Legal Analysis of the Press Release Issued by the Office of the State Counsellor in Connection with the Jurisdiction of the ICC for Heinous Crimes Took Place in Rakhine and other Ethnic States

1. In the said press release, issued on August 9, 2018,[1] there are many flaws from legal, ethical and accountable aspects. Firstly, it stated that Myanmar is not a party to the Rome Statue and the Court has no jurisdiction on Myanmar whatsoever. It is an incomplete utterance. In addition to that situation, under Article 13 (2) and (3) of the Rome Statue, the ICC will have jurisdiction if a situation is referred to the Prosecutor by the UN Security Council and if the ICC prosecutor has initiated the investigation.

2. The Myanmar Government argues 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, citing Article 34 of the Vienna Convention on the Law of Treaties.[2] This however 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. We may note that national courts often exercise criminal jurisdiction over foreign defendants for crimes against national law but indeed also for international crimes (e.g., crimes against humanity) regardless where in the world the latter have been committed. The exercise of such jurisdiction is based on customary international law grounds such as territoriality and universality. There is no reason to assume that the ICC's jurisdiction is less extensive than that of the national courts.

3. With reference to State sovereignty, the State Counsellor continued to argue, "Myanmar' sovereignty would permit it to continue to investigate all violations of international humanitarian law." The Myanmar Government may attempt to invoke 'complementarity principle'[3] provided in

[1] https://drive.google.com/file/d/1Uow6AKah-PLBA6xP7WqRZHPIAHVCZ3Yf/view

[2] Article 34 of the Vienna Convention: GENERAL RULE REGARDING THIRD STATES "A treaty does not create either obligations or rights for a third State without its consent."

[3] Article 1 of the Rome Statue of the International Criminal Court

the Rome Statue. It may be correct only if the following conditions are met in application of the national criminal jurisdictions:

(a) Investigation alone is not sufficient. The alleged perpetrators must be indicted and tried by the independent, impartial, and efficient tribunals, at least by establishing Hybrid Courts which apply a mix of national and international law both procedural and substantial and feature a blend of international and national elements, in particular international and national judges and staff. It is because the incumbent Courts in Burma do not meet the required competency and capacity, mentioned above, to the extent that the perpetrators who committed international crimes, violating international humanitarian law and other international criminal laws, can be heard and tried. Nor do they have any jurisdiction to adjudicate those international crimes.

(b) Seeking accountability on the perpetrators – who contravened, at least, international humanitarian law – should encompass the entire country, particularly all other Ethnic States, apart from Rakhine State. Rather, Myanmar Army Commander-in-Chief Min Aung Hlaing maliciously and incorrectly blamed the Kachin Independence Organization (KIO) last month that despite the fact that his Myanmar soldiers evidently acted transgression of war crimes – by seriously torturing, committing gang rape and murdering – against the two young female volunteer Christian teachers from Kachin Baptist Convention in northern part of Shan State on January 19, 2015. In this regards, keeping silence by the State Counsellor and her government constitutes a criminal action which abets the continued commission of similar heinous crimes against innocent ethnic females in their own Ethnic States.

(c) State sovereignty is unable to deter the practice of the doctrine of superior/command responsibility being practiced in international law: superior/command responsibility is a form of responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes. As former President U Htin Kyaw, the incumbent President U Win Myint and State Counsellor Mrs. Aung San Suu Kyi are superiors, they are under the said doctrine.[4]

4. Legal comments, provided by the Office of the State Counsellor, under the title of 'Procedural Framework Irregularities' – including, inter alia, discrediting the ICC Prosecutor by using term of condescension, such as 'put the cart before the horse' – are also utterly incorrect. At the time the Prosecutor Ms. Fatou Bensouda sought a ruling from the

[4] Extraction from a Statement of Legal Aid Network, issued on January 18, 2018: The superior commanders of the Myanmar Army have abused this doctrine. They have attempted to cover up their own responsibility, by taking action against subordinate soldiers who committed a heinous crime which may constitute genocide,[4] arisen out of Inndin case first and foremost. They can thereby be seen to be fulfilling their duty to prevent and punish such crimes, and defend themselves if they are indicted in the International Criminal Court or an International Criminal Tribunal for Burma/Myanmar - similar to that of Yugoslavia.

Pre-Trial Chamber, she has already done her job – proprio motu investigation by herself – to a noticeable extent. It can be observed in her application[5] as follows:

> Consistent and credible public reports reviewed by the Prosecution indicate that since August 2017 more than 670,000 Rohingya, lawfully present in Myanmar, have been intentionally deported across the international border into Bangladesh. The UN High Commissioner for Human Rights has described the Rohingya crisis as "a textbook example of ethnic cleansing", and according to the UN Special Envoy for human rights in Myanmar, it potentially bears the "hallmarks of a genocide". The coercive acts relevant to the deportations occurred on the territory of a State which is not a party to the Rome Statute (Myanmar). However, the Prosecution considers that the Court may nonetheless exercise jurisdiction under article 12(2)(a) of the Statute because an essential legal element of the crime—crossing an international border—occurred on the territory of a State which *is* a party to the Rome Statue (Bangladesh).

5. When a case is initiated by the ICC prosecutor, the premise is that the alleged crime has been committed within the territory of a ***state party*** (ICC Statute Art. 12.2.a). In the case of the Rohingyas, we see that 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). 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. It should thus be possible for the ICC to exercise jurisdiction over the nationals of any state as long as the alleged conduct has occurred on the territory of a state party.

6. The ICC should have jurisdiction in the Rohingya case if we accept the premise that the alleged criminal conduct has in part been committed on the territory of Bangladesh, an ICC party. The ICC Statute does not require that the accused individuals are nationals of an ICC state party. The principle that no state is bound by a treaty to which it is not a party is not relevant here, since customary international law recognizes criminal jurisdiction regardless of the state of nationality of the accused.

7. Another legal comment under the title of 'Victims (irregular application)' is unfounded as well. It adversely affects not only dignity of the State Counsellor but also the entire State as the government, with prejudice, provided gratuitously offensive comment against the ICC as an institution which appears to have predetermined and ignores due process, by citing Article 68 (3) of the Rome Statue as follows:

> ' --- the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'

The ICC prosecutes individuals, not groups or States. Here, the term 'the accused' cannot be construed as 'State' while the office of the State Counsellor, in its press release, defends the rights of the State, adhering to the doctrine of State sovereignty. For sure, the Court shall take

[5] Application under Regulation 46 (3) submitted by the ICC Prosecutor on April 9, 2018: https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF

appropriate measures, including granting the individual perpetrators the right to a fair and impartial trial, when the formal investigation and prosecution commences. The above mentioned legal comment, provided by the Office of the State Counsellor, is an undignified premature allegation.

8. The final comments mentioned in the paragraphs 18 and 19 are equally depressing. The former pursues to reconcile commission of heinous crimes and remedy for those crimes. It sounds that if remedy can be provided to those victims of international crimes, commission of heinous crimes must be reconciled and perpetrators should go unpunished. It is utterly groundless, ethically incorrect and morally mistaken given that, if it is practiced, similar heinous crimes, to be committed in future, can never be deterred.

The latter, too, actualizes hoodwinking the international community. In the MOU made by the Myanmar government with UNDP and UNHCR, there is no clear provision on how the Rohingyas, whom were forcefully deported from Rakhine State to Bangladesh, will be granted a legal status for citizenship after their repatriation. Under the effective Myanmar citizenship law (1982), Rohingyas will never achieve such legal status. Worse is that, under the 2008 Constitution which has entrenched the military dictatorship, except those born of parents both of whom are ethnic nationals of the country, no person can enjoy citizenship status. As such, even if the Rohingyas, as displaced persons taking refuge in Bangladesh, are allowed to return to Rakhine State, vicious circle will continue, repeated human rights violation will occur, and the Rule of Law will never be upheld. As a negative result, stability of State – which will underpin the economic development for all entire ethnic nationalities – will permanently disappear.

Recommendations

1. Mrs. Aung San Suu Kyi, as the Head of the NLD government, should observe the fundamentals of international law, international humanitarian law and human rights laws. Otherwise, she should nurture civilian legal academicians, who can replace late U Ko Ni, instead of totally ignoring their role and requirement for promoting their capacity from the aspect of the said laws especially. She must immediately stop endorsing legal documents, already prepared by the Attorney General, who is subservient to the Myanmar military leaders.

2. She is responsible to seek democratic accountability and keep her election promises in which the Rule of Law plays an instrumental role. Only when perpetrators, who committed heinous crimes, are taken into legal action and provided reasonable penalties, the Rule of Law may become a reality. She must immediately stop defending those perpetrators in one way or another. If not, we have concern that, apart from Myanmar military perpetrators who committed heinous crimes, the former President U Htin Kyaw, the incumbent President U Win Myint and Mrs. Aung San Suu Kyi themselves may be held accountable for those heinous crimes. They may face international legal campaign, focusing on the concept of Universal Jurisdiction.

3. In order to deter heinous crimes and facilitate the upholding of the Rule of Law, the NLD government must sign and ratify the Rome Statue of the International Criminal Court as soon as possible. To this end, they meet all requirements. In so doing, the NLD government can prove that it is an accountable government – which assumes authentic power, but not superficial – in promoting and protecting human rights effectively, while upholding the rights of indigenous peoples, in which vulnerable ethnic female victims constitute a major part.

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