



Legal Aid Network's Statement

Accountability of the State Counsellor Aung San Suu Kyi and her NLD government In Connection with the ICC's Jurisdiction Issue

1. On April 13, the office of the State Counsellor, headed by Aung San Suu Kyi, issued a press release arguing that there can be no ICC jurisdiction in the Rohingya case given the general principle of treaty law that no state is bound by a treaty it is not a party to. This is not relevant here as it ignores the fact that the consent of a state (through treaty or otherwise) is not required for a court to exercise criminal jurisdiction over a state's nationals. National courts often exercise criminal jurisdiction for international crimes (e.g., war crimes and crimes against humanity) regardless where in the world the latter have been committed, when the doctrine of the universal jurisdiction is practiced. There is no reason to assume that the ICC's jurisdiction is less extensive than that of the national courts. Customary international law recognizes criminal jurisdiction regardless of the state of nationality of the accused.

2. In the case of the Rohingyas, the prosecutor claims that the ICC has jurisdiction since the acts of forced deportation - although having their origins in the territory of a non-party (Burma) - have ongoing effects on the territory of a state party (Bangladesh). She argues that an essential element of the international crime of forced deportation is the crossing of an international border. Therefore, the conduct constituting the crime was "completed" in Bangladesh.¹

3. From a reading of Art. 12.2.a, it appears to be sufficient that the alleged conduct has occurred on the territory of a state party in order for the ICC to exercise jurisdiction. That provision does not require that the nationals of the state party in question (here Burma) have committed the alleged conduct in the territory of a state party. As such, the ICC should have jurisdiction in the Rohingya case.

4. Aung San Suu Kyi, as the State Counsellor, also invokes the principle of national sovereignty and non-interference in the internal affairs of other states. In accordance with the ICC Charter's Preamble, it is correct only when a state is determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

¹ See ICC Statute Art. 7.1.d and section 13 of the prosecutor's request: https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF

Unfortunately, this situation is lacking in Burma for some decades as of now. As such, the practice of the ICC's jurisdiction should be a must.

5. The principle of national sovereignty and non-interference in the internal affairs of other states does not embody unlimited power of any state across the world. It is evidently applicable to the extent that each individual State takes the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.² If violated or ignored by any state, the international community, through the United Nations, also has the responsibility to take action against the respective state by using appropriate means, in accordance with the Chapters VI, VII and VIII of the UN Charter.³

6. As a matter of fact, Aung San Suu Kyi and her NLD government are obliged to sign the Rome Statute of the ICC and to initiate ratification of it by the legislative assembly, wherein the NLD MPs constitute a majority, right away. If so, heinous crimes still committed by the Myanmar Army would be deterred. Instead, public denial of the ICC's jurisdiction by them has emboldened Myanmar Army leaders to commit more heinous crimes, particularly against ethnic nationalities in other Ethnic States, in addition to Rakhine State. This is against the Rule of Law rhetorically claimed by the NLD, as one of its three election promises.

In this regards, Aung San Suu Kyi and her NLD government led by the incumbent President, Win Myint, who is also keeping silent on these serious human rights violations, are responsible and accountable from the aspect of international legal doctrine of Superior/Command responsibility.

Legal Aid Network (LAN)

April 19, 2018

For more information, please contact:

Mr. Aung Htoo (Human Rights Lawyer & Founder of LAN)

Tel: (66) 0932745713

E.mail: legalaiddnetwork@gmail.com; Website: legalaiddnetwork.org

Professor David Fisher – Professor of International Law, Faculty of Law, Stockholm University, Sweden, and a member of the Board of Directors of LAN

david.fisher@juridicum.su.se

² Responsibility to Protect: 2005 World Summit Outcome Document

³ Ditto

