

**Security Council**

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Letter dated 9 August 2018 from the Permanent Representative of Myanmar to the United Nations addressed to the President of the Security Council

I have the honour to forward herewith a copy of the press release of the Ministry of the Office of the State Counsellor dated 9 August 2018 regarding Myanmar's position on the Prosecution's request for a ruling on jurisdiction under article 19 (3) of the Rome Statute of the International Criminal Court (see annex).

In this regard, it would be appreciated if the present letter and its annex could be circulated among the members of the Security Council as a document of the Council.

(Signed) **Hau Do Suan**



Annex to the letter dated 9 August 2018 from the Permanent Representative of Myanmar to the United Nations addressed to the President of the Security Council

Government of the Republic of the Union of Myanmar

Ministry of the Office of the State Counsellor

PRESS RELEASE

(Dated: 9 August 2018)

Background

The International Criminal Court (“the Court” or “ICC”) was established through the Rome Statute of the International Criminal Court (“the Rome Statute”). The ICC has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity and war crimes. Myanmar is **not party** to the Rome Statute and the Court has no jurisdiction on Myanmar whatsoever.

Regardless, the ICC’s Prosecutor has made a *Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* (“the Request”) to the ICC and has requested Myanmar to submit its opinion.

Myanmar has declined to engage with the ICC by way of a formal reply due to the reasons stated below.

A. Bad Faith (*Mala Fides*)

1. The Request by the Prosecutor may be interpreted as an indirect attempt to acquire jurisdiction over Myanmar which is not a State Party to the Rome Statute.
2. Myanmar, as a non-State Party, is under no obligation to enter into litigation with the Prosecutor at the ICC or even to accept *notes verbales* emanating from their Registry by reference to article 34 of the Vienna Convention on the Law of Treaties (“Vienna Convention”).
3. The actions of the Prosecutor, constitute an attempt to circumvent the spirit of article 34 of the Vienna Convention. By allowing such a contrived procedure, the ICC may set a dangerous precedent whereby future populist causes and complaints against non-State Parties to the Rome Statute may be litigated at the urging of biased stakeholders and non-governmental organizations and even then, selectively based on the political current of the times.
4. The Prosecutor appears to have chosen to ignore the fact that the United Nations Security Council has issued a Presidential Statement stressing the need for transparent investigations of alleged human rights abuses while, at the same time, recognizing Myanmar’s sovereignty and territorial integrity. Respect for Myanmar’s sovereignty would permit it to continue to investigate all violations of international humanitarian law whether committed by its own forces or by elements hostile to the Government authorities such as the forces of the Arakan Rohingya Salvation Army (“ARSA”).

B. Procedural Framework Irregularities

5. It is submitted that the Prosecution has incorrectly applied Article 19(3) request for a ruling from the Court on jurisdiction when the Court is not properly seized of

the matter. Article 19(3) was intended to allow the Prosecutor to seek preliminary rulings on matters pertaining to jurisdiction and admissibility which arise in the normal conduct of proceedings ie. within a “situation”. In this matter, the Prosecutor has bypassed important procedural safeguards and instead used Art. 19(3) to request preliminary rulings on issues of jurisdiction prior to even initiating proposed cases within a “situation”.

6. In order to obtain the impartial facts necessary to substantiate a jurisdictional request, the Prosecutor should have conducted a preliminary examination, of the sort envisaged in the *chapeau* of article 53(1) of the Rome Statute. Failure to do so, even if it was in part due to financial reasons, was, in fact, an abandonment of her mandatory duty to exercise her unique discretion under article 53(1)(a), namely to evaluate the information to see if it provides a reasonable basis for believing that a crime **within the jurisdiction of the Court** has been or is being committed.

7. With the benefit of a proper preliminary examination, the Prosecutor would possibly have dealt with the sources of information forming the basis for the Request with more circumspection. As it is, the sources on which the Prosecutor has relied for the purpose of the Request present a completely one-sided and biased narrative of the events in Rakhine State.

8. The amendment of Regulation 46(3) of the Regulations of the Court (“RoC”) on 29 June 2018, in the course of the present proceedings, must be viewed negatively, as it provides support for the Prosecutor. The effect of the amendment was to provide the Prosecutor with a short-circuit process to enable a speedy deliberation of this matter.

9. The Prosecutor had not sought the opening of an investigation by virtue of her *proprio motu* powers under article 15(3) of the Rome Statute. By her actions she has “put the cart before the horse” by approaching the Pre-Trial Chamber for a ruling on jurisdiction *before* conducting a preliminary examination. It is submitted that the Prosecutor has reversed accepted procedure without legal justification.

C. **Lack of Transparency**

10. Myanmar is concerned with the lack of fairness and transparency of the ICC proceedings.

11. The regulations governing the conduct of ICC proceedings stipulates that reasons should be given for derogating from the default rule, namely that its hearings be conducted in public. Regulation 20 states among others, that when a Chamber orders that certain hearings be held in close or private session, the Chamber shall make public the reasons for such an order. In this matter, the Pre-Trial Chamber held an *ex parte Prosecutor only* status conference on 20 June 2018. It also debated issues placed, at the time, on a confidential agenda in a closed hearing without written justification and in blatant violation of its own regulations.

12. All issues discussed at the closed hearing would be of crucial importance and the fact that the Prosecutor’s responses to some of these issues still remain confidential is both inexplicable and prejudicial.

13. The lack of transparency was further manifested when Bangladesh chose to file its observations with the Court confidentially. The Court has the ability to require a participant in the legal proceedings to present its submissions in a public manner or, at the very least, in a partially redacted fashion in order to safeguard vital interests. This was not done and, as a consequence, Myanmar could not reasonably have been expected to make an appropriately informed and formal response when it was denied the submissions of the very country on the territory of which jurisdiction is sought.

D. Amici Curiae — prejudicial vs probative value

14. The Court has permitted organizations to file *amicus curiae* submissions without consideration of their identity or the beneficial scope of their proposed contributions. Several of the briefs submitted did not address legal issues, but instead presented allegations consisting of mostly charged narratives of harrowing personal tragedies calculated to place emotional pressure on the Court.

E. Victims (irregular application)

15. Furthermore, the Court has allowed unsolicited victims' applications (something which, to date, has only ever happened in the context of a pre-existing "situation") which is a totally new development. This is worrying, because the Court appears to have predetermined or, at least, acquiesced to a procedural mechanism which would normally be subject to due process. Article 68(3) states that the Court shall permit views and concerns [*of victims*] to be presented and considered at stages of the proceedings ...in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial..."

16. It has been made known that several groups have *de facto* joined the legal process and have filed detailed observations, without the Court even ruling whether their participation is appropriate under regulation 86 of RoC. The unauthorized and unsolicited submission of observations by these groups has had the effect of placing the Court in a difficult emotional bind. Rejection of their submissions on the grounds of a flagrant procedural irregularity would have left the ICC judges exposed to a charge of callousness.

F. Preconditions to the exercise of jurisdiction — Article 12(2)(a) of the Rome Statute

17. Myanmar categorically rejects the proposition that the Court has jurisdiction as proposed by the Prosecutor in the Request. Myanmar also disagrees with the Prosecution's assertion that population displacement across a national boundary is an essential objective element of the crime of deportation set out in Article 7 (1) (d).

18. Furthermore, there is no organizational policy of the kind required for proving crimes against humanity under the Rome Statute. Such a policy would be hard to reconcile with the repatriation agreement signed between Myanmar and Bangladesh in November 2017, whereby both countries agreed on a short time frame for the voluntary return of all those who had left Rakhine State as a result of hostilities in the region. Myanmar and Bangladesh also signed the Terms of Reference for the Joint Working Group (JWG) and Physical Arrangement for Repatriation of Displaced Myanmar Residents from Bangladesh ("the Physical Arrangement"). All these bilateral agreements are aimed to facilitate repatriation of verified residents of Rakhine State who crossed over to Bangladesh following the terrorist attacks in October 2016 and August 2017. There is no cap on the number to be repatriated and the process was to have commenced on 23 January 2018.

19. The Myanmar Government has recently signed a Memorandum of Understanding ("MOU") with UNDP and UNHCR on 6th June 2018. The MOU seeks UN participation in coordinating and harmonizing humanitarian and development action in Rakhine State, and in assisting the GoM in the voluntary, safe and dignified return of the displaced persons from Rakhine State who have been duly verified as residents of Myanmar according to the Arrangement.

G. Complementarity

20. The Myanmar government has on 30th July 2018 established an Independent Commission of Enquiry. The Commission consists of four members: two international members (one is the Chairperson of the Commission) and two national members. The Commission will investigate the allegations of human rights violations and related issues following the terror attacks by the Arakan Rohingya Salvation Army (ARSA).

Conclusion

21. For all the reasons cited above, Myanmar submits that the *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* is meritless and should be dismissed.
