proportional and "the least restrictive alternative must be adopted where several types of limitations are available." Importantly, the public health grounds cited as basis to justify the rights restrictions must be of limited duration and subject to review by ordinary civilian courts.

¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 12.

²⁰ Tim Fish Hodgson and Ian Seiderman, "COVID-19 Symposium: COVID-19 responses and State Obligations Concerning the Right to Health (Part I)," *Opinio Juris*, <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/> (Accessed 27 April 2020); Tim Fish Hodgson and Ian Seiderman, "COVID-19 Symposium: COVID-19 responses and State Obligations Concerning the Right to Health (Part 2)," *Opinio Juris*, <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/> (Accessed 27 April 2020)

²¹ Committee on Economic, Social and Cultural Rights, Statement on the coronavirus (COVID-19) pandemic and economic, social and cultural rights, UN Doc. E/C.12/2020/1 (2020), para. 2.

²² *Physical accessibility* requires States to take steps to prevent, treat and control epidemic, endemic, occupational and other diseases as well as create conditions "which would assure to all medical service and medical attention in the event of sickness. Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 12(b).

²³ *Economic accessibility* requires that the poorest groups are not "disproportionately burdened with health expenses" compared to more affluent members of society. Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 12(b).

²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 12(b).

²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 33-34.

2. Domestic Law

2008 Myanmar Constitution. Article 354 of the 2008 Myanmar Constitution grants to “every citizen” the freedom “to express and publish freely their convictions and opinions,” if not contrary to laws enacted for the “security, prevalence of law and order, community peace and tranquillity or public order and morality.” This provision is not compatible with international human rights law as it limits the enjoyment of such freedom to “citizens.” International human rights law guarantees the rights to freedom of expression and to seek and impart information to *all persons*.²⁶

Apart from the right to freedom of expression, article 367 of the 2008 Constitution also guarantees the right to healthcare of Myanmar citizens. This provision is incompatible with the ICESCR. The treaty guarantees the right to health to all persons without discrimination.

Media Law.²⁷ The Media Law of 2014 provides protections for “news media workers.” The term “news media workers” refers to persons who take up any job related to a media industry. Under section 4, news media workers have the following rights: (i) to freely criticize, point out or recommend operating procedures of the legislative, the executive and judiciary in conformity with the 2008 Myanmar Constitution; (ii) to investigate, publish, broadcast information and related opinions to which every citizen is entitled in accordance with rules and regulations; (iii) to reveal issues relating to rights and privileges lost by the citizen; (iv) to collect information, to be provided with accommodation and to enter into certain offices, departments and organizations in accordance with regulations of relevant departments or organizations. News media workers are also entitled to request to see news and information which are accessible to the public.²⁸ News media publications are protected from censorship under the Media Law.²⁹

Although the law contains these positive developments, it also contains vague and imprecise provisions that can undermine the protections granted by the same law.³⁰ For instance, Section 7 guarantees that when news media workers seek to cover news “in areas where wars break out, and where conflicts or riots and demonstrations take place,” they shall be exempt from detention and entitled to ask for protective measures from security-related organizations, and their equipment protected from seizure or destruction by authorities provided that they comply with “regulations specified by relevant and responsible organizations.” The protection accorded journalists reporting on conflict is thus qualified by the latter vaguely worded phrase.

A. Remedies

i. Myanmar National Human Rights Commission Law

The term “human rights” that the MNHRC must uphold under its enabling law refers to the following rights:

- (a) the rights of citizens enshrined in the 2008 Myanmar Constitution;
- (b) human rights contained in the UDHR; and
- (c) human rights contained in the international human rights instruments applicable to the State, such as the ICESCR and CRC

²⁶ For a full discussion, see International Commission of Jurists, “Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible: A Legal Briefing” (2019). <https://www.icj.org/myanmars-discriminatory-citizenship-laws-can-and-must-be-immediately-reformed/>; International Commission of Jurists, Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study (2018). <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/>

²⁷ Discussion herein is based on an unofficial English translation of the 2014 Media Law.

²⁸ Section 6(a), Media Law.

²⁹ Section 5, Media Law.

³⁰ See ARTICLE 19, “Myanmar: News Media Law 2014: Legal Analysis” (2014).

a. Powers of the MNHRC

The MNHRC is Myanmar's national human rights institution. The ICJ has previously analysed the constitutional, legislative and practical barriers hindering the MNHRC from effectively performing its mandate.³¹ Under the MNHRC Law, the MNHRC has the following powers and duties, among others:

- (a) Monitor and promote compliance with international and domestic human rights laws
- (b) Verify and conduct inquiries in respect of complaints and allegations of human rights violations;
- (c) Consult and engage relevant civil society organizations, business organizations, labour organizations, national races organizations, minorities and academic institutions, as appropriate
- (d) Carry out anything incidental or conducive to the implementation of any function of the MNHRC.³²

Individuals may lodge a complaint with the Commission on their own behalf, or on behalf of another person or on behalf of a group of persons with a similar cause of complaint concerning any alleged violation of human rights.³³ Thus, there is reason to believe that civil society groups, the media outlets whose website access was blocked, and/or the telecommunications licensees can file the complaint individually or jointly to question the legality of the MOTC Order.

In order to carry out its mandate, the MNHRC may issue a summons in writing to a person (*subpoena ad testificandum*) that in its opinion is able to give any information relating to any matter being investigated by the MNHRC, to appear before the MNHRC at a time and place specified.³⁴ The MNHRC may also issue a summons to a person or office to produce documents or evidence (*subpoena duces tecum*) in their possession or control that, in the opinion of the MNHRC, relates to any matter being investigated.³⁵ This power could be used to know the following relevant information surrounding the website ban:

- (a) The "emergency situation" under Section 77 of the Telecommunications Act justifying the MOTC Order;
- (b) The full list of websites whose access was ordered to be blocked;
- (c) The exact grounds mentioned in the MOTC Order to justify the ban; and
- (d) The factual circumstances justifying the ban.

Under Section 36, two types of documents are excluded from the scope of a *subpoena duces tecum*: (i) documents or evidence, the release of which would affect the security and defense of the State; or (ii) documents which are classified by the departments and organizations of the Government. Importantly, there is no provision guaranteeing any appeal mechanism or independent judicial review of an executive determination that a particular document or evidence is "classified". Further, if a government department, organization or related entity refuses to cooperate in good faith with the MNHRC, the MNHRC law does not provide any mode by which to compel the uncooperative official in case of non-compliance.³⁶

In any case, the likelihood of a Section 36 constraint should not deter the filing of the complaint with the MNHRC. The filing of the complaint would compel the MNHRC to look into the matter, which in turn could lead to disclosure of relevant information that is presently

³¹ See International Commission of Jurists, "Four Immediately Implementable Reforms to Enhance Myanmar's National Human Rights Commission" (2019).

³² Section 22, MNHRC Law. The full list of powers is attached to this document as **Annex A**.

³³ Section 30, MNHRC Law.

³⁴ Section 35, MNHRC Law.

³⁵ Section 36, MNHRC Law.

³⁶ Section 38, MNHRC Law.

not publicly available or, alternatively, disclosure of more information surrounding the website blocking in general. This would nonetheless attract significant public scrutiny that could potentially be leveraged into other advocacy opportunities, including through “public pressure”.

Section 37 of the MNHRC Law has also been used by the MNHRC to justify its non-interference in potential human rights issues. This provision prohibits the MNHRC from inquiring into a complaint which violates any of the following: (a) cases under trial before any court, cases under appeal or revision on the decision of any court; (b) cases that have been finally determined by any court. The MOTC Order has not yet been questioned in a judicial proceeding and so this provision would unlikely affect any complaints to be filed with the MNHRC.

b. Action on the complaint; Remedies

The MNHRC, in conducting an inquiry, is mandated to “abide by the principles of natural justice.”³⁷ In inquiries involving government departments, organizations or related entities, such as the MOTC, the MNHRC shall refer its findings to that relevant governmental authority. Such authority must respond to the MNHRC on its action regarding the MNHRC’s recommendations within 30 days. In its recommendations, the MNHRC is mandated to include that the complainants are not to be subjected to reprisals.³⁸ The MNHRC may also report its findings and recommendations to the President and the Pyidaungsu Hluttaw and may publish them for public information as may be necessary.³⁹ If the MNHRC finds out credible evidence of violations of the rights of an individual or individuals, the report submitted should mention the following recommendations:

- (a) A determination that a human rights violation has occurred and a recommendation that such human rights and similar violations should not be repeated or should be discontinued;
- (b) Appropriate measures by a person or any agency to redress the human rights violation;
- (c) Obtaining due compensation for the victim for any loss or damage suffered;
- (d) Recommending for action to any department, organization, service, person or the relevant authority and to require them to inform the Commission within a reasonable period of the steps that have been taken to give effect to that recommendation.⁴⁰

Should the MNHRC decide to decline, defer or discontinue the conduct of an inquiry into the matter, the MNHRC may still conduct an inquiry into the matter on its own initiative whether now or at a later date (*motu proprio*).⁴¹ Section 28 empowers the MNHRC to conduct its own inquiry when it becomes aware of “widespread, systemic or entrenched situations or practices that violate human rights.”

The MNHRC Law also provides protections to individuals and groups that intend to invoke the remedies under the law. Under the law, a person is prohibited from victimizing, intimidating, threatening, harassing or otherwise interfering with any person on the ground that the latter or any person associated with the latter:

- (a) intends to use the rights under the MNHRC Law, such as the filing of a complaint under Section 30;
- (b) has used the rights under the MNHRC Law, or promoted those rights of some other persons;
- (c) Has given information or evidence in relation to any complaint, investigation or proceedings under the MNHRC Law;

³⁷ Section 28, MNHRC Law.

³⁸ Section 38, MNHRC Law.

³⁹ Section 39, MNHRC Law.

⁴⁰ Section 40, MNHRC Law.

⁴¹ Section 33, MNHRC Law.

- (d) has declined to do anything which would contravene the MNHRC Law;
- (e) has otherwise done anything under or by reference to the MNHRC Law.⁴²

ii. Constitutional Writ

Sections 18(c), 296 and 378 of the 2008 Myanmar Constitution authorizes the Union Supreme Court to issue the following writs:

- (a) Writ of *Habeas Corpus* means a writ issued in writing after causing to bring the detainee to the office and hearing whether or not the detention is in conformity with Law by any Court of the Republic of the Union of Myanmar or any competent authority;
- (b) Writ of *Mandamus* means a writ issued in writing to comply with Law by any competent person, authority, or any government department for the failure to comply with the power conferred thereon;
- (c) Writ of Prohibition means a writ issued in writing not to perform beyond the jurisdiction (*ultra vires*) or against justice in any proceeding of any Court or any quasi-judicial matter
- (d) Writ of *Quo Warranto* means a writ issued in writing whether or not it is in conformity with Law after hearing whether or not any government department or any empowered authority has carried out in accordance with laws, rules, regulations, by-laws, procedures, orders, notifications, directives issued on person or persons
- (e) Writ of *Certiorari* means a writ issued in writing whether or not the decision is in conformity with Law if it is found that the decision of any Court or any quasi-judicial matter is not in conformity with Law.⁴³

Based on the relevant facts and practice in Myanmar, an application for a writ of mandamus should be an appropriate remedy.

The application for the issuance of a writ may be suspended when a “state of emergency” is declared.⁴⁴ However, it appears that there is no state of emergency under articles 40, 410, 412, 413 and 417 of the 2008 Myanmar Constitution that would prevent the filing of a constitutional writs case in court.⁴⁵ No state of emergency under these provisions has been declared by the Union Government due to COVID-19. The term “emergency situation” under Section 77 of the Telecommunications Law does not appear to be equivalent to a “state of emergency” under the 2008 Myanmar Constitution.

We understand that the COVID-19 pandemic does not present any constraint that would prevent the filing of a constitutional writs case with the Union Supreme Court, although travel restrictions may impose practical and logistical challenges.⁴⁶

⁴² Section 42, MNHRC Law.

⁴³ See International Commission of Jurists, Strategic Litigation Handbook for Myanmar (2019) <https://www.icj.org/icj-publishes-strategic-litigation-handbook-for-myanmar/>

⁴⁴ Section 296(b), 2008 Constitution.

⁴⁵ The Constitution contemplates three states of emergency.⁴⁵ The first type, under articles 40(a) and 410, empowers the President to temporarily appropriate executive and legislative powers from lower levels of government, in a particular geographical area. The second type, under articles 40(b), 412 and 413, has two degrees: under article 413(a) the civil service may request temporary support from the Tatmadaw to perform its functions in a particular geographical area; under article 413(b) the President may issue an ordinance temporarily transferring executive and judicial powers to the Tatmadaw in a particular geographical area. The third type of emergency, under article 417, involves the full nationwide transfer of executive, legislative and judicial powers to the Tatmadaw for a period of one year. In each instance, a declaration by the President is required to enact a state of emergency.

⁴⁶ See The Republic of the Union of Myanmar Nay Pyi Taw Council, Order No. 44/2020, ‘Announcement to departments/organizations and common people coming to the Union Territory, Nay Pyi Taw’ (28 April 2020). <https://www.moi.gov.mm/npe/nlm/sites/default/files/newspaper->

a. Applicable Procedure

The 2014 Writs Law requires the applicant to completely describe the facts justifying the remedy sought or the applicant's loss.⁴⁷ The name of the government ministry as the respondent must be indicated in the application together with any relevant attachments. An affidavit must also be attached verifying the veracity of the facts alleged in the petition.⁴⁸ The Director General will return incomplete documents and information.⁴⁹

After receiving the application, the Union Supreme Court will assess whether or not the documents and relevant affidavits are attached. A Preliminary Hearing Board, composed of three judges of the Union Supreme Court, will first hear the application based on the "facts and documents attached to the application" and after "summoning and hearing the applicant."⁵⁰ It can then issue an order either accepting or rejecting the application. If accepted, the applicant must deliver the summons to respond to the petition to the respondent. The applicant must also provide the respondent with a certified copy of the Preliminary Hearing Board decision, as well as the petition and affidavit supporting the petition.⁵¹ The applicant will bear the cost of the summon fees as well as fees incurred in providing the decision and certified copies to the respondent.⁵²

The respondent can then submit a counter-affidavit. The applicant can submit a reply affidavit in response to the counter-affidavit.⁵³

A Final Hearing Board will then be constituted to pass an order after hearing the applicant and the respondent (i.e., MOTC).⁵⁴ It shall decide on the petition on the day of the final argument hearing or its adjournment.⁵⁵ According to Section 11 of the 2014 Writs Law, the decision of the Union Supreme Court shall be final and conclusive.

iii. Specific Relief Act

The Specific Relief Act can also be invoked to file a case against the MOTC. Under Section 42, any person entitled to any legal character, or to any right as to any property, may institute a suit against another person denying, or interested to deny, that person's title to such character or right, and the Court may in its discretion make a declaration that the plaintiff is so entitled, and the plaintiff need not in such suit ask for any further relief. The victim can file the declaration suit.

However, before any such proposal is made in court, the victim must first send a notice to the respondent government institution. This is required by Section 80 of the Civil Procedure Code, which provides:

No suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such a public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered or left at the office of—

(a) in the case of any suit against the Government, the Secretary to the Union Government or the Collector of the District, and

[pdf/2020/04/29/29_April_20_gnlm_0.pdf](#); The Republic of the Union of Myanmar, 'Announcement of National-Level Central Committee for Prevention, Control and Treatment of COVID-19', (27 June 2020). https://www.moi.gov.mm/npe/nlm/sites/default/files/newspaper-pdf/2020/06/28/28_June_20_gnlm.pdf

⁴⁷ Section 4, 2014 Writs Law.

⁴⁸ Section 22, 2013 Writs Rule.

⁴⁹ Section 25, 2013 Writs Rule.

⁵⁰ Sections 7 and 8, 2014 Writs Law; Sections 27 and 28, 2013 Writs Rule.

⁵¹ Section 29, 2013 Writs Rule.

⁵² Section 32, 2013 Writs Rule.

⁵³ Sections 35-37, 2013 Writs Rule.

⁵⁴ Sections 9 and 10, 2014 Writs Law; Section 40, 2013 Writs Rule.

⁵⁵ Section 43, 2013 Writs Rule.

(b) in the case of a suit against a public officer, the officer against whom the suit is brought, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the complaint shall contain a statement that such notice has been so delivered or left.

If, after two months from receiving the notice, the government department has still not performed on the matter mentioned in the notice, only then can the case proceed in the relevant court.

In the declaration suit, the proposal must contain a complete presentation of the relevant facts and the purpose of the proposal, as well as the respondent's address and application letter with court stamp fees for the summons. Relevant supporting documents must be attached together with the power of attorney. The original as well as copies of the lawyer's license, the court fees and the original and two copies of the proposal must be presented.

Annex A – Full list of duties and powers of the MNHRC (Section 22, MNHRC Law)

- Promoting public awareness of human rights and efforts to combat all forms of discrimination through the provision of information and education
- Carrying out the following to monitor and promote compliance with international and domestic human rights laws:
 - Recommending to the Government the international human rights instruments to which Myanmar should become a party
 - Reviewing existing laws and proposed bills for consistency with the international human rights instruments to which the State is a party and recommending the legislation and additional measures to be adopted for the promotion and protection of human rights to the Pyidaungsu Hluttaw through the Government
 - Assisting the Government in respect of its preparation of reports to be submitted under obligations in accordance with the international human rights instruments to which the State is a party and on the contents of those reports
- Verifying and conducting inquiries in respect of complaints and allegations of human rights violations
- Visiting the scene of human rights violations and conducting inquiries, on receipt of a complaint or allegation or information;
- Inspecting the scene of human rights violations and, after notification, prisons, jails, detention centres and public or private places of confinement
- Consulting and engaging the relevant civil society organizations, business organizations, labour organizations, national races organizations, minorities and academic institutions, as appropriate
- Consulting, engaging and cooperating with other national, regional and international human rights mechanisms, including the Universal Periodic review, as appropriate
- Responding to any matter referred to the Commission by the Pyigaundsu Hluttaw or the Lower House or the Upper House or the Government
- Responding to the specific matters referred by the President in connection with the promotion and protection of human rights
- Preparing reports in respect of the functions of the Commission and publishing them as appropriate
- Carrying out anything incidental or conducive to the implementation of any function of the Commission
- Submitting to the President and the Pyidaungsu Hluttaw an annual report on the situation of human rights in Myanmar, the activities and functions of the Commission, with such recommendations as are appropriate

Submitting special reports on human rights issues to the President as and when necessary