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PRE-TRIAL CHAMBER III

Before: **Judge Olga Herrera Carbuccia, Presiding Judge**
 Judge Robert Fremr
 Judge Geoffrey Henderson

**SITUATION IN THE PEOPLE'S REPUBLIC OF BANGLADESH/
REPUBLIC OF THE UNION OF MYANMAR**

PUBLIC
with Public Annexes A, B, C & D

Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence

Source: The Confederation of Trade Unions Myanmar – “CTUM”

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy-Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims **The Office of Public Counsel for the Defence**

States' Representatives

Amicus Curiae

The Confederation of Trade Unions
Myanmar – "CTUM"

REGISTRY

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Victims Participation and Reparations Section

Philipp Ambach

Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, the Confederation of Trade Unions Myanmar – “CTUM” hereby seeks leave to present observations to assist Pre-Trial Chamber III of the International Criminal Court in the determination of the issues arising out of the Prosecutor’s *“Request for the authorisation of an investigation pursuant to article 15”¹* (“the Prosecutor’s Request”).

The Applicant

1. The Confederation of Trade Unions Myanmar - “CTUM” (“the Applicant”) was formed in 1991 with the vision of restoring democracy in Myanmar and creating equal employment opportunities for all. Through the execution of its mandate and by fostering strong industrial relations, the Applicant is working to develop greater awareness of all social and political issues currently affecting Myanmar.² The conflict in Rakhine State affects Myanmar as a whole and, consequently, the Applicant is ideally poised to represent the interests of the Myanmar public and those strongly objecting to the involvement of the International Criminal Court in Myanmar’s sovereign affairs. The Applicant will seek to assist the Court by providing a Myanmar perspective to a number of issues arising out of the Prosecutor’s Request which might otherwise be lacking.

2. The Applicant is aware of, supports and hereby adopts the substance of the request for leave to submit observations filed by Professor Dr. Tin Aung Aye on 10 October 2019³ and, likewise, makes this petition in the full knowledge that the Government of the Republic of the Union of Myanmar has taken the principled decision not to engage with the International Criminal Court.⁴

¹ ICC-01/19-7.

² Annex A.

³ ICC-01/19-13.

⁴ Government of the Republic of the Union of Myanmar Ministry of the Office of the State Counsellor: Press Release dated 9 August 2018: *“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. 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*

3. The Applicant agrees that the need for submissions which challenge the Prosecutor's assumptions and adopted narrative is imperative in an adversarial system of law and should not be viewed by the learned Pre-Trial Chamber as unnecessarily provocative. Accordingly, The Applicant believes that it would be in the interests of justice for the Court not just to receive but, even, to invite⁵ submissions in order to ensure a balanced presentation of views, pertaining to the political and humanitarian situation in Rakhine State.

Relevant Statutory Provision

4. Rule 103(1) of the Rules of Procedure and Evidence states as follows:

"At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate".

5. Although the rule provides for submissions to assist in the proper determination of "*the case*", practice at the International Criminal Court, both in the present situation and elsewhere, has shown that leave to submit amicus curiae submissions may be granted at any stage of the legal proceedings, including prior to the initiation of an investigation.⁶

Treaties ("Vienna Convention"). The actions of the Prosecutor, constitute an attempt to circumvent the spirit of article 34 of the Vienna Convention". <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/08/09/id-8936>

⁵ ICC-02/05-10: where Pre-Trial Chamber I in the Darfur Situation decided to invite "Louise Arbour, High Commissioner of the Office of the United Nations High Commissioner for Human Rights and Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan, to submit in writing their observations on issues concerning the protection of victims and the preservation of evidence in Darfur".

⁶ c.f.; ICC-02/17-43 where Pre-Trial Chamber III granted leave to a collective of human rights organizations seeking to intervene in the proceedings arising out of the Prosecution's appeal against the decision to deny authorization to open an investigation in Afghanistan: "At this stage, the Chamber does not take a position either on the views expressed in either the Amicus curiae's Request [...], or on the merits of the arguments elaborated by the applicants therein. However, in light of the nature and complexity of the issues at stake, it considers that receiving additional submissions may assist the Chamber in determining the Prosecutor's Request".

6. The Applicant, like Professor Dr. Tin Aung Aye, is not affiliated with or funded by the Government of Myanmar. Being situated, however, in Myanmar, the Applicant is, also, ideally placed to acquire information which might otherwise be denied to the Prosecutor given her present inability to enter the territory of Myanmar and, otherwise, to interact with Myanmar governmental agencies. The Applicant is, thus, aptly suited to act as an "*independent and impartial intervener having no other standing in the proceedings*".⁷

7. Furthermore, the Applicant also believes that its observations will be of "*indispensable assistance*"⁸ to the Court by presenting discrete factual knowledge and unique documentation obtained, *inter alia*, as a result of access to information petitions that it has made in Myanmar and elsewhere.

The Proffered Expertise

8. If given leave, the Applicant will present observations on Part V Section C of the Prosecutor's request which concerns "*the context of discrimination and violence against the Rohingya in Myanmar*".⁹ With the benefit of historical and contemporary documentation acquired from State authorities and foreign archives, the Applicant will, in particular, elaborate on and challenge the following issues arising out of the Prosecutor's Request;

- a) The alleged intentional policy to deport 787,000 Rohingya people from Myanmar to Bangladesh in the context of two waves of violence;
- b) The "*Rohingya self-identity as a distinct ethnic group with their ... long standing connection to Rakhine State*";¹⁰

⁷ ICC-01/09-35.

⁸ ICC-01/04-01/07-3003-tENG at para. 54.

⁹ Prosecutor's Request at page 22.

¹⁰ Prosecutor's Request at para. 46.

- c) the creation of conditions and institution of policies to prevent the return of "*displaced Rohingya and failed agreements to repatriate them*", and;¹¹
- d) Myanmar's citizenship laws and other targeted policies which, according to the Prosecutor "*have been implemented in a discriminatory and arbitrary manner*".¹²

9. Whereas the above-mentioned issues touch on essential legal elements of the crimes alleged by the Prosecutor, they are, nevertheless, viewed by civil society organizations as being highly contentious. By providing factual information which challenges these assertions, in a respectful and non-inflammatory fashion, the Applicant will seek to assist the learned Pre-Trial Chamber to make a more well-informed and all-encompassing decision.

(a) *The alleged deportation of the Rohingya in the 2016 & 2017 waves of violence*

10. The Applicant cannot deny recent satellite imagery which portrays certain instances of alleged devastation and, more particularly, the destruction of homesteads. The Applicant will, however, seek to introduce research and other information which suggests that a substantial percentage of the population which left Rakhine State for Bangladesh in 2016 and 2017 did so out of subjective fear or expediency and not as a result of an intentional and organizational policy of expulsion.

11. Through the information submitted, it will be shown that the frenzied attacks perpetrated by the Arakan Rohingya Salvation Army (ARSA) and members of the local population on 30 police outposts and one military base on 25th August 2017 were well-planned and, considering historical precedent, most likely designed to attract international ire and condemnation. The facts will show that the Muslim population was fleeing Rakhine State on 25 August 2017 before the initiation of military and security operations on 28 August 2017. Boats, for example, were already

¹¹ Prosecutor's Request at para. 69.

¹² Prosecutor's Request at para. 49.

waiting at Myanmar's coast ready to take people across the waters to Bangladesh. Such incontrovertible evidence will contradict the Prosecutor's narrative which asserts that it was the deliberate intention of Myanmar to forcibly displace the population in the area.

12. Indeed, as the OHCHR Flash Report states quite clearly:

"The team received many testimonies about such restrictions. As a result of such barriers, a Rohingya can find it easier to flee to Bangladesh than to other parts of Rakhine State or another region of Myanmar. It is not therefore surprising that an estimated 66,000 Rohingya have crossed the border with Bangladesh since 9 October (2016)" [emphasis added].

13. The Applicant will submit that there is no reason to believe that the more substantial flight of refugees across the international border during the 2017 wave of violence would have been motivated by any other factors. The passage cited in paragraph 12, which is taken from one of the principal documents on which the Prosecutor herself relies, reinforces the Applicant's view that the intentional deportation charge is speculative at best. Speculation, of course, does not meet the evidentiary standard required for opening an investigation.

(b) Rohingya self-identity & their alleged -long standing connection to Rakhine State

14. Should leave be granted, the Applicant will expand on the evolution of the Rohingya designation for which, so it will be alleged, there exists no solid documentary evidence during the years of British colonial rule in Arakan which came to an end in 1948.¹³ Indeed, it will be argued that the term "Rohingya" only

¹³ Tonkin, D; Exploring the Issue of Citizenship in Rakhine State, "Citizenship in Myanmar: Ways of Being in and from Burma" ed. Ashley South & Marie Lall - ISEAS Singapore and Chiang Mai University Press, 2017. Tonkin even remarks that 'Rohingya' is "an ethnic designation which was unknown to the former British administration: "*I have found not a single reference to the term "Rohingya" in any shape or form in any*

became a part of the general discourse as a manifestation of shared "self-identity" in the 1950's with its usage becoming more widespread in the last decade of the 20th century - mostly as a result of reports of abuses committed against Muslim residents of Rakhine State.¹⁴ The term became especially common in the wake of the exodus of 1991 which saw the international community, in its deliberations on the crisis, adopt "Rohingya" as an agreed designation. Although the Prosecutor defines the term "Rohingya" as connoting a "*distinct ethnic group*", the Applicant will submit research which argues that it would be more appropriate to define the name as embodying an "*ongoing process of identity formation that has unified Muslim communities in the North Arakan region with a similar cultural profile but a diverse historical background*".¹⁵

15. The Applicant will also submit that although the term "Rohingya" has come to denote the Muslim presence in Arakan, such presence cannot be termed "*long standing*" in macro-historical terms. Records will show that from 1826 to 1862, Arakan was ceded to Britain following the first Anglo-Burmese War, subsequently being administered as part of the Bengal Presidency and only becoming part of the Indian Province of "British Burma" after the Second Anglo-Burmese War. At the beginning of the colonisation of the region, the British developed Arakan as a major rice exporter, and approximately 10% of the Muslim working population of the Chittagong Region migrated seasonally to Arakan in order to meet the increasing need for labour to harvest and export the rice. In the course of time, some of these laborers decided to settle in Arakan at the conclusion of the rice harvest, while others did so of their own volition throughout the year.

16. With respect to the alleged "*lawful presence*"¹⁶ of "*the Rohingya victims in the areas from which they were removed*",¹⁷ the Applicant will tender materials released

documents or correspondence, official or private, recording the 124 years of British rule in Arakan from 1824 to 1948".

¹⁴ Leider, J; Rohingya: The History of a Muslim Identity in Myanmar, Oxford Research Encyclopedia of Asian History, May 2018.

¹⁵ ibid at p. 2.

¹⁶ Prosecutor's Request at paras 120-122 incl.

¹⁷ Prosecutor's Request at para. 120.

from the diplomatic archives of Australia, the United States and the United Kingdom which highlight the extent of illegal migration from Bengal into Rakhine State during the first three decades of Myanmar's independence (1948-1978). These materials include the contents of a conversation between the former British Ambassador to Rangoon – T.J. O'Brien and his counterpart the Bangladeshi Ambassador – K.N. Kaiser, to be found in British National Archives. This confidential conversation suggests that even Bangladesh, as recently as 1975, acknowledged that a large number of the Rakhine State population were "trespassers" and that Burma had "some right" to eject them¹⁸ yet had not done so.

17. With the leave of the learned Pre-Trial Chamber, the Applicant proposes to address the demographic background of the conflict in Northern Rakhine using sources from the past including those from the colonial period challenging, thereby, some of the allegations presented by the Prosecutor¹⁹. One relevant issue is the changing demography of Myanmar caused by influx of migrants encouraged by the British Government during its colonial rule in Myanmar. The United Kingdom Foreign Office Research Department report of "*The Mujahid Revolt in Arakan*" of 31 December 1952²⁰, observes that the explosion of population in Bengal led, over the years, to a steady movement southwards, with the result that the Chittagong district became predominantly Indian-Muslim in character and over-populated in relation to its resources thereby causing population overspill into Northern Akyab [in Myanmar].²¹ In the nineteenth century, with the elimination of the former frontier and the extension of Pax Britannica over India as a whole, this population migration was accelerated. Every year saw a large seasonal influx of workers from Chittagong into Akyab district coming to work in the rice-fields; some traveling by sea directly to the port of Akyab and many crossing the Naf river to Maungdaw spreading further afield on foot. Some of this population settled in the country, especially in the parts

¹⁸ Annex B: National Archives, London: FCO 15/2041-C384097.

¹⁹ Bergsmo, M; "Myanmar, Colonial Aftermath, and Access to International Law", TOAEP Occasional Paper Series at p.5: <http://www.toaep.org/ops-pdf/9-bergsmo>.

²⁰ <http://www.legal-tools.org/doc/851b1e/>.

²¹ Paragraph 5.

nearest their former homes, so that in 1917, the Settlement Officer reported that "Maungdaw township has been overrun by Chittagong immigrants. Buthidaung township is not far behind".²²

(c) The alleged creation of conditions to prevent the return of a displaced population

18. Should it be granted leave, the Applicant will submit that ample documentary evidence exists to refute one of the main tenets of the Prosecutor's argument, namely, that there exists an official and intentional policy of property devastation and subsequent re-characterization of land use designed to prevent the return of persons displaced as a result of the most recent waves of violence. The Applicant will suggest that the Prosecutor has drawn her conclusions as to the existence of a "scorched-earth" strategy and, more generally, an "*underlying [organizational] policy to attack the Rohingya civilian population*"²³ by focusing solely on a few instances of "*exclusionary and discriminatory rhetoric*"²⁴ attributable, allegedly, to the "*highest echelons of the Myanmar State authorities*".²⁵ In so doing, the Prosecutor has ignored the larger picture which has been one of an international and regional effort to facilitate the complex process of voluntary repatriation and, moreover, a willingness on Myanmar's part to fully engage in the process despite a perceptible lack of willingness on the part of the displaced population in Bangladesh.

19. Accordingly, and with leave, the Applicant will elaborate on steps taken by the Myanmar Government to facilitate repatriation pursuant to important bilateral agreements signed with Bangladesh which are annexed hereto: i) The Arrangement on Return of Displaced Persons from Rakhine State dated 23 November 2017,²⁶ and; ii) The Physical Arrangement for Repatriation of Displaced Myanmar Residents from

²² By 1931, the last year for which details of population are available, Indian Muslims, nearly all originating in Chittagong, formed 57 per cent of the population of the Maungdaw township and 56 per cent of the population of Buthidaung.

²³ Prosecutor's Request at para. 189.

²⁴ Prosecutor's Request at para. 192.

²⁵ Prosecutor's Request at para. 195.

²⁶ Annex C.

Bangladesh under the Arrangement on Return of Displaced Persons from Rakhine State dated 16 January 2018.²⁷ Similar bilateral agreements have been concluded by both Governments in the past.

20. The first of these bilateral arrangements explicitly states that “[t]he process of return will commence at the earliest and shall be completed in a time-bound manner agreed by both parties”, namely Myanmar and Bangladesh. The Arrangement on Return of Displaced Persons (“the Arrangement”) sets out the jointly agreed undertaking that Myanmar should effect all necessary measures to halt the outflow of Myanmar residents to Bangladesh. In pursuance of this undertaking, the Union Minister of the Office of the Ministry of the State Counsellor in Myanmar, together with the Ambassador of Bangladesh, the Heads of Mission of China and India and the United Nations Resident Coordinator visited Northern Rakhine in early October 2017 and, while assessing the situation on the ground, appealed to the people encamped near the border and awaiting transportation to Bangladesh in an attempt to dissuade them from leaving Myanmar²⁸. The Bangladeshi Ambassador, in fact, set out the terms of the bilateral agreement and persuaded some of them to go back to their own villages.²⁹

21. The Arrangement also includes provisions for those who left Myanmar to return voluntarily and safely to their own households and original places of residence or to a safe and secure place of their choice nearby. Under the Arrangement, Myanmar also agrees to take all possible measures to see that the returnees will not be settled in temporary places for a long period of time and that their freedom of movement in the Rakhine State will be allowed in conformity with the existing laws and regulations. Their access to basic services and livelihood will be further promoted.

²⁷ Annex D.

²⁸ <https://www.youtube.com/watch?v=3awIV0GHuVw>

²⁹ <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-7754>.

22. Under the Arrangement, Myanmar also affirms that "*there shall be no restriction on the number of persons to be repatriated, so long as they can establish bona fide evidence of their residence in Myanmar.*" In fact, both Myanmar and Bangladesh agreed that "*the process of return shall commence within two months of the signing of the Arrangement and be completed within a reasonable time from the date the first batch of returnees is received*". Had the Arrangement been implemented as Myanmar hoped and expected, the return of refugees would have started in January 2018.

23. The second agreement sets out the logistical framework for implementing the Arrangement. This instrument ("the Physical Arrangement") establishes a mechanism for verifying that returnees are indeed former residents of Myanmar and formulates a reception procedure. Pursuant to the Physical Arrangement, transit centers were to be established in Bangladesh and Myanmar. Two reception centers are already operational in Myanmar; one for those returning by land (Taung Pyo Letwe) and one for those returning by sea (Nga Khu Ya). Myanmar has also built a transit centre (Hla Phoe Khaung). Under the Physical Arrangement, both Myanmar and Bangladesh agreed on the design and content of the form which would have to be completed by the returnees in order to assist Myanmar in the verification process.

24. In pursuit of the aforementioned, Myanmar and Bangladesh have established a Joint Working Group which is chaired by the Permanent Secretary in the Ministry of Foreign Affairs of Myanmar and the Foreign Secretary of Bangladesh. This and the aforementioned joint and regional efforts are strong evidence of Myanmar's former and ongoing will to facilitate the return of verified Myanmar residents while ensuring sustainable and durable solutions for their economic welfare.

25. The Applicant will also refer the learned Pre-Trial Chamber to the tripartite Memorandum of Understanding ("MoU") signed by Myanmar, the United Nations Development Programme ("UNDP") and the United Nations High Commission for Refugees ("UNHCR") on 6 June 2018 and extended, for a further year, on 27 May

2019. This MoU establishes a framework for interagency cooperation with the aim of creating conducive conditions for "*the voluntary, safe, dignified, and sustainable repatriation of refugees from Bangladesh and for helping to create improved and resilient livelihoods for all communities living in northern Rakhine State*".³⁰

26. In the Memorandum of Understanding (MoU), and with a view to assisting Myanmar, UNHCR undertakes the following steps:

- i) to assist with the implementation of the voluntary repatriation programme and the reintegration of all returnees through mandated protection activities, community consultations and site visits;
- ii) to work with UNDP to prepare the conditions for recovery and resilience-based development in potential areas/places of origin and/or return, including through joint assessment and programming.

27. Similarly, UNDP undertakes to assist Myanmar, *inter alia*, as follows:

- i) to coordinate and support the necessary assessments related to community resilience-building, including sustainable livelihoods, conflict sensitivity and local institutional capacity building, at selected project sites;
- ii) to promote social cohesion amongst returnees and host communities;
- iii) to support access to livelihoods through the design and implementation of community-based interventions.

28. Subsequent to the aforementioned accords, an initiative was adopted during the 33rd ASEAN Summit held in Singapore on 13 November 2018, whereby an emergency response and assessment team of regional experts was sent to Rakhine State to identify areas of cooperation. The results of this preliminary-needs

³⁰<https://www.mm.undp.org/content/myanmar/en/home/presscenter/pressreleases/2019/unhcr-undp-government-of-the-union-of-myanmar-extend-mou.html>. It should be noted that Myanmar's Ministry of Social Welfare, Relief and Resettlement, together with the United Nations Development Programme, issued the Rakhine Joint Assessment Report on 21 September 2019.

assessment were published in May 2019 by the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management ("AHA Centre") and, with leave, will be submitted to the Pre-Trial Chamber. This report, inter alia, details the efforts made under the abovementioned agreements to ensure the return of displaced persons and to identify potential relocation sites where repatriation to former places of residence is no longer possible. The report further stated as follows:

"...it was verified that the systems for the registration of returnees covering processes, procedures, provisions, personnel and coordination at the levels of Union, Rakhine State, and Maungdaw District are all in place and operational. It is evident that significant efforts have been made by the Government of Myanmar to facilitate a smooth repatriation process, and these have been communicated with the Government of Bangladesh through the joint working group meetings"³¹.

29. The Applicant will, additionally, proffer information attesting to the most recent efforts made through the bilateral Joint Working Group whereby the Government of Myanmar conveyed to the Government of Bangladesh the names of 3,450 Rohingya refugees who had been cleared for return to Rakhine State, Myanmar. 211 refugees have already returned of their own volition. Far from judging it to have pursued failed initiatives (according to the Prosecutor), the UNHCR has welcomed the Government of Myanmar's engagement in the process as "*a positive step in the affirmation of the right to return of Rohingya refugees*".³² Myanmar's efforts to facilitate humanitarian relief and repatriation were also acknowledged during the 40th session of the ASEAN Inter-Parliamentary Assembly held in Bangkok in late August 2019.³³

³¹<https://www.legal-tools.org/doc/3rf0ni>.

³²<https://www.unhcr.org/uk/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar.html>

³³https://www.irrawaddy.com/news/burma/asean-members-back-myanmars-repatriation-aid-efforts-rakhine.html/amp?_twitter_impression=true

30. Experience derived from the exodus of 1978 and 1991 has shown that repatriation efforts were not successful until confidence in the process had been established. In the present scenario, the Applicant will seek to demonstrate that the primary obstacles to repatriation are not, as alleged by the Prosecutor, the purported creation of conditions calculated to dissuade return but, rather, the insistence on the grant of citizenship without prior verification, the spread of misinformation concerning the voluntary nature of the repatriation process³⁴ and the fear of reprisals from the Arakan Rohingya Salvation Army (“ARSA”) and its supporters.

31. The Physical Arrangement clearly sets out the necessary procedure for the voluntary, safe and dignified return of verified Myanmar residents. The first step in this process requires Bangladesh to inform the people in refugee camps of the willingness of the Myanmar government to accept their repatriation. Those who volunteer to return are required to indicate their consent by completing agreed forms. Thereafter, Bangladesh is under a duty to send the signed forms to the Myanmar authorities for their verification. At the outset, Bangladesh failed to comply with its obligation to obtain informed consent and, as a direct result, the first group of 2,200 returnees due to be repatriated to Myanmar on 15 November 2018, were unaware that their names had been submitted to Myanmar. This led to the failure of the repatriation exercise.

32. To conclude, an organizational policy to prevent the return of the displaced population is totally contradicted by Myanmar’s undertakings pursuant to its bilateral agreements with Bangladesh and the tripartite memorandum of understanding (MoU) signed with the UN Agencies.³⁵ These agreements were signed in the utmost good faith with genuine intent to ensure that displaced persons were restored to their former places of residence. Accordingly, it will be submitted that

³⁴https://www.latimes.com/world-nation/story/2019-08-19/rohingya-muslims-refugees-myanmar?_amp=true&_twitter_impression=true

³⁵ The Applicant has obtained copies of the agreements as signed.

there are absolutely no grounds – not even reasonable – to believe that there was an official policy to prevent such repatriation.³⁶

(d) The alleged discriminatory application of Myanmar's citizenship laws and other policies

33. At the outset, it should be noted that the 1989 nationwide citizenship scrutiny exercise leading to the replacement of the national registration cards with citizenship scrutiny cards and, thereafter, the invalidation of the temporary registration cards in early 2015 - identified by the Prosecutor as discriminatory in nature - were all policies promulgated prior to the constitution of the NLD-led government (which took office in March 2016) and prior to the time period relevant to the Prosecutor's Request

34. Notwithstanding, the Applicant will present information challenging the Prosecutor's broad assertion that the 1982 Citizenship Law and subsequent policies have been exploited with intent to disenfranchise the Muslim populace of Rakhine State. The proposed information will show that Myanmar is sensitive to and, moreover, views the resolving of demands for citizenship as key to lowering tensions in Rakhine State. The failure to accede fully to such demands, it will be submitted, may have resulted from administrative inertia in the implementation of the relevant legislation but certainly not from an intentional policy of denial. This is borne out by a key recommendation³⁷ contained in the final report of the Investigation Commission for Maungdaw in Rakhine State - set up to examine the incidents of violence in 2016. This recommendation (No. 19), issued prior to the outbreak of violence in 2017, calls for the verification process to be prioritized stating as follows:

"A rigorous process of Citizenship verification for Muslims in Rakhine State including Maungdaw under the Citizenship Law 1982 should be

³⁶ The Applicant has information to show that the Government of Myanmar has, furthermore, taken steps to ensure that returnees will be provided food, non-food items and other amenities to enable the returnees to rebuild their livelihoods.

³⁷ Recommendation 19 which was not published in the summary of the final report on which the Prosecutor relies. This recommendation has been disclosed to the Applicant.

initiated as a priority. Those who meet the citizenship criteria should be granted citizenship with attendant citizenship rights. For this purpose, verification teams may be formed systematically, and the processing may be expedited by giving the first priority to those who hold the threefold National Registration Cards and to those who have already filled in the genealogical charts (Family-Tree Forms). In this way, citizenship rights can be granted in the fastest possible manner and minimize criticism from abroad”.

The Applicant suggests that this recommendation is clear evidence of a will to encourage (as opposed to deny) the return of displaced persons.

35. The Applicant will, also, seek to qualify the Prosecutor's assertion that “membership of a “national race” (or “national ethnic group”) has been made the key criterion for citizenship” and, consequently, that “the focus on ethnicity has been profoundly discriminatory in intent”. This assertion is drawn, *inter alia*, from the United Nations Fact Finding Mission Report which, failed to mention the concept of “associate citizenship” which, so it will be argued, was designed to address the situation of those who had applied for citizenship post-independence having “come at different times for different reasons from different lands”³⁸ yet had not been accorded citizenship at the time that the 1982 Citizenship Law was enacted.

36. The Applicant will assert, therefore, that the true legislative intent underpinning the 1982 Citizenship Law was that the various categories of citizenship were to be of a transitional nature only. In due course, full citizenship was to have been made generally available to all those descended from associate citizens or naturalized grandparents, regardless of ethnicity; whether **or not** they were included among the 8 ethnic groups mentioned in the 1982 Citizenship Law or the 135

³⁸ General Ne Win, 8 October 1982; http://www.burmalibrary.org/docs6/Ne_Win's_speech_Oct-1982-Citizenship_Law.pdf

"national races" first published in 1990. This is made abundantly clear in a speech delivered by General Ne Win on 8 October 1982 and in Article 7(f) of the 1982 Citizenship Law³⁹

37. In light of the aforementioned, the Applicant will seek to introduce information which will prove that the requisite discriminatory intent for the crime against humanity of persecution cannot be implied circumstantially from the provisions of pre-existing legislation or from the implementation thereof.

38. It will also be submitted that discriminatory intent cannot be construed from other governmental policies. Documentation will show that the incumbent Government is actively addressing the aforementioned deficiencies identified by the Kofi Annan Advisory Commission through a Committee for the Implementation of the Recommendations on Rakhine State. This Committee has benefited from the sage advice of an advisory board chaired by Dr. Surakiart Sathirathai - former Deputy Prime Minister and Minister of Foreign Affairs of Thailand.⁴⁰ According to the State Counsellor - Daw Aung San Suu Kyi - speaking in Singapore on 21 August 2018,⁴¹ 81 of the 88 recommendations of the Kofi Annan Advisory Commision were being implemented. The Union Enterprise for Humanitarian Assistance, Resettlement and Development for Rakhine State (UEHRD) added, on 7 May 2019, that Myanmar would have made further progress were it not for the diversion of resources and defensive measures occasioned by the ARSA attacks of 2017.⁴²

³⁹ <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b4f71b>

⁴⁰ The Advisory Board also included prominent international members such as Mr. Urban Ahlin - Speaker of the Swedish Parliament, Professor Lord Derzi of Denham - former Parliamentary Under-Secretary of State of Health, Department of Health in the United Kingdom, and Mr. Roelf Meyer - former Minister of Defence and former Minister of Constitutional Development and Provincial Affairs in South Africa. These individuals have made a number of visits to Rakhine State and have suggested a number of useful recommendations⁴⁰.

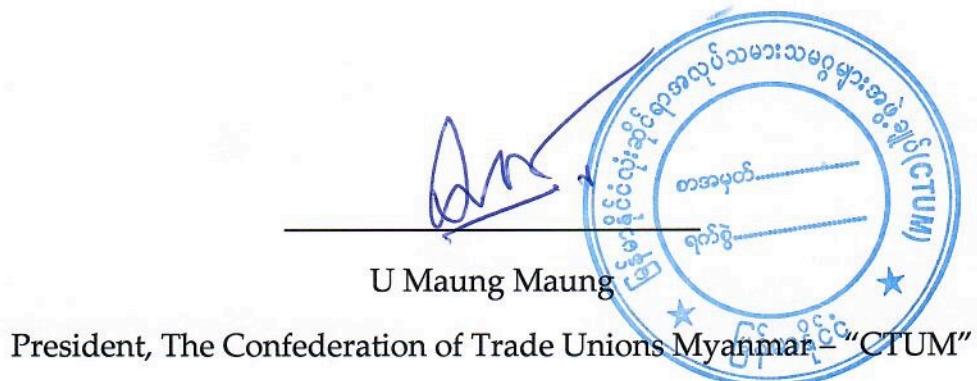
⁴¹ <https://www.straitstimes.com/singapore/suu-kyi-outlines-efforts-to-ease-rohingya-crisis>

⁴² <https://www.mmtimes.com/news/govt-reviews-implementation-kofi-annan-commission-recommendations.html>

39. To this end, and if given leave, the Applicant will submit up to four of the most recent quarterly reports issued by the aforementioned Committee for the Implementation of Recommendations on Rakhine State.⁴²

Conclusion

40. In light of the quantity of documentation at its disposal and the need to select further information which will be of most benefit to the learned Pre-Trial Chamber, the Applicant respectfully requests leave and sufficient time to present observations on the issues identified in paragraph 8 above. The Applicant also respectfully requests leave to make oral submissions if necessary, through counsel at any future hearing to be held on the Prosecutor's Request.



Done this 16th day of October, 2019.

Yangon, Republic of the Union of Myanmar

⁴²The Myanmar Government is not fostering discrimination but, to the contrary, is intent on establishing an ecumenical environment in Rakhine State. The Applicant will show that there have been several frank discussions between Senior Government Officials and Community Leaders from all communities to discuss their present concerns. There are currently over 200 social cohesion activities organised by local NGOs and Community Groups and Government Agencies including sports initiatives.