



Seeking Criminal Accountability of the Former President U Htin Kyaw

Today, U Htin Kyaw has already resigned from the position of the State President. It needs to be analysed in connection with the effort, exerted by a part of Australian legal and human rights community, to prosecute Aung San Suu Kyi in Australia for heinous crimes against Rohingyas in Rakhine State, Burma, quite recently. Invoking the customary international law, the Australian Attorney General Christian Porter rejected that effort by elaborating that Aung San Suu Kyi enjoys the de facto, if not de jure, immunity as the Head of the government.

This legal reference is correct only for ordinary criminal cases. However, the Head of State immunity cannot be practiced for the perpetrators who allegedly committed heinous crimes such as war crimes, genocide and crimes against humanity and they shall be indicted and prosecuted. Regardless of whether being former or incumbent Head of State, sovereign immunity for him is denied under the statutes for the International Criminal Tribunals for Rwanda and for former Yugoslavia¹ and the Rome Statute of the International Criminal Court.² This legal doctrine was applied in the case of Augusto Pinochet, a military dictator and former Head of State from Chili, and he was arrested in London in October 1998 while undergoing medical treatment.

As such, in the case of Burma, U Htin Kyaw and Aung San Suu Kyi are accountable for the heinous crimes taking place in Ethnic States, such as Kachin, Northern Shan, Karenni and Rakhine States in Burma from the aspect of the superior/command responsibility under international law. It 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 fulfil his duties to prevent and punish these crimes.

The incident of Aung San Suu Kyi happened in Australia a few days ago has caused great concern for President U Htin Kyaw, who is Head of State, and it impliedly forced him to resign within a week.

¹ Article 6 and 7 of those statutes

² Article 27 of the Rome Statute of the International Criminal Court

Irrelevance of official capacity 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Similar responsibility will fall on the new President, who will assume power soon. Unfortunately, under the restrictions of the 2008 Constitution and with the military background of the presidential candidates, it is unlikely to see the perpetrators to be indicted in the national courts even if one of them becomes the State President. Burma has been in the crisis of seeking accountability.

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