LEGAL AID NETWORK (LAN)
PUBLISHED ON JULY 20, 2024

DIPLOMATIC BRIEFING ON BURMA

Bulletin No (3)

COVER PHOTO BY DIBYANGSHU SARKAR, THE GUARDIAN
Rohingya Muslims make their way to the Balukhali refugee camp

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Seeking Accountability for Ending Impunity in Burma/Myanmar:

A SPECIAL FOCUS ON THE PLIGHT OF ROHINGYA

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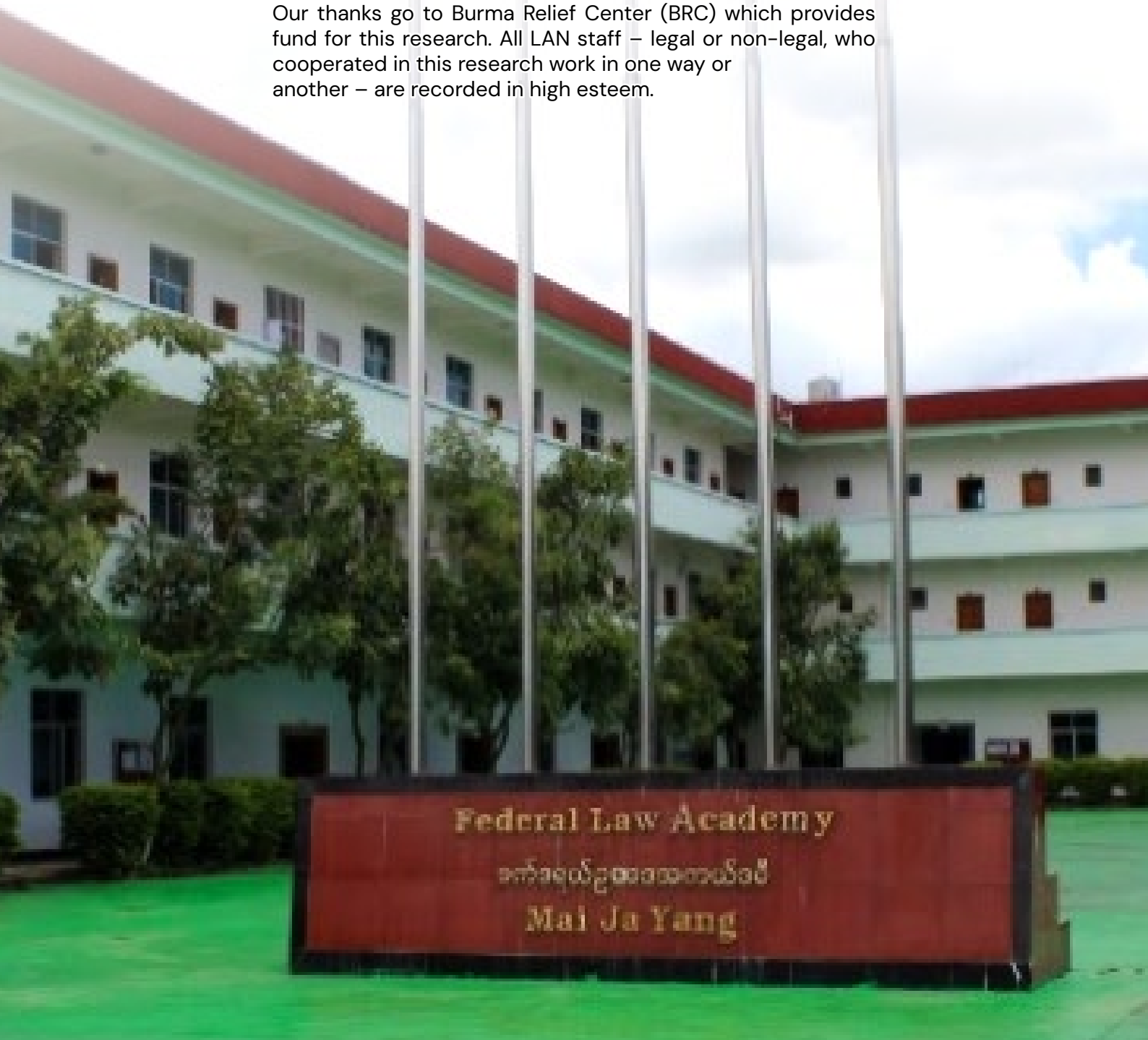
Status of the Organization

Legal Aid Network (LAN) is an independent organization. It is neither aligned nor is it under the authority of any political organization. The LAN has been conducting research related to issues of Rohingya for some years already.

Acknowledgement

We appreciate Mr. Aung Myo Min – the Union Minister, Ministry of Human Rights, serving in the National Unity Government – who requested to compile a research paper relating to Rohingya and encouraged us.

Our thanks go to Burma Relief Center (BRC) which provides fund for this research. All LAN staff – legal or non-legal, who cooperated in this research work in one way or another – are recorded in high esteem.



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Preamble

Almost 80 years after the Second World War, nationalism, ultranationalism and ethnic nationalism have simultaneously resurged. This underpinning has spurred tremendous competition among many States and Societies today, in both positive and negative ways. On the one hand, benign nationalism – if practiced within the scope of civic culture and human rights norms, which are recognized as part of customary international law – must be appreciated. On the other, the oscillation between nationalism, ultranationalism and ethnic nationalism potentially threatens not only local peace but also world peace, violating the stated norms. Resolving this threat – in terms of the protection of liberty, life and security – requires upholding the minimum standards of the rule of law and the rule of international law. At the same time, concurrently dealing with the related issues in society is also a necessity given the societal influence on written and unwritten law or the status of the rule of law.

In connection with the normative and empirical approaches stated above, the violent or non-violent conflicts – surrounding nationalism, ultranationalism and ethnic nationalism – occurring in Burma are also worth observing. Such observation is necessary to support the resolution of the Rohingya issue apart from others that constitute the gravest crimes of international concern.

To facilitate the resolution of the Rohingya issue, the international community might be encouraged to take the following actions: *apply diplomatic pressure; impose sanctions and restrictions on human-rights abusers; lead international condemnation; demand greater humanitarian access to the Rohingya; and work toward more international support for refugees*. Such actions would not be mistakes per se, but they would also be neither accurate responses nor entirely sufficient. They would simply alleviate the Rohingya's suffering without properly dealing with the root cause of the problem.

During the Second World War, Adolf Hitler planned to exterminate six million Jews. Some of his military generals objected to the plan, claiming that such a heinous crime would be recorded in history negatively, but he responded by saying, 'Is there anybody who say anything today about genocide committed by Turkey against over one million Armenians during the first world war?' In response, all the generals became silent and agreed to be complicit in Hitler's endeavor to commit the holocaust. Such historical lessons

proved that successfully deterring similar incidents in the future required first effectively seeking accountability for the past heinous crimes and ending impunity. In so doing, the rule of law foundation would have been established in a different time and space. This key principle should be applied to the case of the Rohingya and other victims.

The current situations indicate that, if the related resistance forces operating to liberate not only Rakhine state/province, from which the Rohingya issue emanated, but also for the entire country of Burma – the NUG and other democratic forces – have the political will to engage with the legal requirements, and if these forces work together, seeking accountability for Rohingya will become a reality. It is because in northern part of Rakhine state/province, Buthitawn and Maung Taw townships – in which lies the mass graves of the Rohingya – are currently under siege by the ULA/AA, a prominent ANSA (Armed Non-State Actor).

Thus, the provisional measures order rendered by the ICJ would have been implemented: the ICC prosecutor authorized for the investigation by the ICC Pre-Trial Chamber III in 2019 would reactivate his duty and resume investigation; the IIMM may also expand its mandate by finding effective ways to hold the *Tatmadaw* military leaders, who have allegedly committed the gravest crimes of international concern, accountable; and the UN Security Council and ASEAN would independently review their policy as it ignores international legal doctrine, *jus cogens* norms. Through such measures, countless positive results would have come into existence, and the rule of international law would have been somewhat established.

However, the above expected developments, notwithstanding possibly becoming a reality, are insufficient as they alone will never be an overarching factor to bring peace in war-torn societies in Burma after resolving the underlying issues that have emerged from nationalism, ultranationalism and ethnic nationalism. To properly address these issues, this paper emphasized the right to liberty, life and security and the rule of law with the backdrop of the interrelationship between the scope of 'Law and Society' and 'Law and State', aiming to achieve peace.

Executive Summary

This paper explores the pathways to sustainable peace in Burma by examining the relevant legal and societal dimensions, focusing on the interplay between law, society and the state. The research employs a problem-based doctrinal methodology, supported by empirical and comparative methods, to assess the impact of laws on society, particularly within the frameworks of legal realism and socio-legal research.

The primary objective of this study is to address fundamental human rights issues, such as the rights to liberty, life, and security, and their intricate relationship with the rule of law. It analyses the dynamics of liberalism, which underpin the concept of liberty, and its intersection with the rights to life and security. The research emphasizes that liberty is meaningful only when robust protections for life and security are in place under a democratic constitution that upholds the rule of law.

The scope of "Law and Society" and "Law and State" is critically examined through Hans Kelsen's theory that law stems from norms, which are essentially acts of will prescribing specific behaviors. This theoretical framework is crucial for understanding how legal norms influence societal and state structures, particularly in the context of Burma's ethnic nationalities and their aspirations for federalism, confederation, or independence.

A significant portion of the paper is dedicated to the plight of the Rohingya in Rakhine State, analyzing their citizenship crisis, historical context, and the evolving legal framework. The study underscores the severe human rights violations suffered by the Rohingya and stresses the importance of accountability for past atrocities to establish a foundation for the rule of law and sustainable peace.

The report's findings suggest that for Burma to achieve lasting peace, it must address underlying legal and societal issues. This includes recognizing the importance of self-determination for ethnic groups, ensuring the protection of fundamental human rights, and fostering a legal environment that supports justice and accountability.

Ultimately, the paper advocates for a holistic approach to peacebuilding in Burma, integrating legal reforms, socio-political considerations, and active measures to hold perpetrators of human rights violations accountable. It affirms that only through such comprehensive efforts can sustainable peace and stability be achieved in the region.

Research method

We apply the problem-based doctrinal research methodology.[1] The problem-based methodology focuses on legal doctrines, concepts, and laws in combination with socio-legal research,[2] which realizes the law in support of a functioning society. Further, we extensively use the empirical[3] approach as a mixed method to explore the consequences of law—or the actual impact the law has on society—in terms of the "law in action" enumerated under legal realism.[4]

Simultaneously, when seeking to identify pathways to sustainable peace in Burma, the doctrinal research combined with empirical and comparative methods alone may be insufficient. The socio-legal research method is, therefore, primarily applied as legal problems are connected to historical, social, political and economic issues at the national, regional and global levels. Particularly for the ethnic nationalities in Burma, the underlying legal and societal factors shape the objectives for achieving federalism or the confederation or establishment of an independent state, all of which are directly relevant to the right of self-determination in one way or another. Only when socio-legal research is conducted can the second objective of this research—to examine the underlying legal and societal issues from the perspective of the connections between law and society—be undertaken.

1 'Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.' Dennis Pearce, Enid Campbell and Don Harding ('Pearce Committee'), Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (Australian Government Publication Service, 1987).

2 '……the legal problems are connected with social, political, economic, psychological issues.' 'Socio-Legal Research' (Ministry of Human Resource Development, Government of India) <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/04._socio-legal_research/et/8151_et_et.pdf> accessed 11 September 2021.

3 The adjectives empirical and empiric mean a science 'based on, concerned with, or verifiable by observation or experience rather than theory or pure logic', see <https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/empirical#:~:text=em%C2%B7pir%C2%B7i%C2%B7cal,evidence%20to%20support%20their%20argument.>

4 'A theory that all law derives from prevailing social interests and public policy. According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case', see <https://www.law.cornell.edu/wex/legal_realism> and <https://www.britannica.com/topic/philosophy-of-law/Realism.> accessed 23 March 2023.

Chapter 1

PART 1: THE RIGHT TO LIBERTY, LIFE AND SECURITY AND THE RULE OF LAW

The right to liberty, one of the most fundamental human rights,[5] derives from the essence of liberalism. Butler shed light on the major characteristics of liberalism: maximising freedom, priority of the individual, toleration, minimising coercion, representative and limited government, rule of law, spontaneous order, free markets, civil society, and doubts about power.[6] It is crystal clear that 'liberty' is an intrinsic value. However, it cannot stand in isolation. There are interconnections and interdependence between "the right to liberty" on the one hand and "the right to life and security" for individuals on the other. The former is outweighed by the latter as, if the latter lacks, the former cannot survive. Simultaneously, the latter can somewhat be guaranteed if the former functions legally with the underpinning of a democratic constitution which upholds the rule of law.

In connection with the rule of law, the preamble of the Universal Declaration of Human Rights (UDHR) lays an instrumental foundation for human rights, including the right to self-determination of not only individuals but also collective groups such as ethnic minorities, by asserting that human rights should be protected by the rule of law. Henkin stressed that mistreatment of minorities by the states, in violation of minority treaties, may threaten international peace.[7] For all human beings – including the minority groups such as Rohingya and others, particularly in the developing countries[8] – the right to self-determination in support of liberty may be meaningful only when it can be protected in both aspects – civil and political rights as well as economic, social and cultural rights – leading to guaranteeing the right to life and the right to security.

5 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR), Article 3: 'Everyone has the right to life, liberty and security of person.'

6 Eamonn Butler, 101 Great Liberal Thinkers - School of Thought (Institute of Economic Affairs, London 2019) 3-7, available at <https://iea.org.uk/themencode-pdf-viewer-sc/?file=/wp-content/uploads/2019/08/Great-Liberal-Thinkers-Interactive.pdf> accessed 4 March 2023.

7 Henry J Steiner and Philip Alston, International Human Rights in Context: Law, Politics, Morals (Clarendon Press, Oxford 1996) 115.

8 Business Development Bank of Canada, 'Developing Countries' (BDC) https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/developing-country and IGI Global, 'What is Developing Countries' https://www.igi-global.com/dictionary/developing-countries/7401 accessed 9 July 2022. ; Tariq Khokhar and Umar Serajuddin, 'Should we continue to use the term "developing world"?' (World Bank Blogs 16 November 2015) https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world accessed 15 November 2023.

PART 2: THE SCOPE OF "LAW AND SOCIETY" AND "LAW AND STATE"

Hans Kelsen

Kelsen expounds that law emanates from norms, meaning acts of will that command or prescribe particular behaviors.[9] Although a positivist, he adopts custom as a valid norm when people are accustomed to behaving in a certain way. According to him, a norm is valid when it exists, is observed or is applied; a norm decrees an Ought which creates all possible normative functions: commanding, empowering; permitting and derogating.[10]

Kelsen elaborates on the nexus and distinction between 'Normal' and 'Ought'. Something that occurs regularly can become what should be done. However, the distinction is more significant than the nexus as what regularly happens ought to happen is often incorrect. Statutory law, provided by the state, can intervene in societal norms and exclude customary law, making the stated norm lose its validity if it is no longer observed or applied.[11]

Kelsen emphasizes that law, in terms of statute law, must be conceived as a coercive order.[12] Law assigns duties through coercion and sanctions against those who do not fulfil their duties.[13] Law is produced by the state, normally by the legislative assembly, and enforced by the executive. Courts, as part of the state, determine what people ought to do.[14] Kelsen does not address the purpose of law in the relationship between law and state.

Kelsen asserts that law regulates its own creation, standing in isolation from society.[15] He interprets law as a set of norms, a normative order.[16] The norms described by jurisprudence are legal norms by which a coercive act can be done as a sanction, encompassing both criminal actions and civil wrongdoings.[17] He argues that law must be distinguished from moral judgments, separating it from nature and natural science.[18]

9 Hans Kelsen and Michael Hartney (tr), General Theory of Norms (Oxford University Press, Oxford 1991) 5-8, https://doi.org/10.1093/acprof:oso/9780198252177.001.0001 accessed 23 March 2023.
10 ibid
11 ibid
12 Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 The University of Chicago Law Review 75, 78, available at https://chicagounbound.uchicago.edu/uclrev/vol9/iss1/5 accessed 23 March 2023.
13 Hans Kelsen and A Wedberg (tr), General Theory of Law and State (originally published by Harvard University Press, Cambridge MA 1945, The Lawbook Exchange, New Jersey 1999) 28.
14 ibid 27.
15 ibid 271.
16 ibid 270.
17 ibid 272.
18 ibid 273.

Eugen Ehrlich

Kelsen's idea contrasts with Ehrlich's sociological of legal science, which emphasized the role of society in the "Living Law" concept. Ehrlich[19] believes that a significant part of law is independent of the state, asserting that the law's main function is to create order within societal associations. He clarifies that these norms are not state produced but emerge from societal institutions and structures of which people are a part.

According to Ehrlich, the living law dominates life itself even without being formalised in legal propositions. It meets the minimum requirements of law: the modern legal document and direct observation of life.[20] Events in society, such as commerce, customs and associations, should be observed directly in the actual life experience of the parties.[21] Thus, law is inherently part of society,[22] contrary to Kelsen's view of law as separate from society. Ehrlich emphasizes that law continues to exist as long as societal facts and norms exist.

Law, Society and State

As stated above, Kelsen's focus on 'should be done' and 'should not be done'[23] is relevant to promoting and protecting individual rights under the International Covenant on Civil and Political Rights (ICCPR) but less relevant to those under the International Covenant on Economic, Social and Cultural Rights (ICESCR) which sets forth the actual "content of law".

The "Content of law" is the result achieved after a law-making process is implemented. Legislative bodies' ability to determine the "content of law" varies. For example, in Britain's common law system, the Parliament has full authority to enact any law, while the US Constitution limits the laws the American Congress can create, ensuring laws do not infringe on fundamental rights.[24]

Kelsen emphasizes the state's role over society, arguing that a rule of conduct is not only customary but also what ought to be done.[25] He challenged Ehrlich's work from the pure theory of law perspective, not sufficiently considering society's influence on the law. His analysis of "used to be done" (customary law) and "should be done" (statute law) is partly true and valuable, but overemphasising statue law can lead to rule by law rather than rule of law.

19 Eugen Ehrlich and Walter R Moll (tr), Fundamental Principles of the Sociology of Law (Harvard University Press, Cambridge MA 1936).
20 ibid 493.
21 ibid 491-493.
22 ibid 494-497.
23 Hans Kelsen, 'What is the pure theory of law?' (1959) 34 Tulane Law Review 269, 270.
24 The First Amendment of the US Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'
25 Kelsen (n 14) 27.

All customary practices, although significant, can lack ethical value. If these practices threaten rights like life, security and health, statute law should intervene to prohibit such human conduct, and punish the perpetrators. Otherwise, the flow of living law should not be restrained. Kelsen's over-focus on statute law minimizes society's role, is problematic.

Commercial, customary, religious, moral, traditional, and cultural rules and practices affect, facilitate and generate a society. Globalization and technological innovation have made societal dynamics much more complex over the past forty years. This complexity includes democratic transformations, authoritarian regimes, disguised as democracy, changing political ideologies, charismatic leaders, interest-based approaches, competitive performance, diverse values, and various societal influences on law.

Legal systems derive inputs from the social environment. Law gets its basic raw materials from society, signifying the relationship between law and state underpinned by society. Recognizing society's influence on written or unwritten law is essential. If society, operated primarily by state organs, is the whole, law constitutes a part of it. This perspective is relevant to implementing the Rule of Law in Burma.

Chapter 2

AN ANALYSIS OF THE ROHINGYA ISSUE FROM LEGAL AND SOCIETAL ASPECTS

(A Summary of IIFFMM report 2018 (A/HRC/39/CRP.2))

Situated in the western part of Burma, Rakhine State/Province sits along the Bay of Bengal and shares a border with Bangladesh. Rakhine State/Province is considered one of the poorest states/provinces, with approximately 44 percent of its population living below the poverty line.[26] All communities in the state/province lack livelihood opportunities, which negatively impacts various social development indicators.[27] While the state is home to diverse ethnic and religious groups, the majority are ethnic Rakhine and Buddhist. The second-largest religious group consists of Muslims, predominantly Rohingya, with a smaller percentage of Kaman.

PART 1: THE CITIZENSHIP CRISIS IN THE ROHINGYA COMMUNITY

Regarding the citizenship status of the Rohingya, the 1947 Constitution and the 1948 Union Citizenship Act of newly independent Burma originally provided a relatively inclusive framework.[28] Section 4(2) of the Union Citizenship Act stated that any person descended from ancestors who have permanently resided in the territories of the Union for at least two generations, and whose parents and the person in question were born in such territories, shall be considered a citizen of the Union.[29] Additionally, section 7 allowed individuals who were 18 years old, had resided continuously in the country for at least five years, and intended to remain in the country to apply for citizenship. Most long-term residents met the criteria, irrespective of whether the residents belonged to one of Burma's "indigenous races."[30]

Most Muslims in Rakhine state/province, whether they had ancestral ties to the region before colonization or were migrants during the colonial era, were considered part of the population. Notably, some evidence suggests the authorities recognized the Rohingya as an indigenous group. Prime Minister U Nu and the first president of the country, Sao Shwe Thaike, both referred to

26 UNDP, Poverty Profile, Integrated Household Living Conditions Survey in Myanmar – 2009-2010 (2011)Rakhine State continues to rank low compared to other states and regions in Myanmar on many indicators of living standards. See UNDP, Myanmar Living Conditions Survey 2017 (June 2018).

27 UNICEF, Rakhine State – A Snapshot of Child Wellbeing, available at: https://www.unicef.org/myanmar/Rakhine_State_Profile_30-07-15.pdf

28 1947 Constitution, s. 11.

29 The 1948 Union Citizenship Act lists a range of other pathways to citizenship not reproduced here, including several non-automatic modes of acquiring citizenship (e.g., naturalization).

30 Defined as "the Arakanese, Myanmar, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A. D. (1185 B.E.)," see 1948 Union Citizenship Act, s. 3(1).

the Rohingya as a native group of Burma.[31] In fact, U Nu specifically mentioned the Rohingya by name in a radio address in 1954, referring to them as "our nationals, our brethren."[32]

During General Ne Win's regime, the legal framework for citizenship remained unchanged, and the 1974 Constitution did not significantly alter the definition of "citizen." According to the constitution, all Rohingya who were considered citizens from 1948 to 1962 continued to be recognized as citizens. However, a growing narrative claimed most Muslims in Rakhine State were illegal Bengali immigrants. This narrative emerged alongside an increasing emphasis on the importance of "national races" and a desire to deport alleged aliens. In 1978, the *Tatmadaw* (Burma's military) and immigration officials executed a nationwide project called "Operation Dragon King." The project purpose was to register all citizens and aliens before a national population census. However, the implementation of this project in Rakhine State resulted in over 200,000 Rohingya fleeing to Bangladesh, accompanied by allegations of serious human rights abuses. The government claimed that the number of Rohingya fleeing was proof of their illegal status. Yet analysis suggests that very few alleged illegal immigrants were identified.[33] As a result, the government reached an agreement with Bangladesh to repatriate the "lawful residents of Burma who are now sheltered in the camps in Bangladesh."[34] Consequently, almost all the refugees returned to Burma.

In this context, General Ne Win took the initiative to review the country's citizenship laws and subsequently implemented the 1982 Citizenship Law. The Ne Win regime exercised—pertaining to the law—a system based on "three classes of citizens," with full citizenship reserved only for "pure-blooded nationals." The other two classes were for people who "cannot be trusted fully" and who would therefore not receive "full citizenship and full rights." From the statement, the people targeted clearly included Muslims and Chinese. Together with the implementing regulations (the 1983 Procedures), the law created a citizenship framework with three distinct categories (or "classes") of citizens: full citizenship, associate citizenship, and naturalized citizenship.[35]

The reality, however, is that implementation of the law has been discriminatory and arbitrary. The authorities only began enforcing the law after the State Law and Order Restoration Council (SLORC) took

31 Independent International Fact-Finding Mission on Myanmar (IIFFMM Report 2018) 'Report of the Detailed Findings' (2018) UN Doc A/HRC/39/CRP.2, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf accessed 8 May 2024

32 E.g., M. Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma' (2017) 37 Journal of Muslim Minority Affairs 454, 454–469.

33 See analysis in Nyi Nyi Kyaw, 'Unpacking the Presumed Statelessness of Rohingyas' (2017) 15(3) Journal of Immigrant & Refugee Studies 274, 274–275, where the author quotes several State officials and State-run media indicating that the numbers of illegal immigrants found in operation Dragon King were very low (e.g., action was taken against a total of 2,296 people across the country).

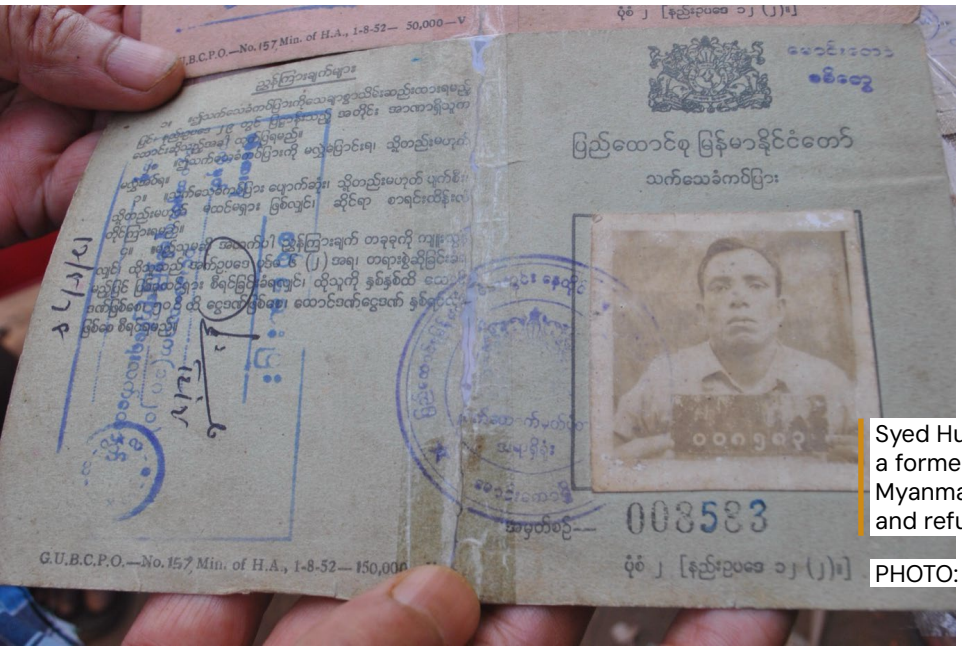
34 1978 Repatriation Agreement between the Government of the People's Republic of Bangladesh and the Government of the Socialist Republic of the Union of Burma (9 July 1978), available at: https://dataspace.princeton.edu/jspui/bitstream/88435/dsp01th83kz5 38/1/1978%20 Repatriation%20Agreement.pdf

35 IIFFMM Report 2018 (n 31)

power in 1988. As part of a nationwide citizenship scrutiny exercise, the new SLORC military regime stripped the Rohingya of citizenship. Rohingya individuals were thus required to turn in their National Registration Cards (NRCs) and instead obtain a Citizenship Scrutiny Card (CSC). However, the Rohingya who presented their NRCs were reportedly denied a CSC, even when meeting the citizenship requirements. This arbitrary action was facilitated by the provisions of the 1982 Citizenship Law. Instead of the NRCs being returned to the Rohingya, they were given Temporary Registration Cards, also known as "white cards." These temporary "white cards" became the *de facto* identification documents for the Rohingya in Rakhine State.

According to credible reports, the authorities had also stopped issuing birth certificates to Rohingya children in northern Rakhine in the 1990s, without providing an official reason for the policy change. Further security operations in Rakhine State in the early 1990s led to approximately 250,000 people fleeing to Bangladesh, with widespread allegations of serious human rights violations. Despite the military government claiming these individuals were illegal Bengali immigrants, a repatriation agreement was signed with Bangladesh, and the Rohingya were accepted back into Burma.

The successive military regimes treated the Rohingya population with complete arbitrariness, which violates legal certainty, the rule of law and international human rights law in general. Arbitrariness manifested in the way citizenship was revoked, domestic laws were or were not applied, cards were handed out and then revoked, and people were called "illegal immigrants," yet accepted back in repeated cycles of mass displacement and repatriation. Over the decades, the Rohingya have experienced different levels of participation in Burma 's national life—from full citizens to non-citizens with voting rights, non-citizens without voting rights, illegal immigrants who must leave, illegal immigrants who may stay and reside, and illegal immigrants whose citizenship must be verified. Each status was symbolized by a different card or its revocation.[36]



Syed Husain shows the national ID of his father, a former member of the Burmese army. The Myanmar government called this document false, and refused citizenship to the family.

PHOTO: ROHINI MOHAN, THE WIRE

36 IIFFMM Report 2018 (n 31)

PART 2: THE COMMISSION OF CRIMES AGAINST HUMANITY (AGAINST THE ROHINGYA)

The events that transpired in northern Rakhine State in 2017 stemmed from the institutionalized oppression of the Rohingya, the 2012 violence, and the government's subsequent actions and omissions. The "clearance operations" carried out in 2017 constituted grave violation of human rights. In violation of all basic principles of international law, the *Tatmadaw* and other security forces committed human rights violations on a massive scale. The operations targeted, brutalized, and terrorized the Rohingya civilian population. Thousands of Rohingya villagers were killed and injured. Women and girls were subjected to rape and other forms of sexual violence, and frequently killed afterward. Attacked deliberately and callously, the children were subjected to grave violations. Men and boys were disappeared, probably killed. The grueling journey to Bangladesh caused further death and injury. Rohingya-populated areas across the three townships of northern Rakhine State—Buthidaung, Maungdaw, and Rathedaung—were targeted and deliberately destroyed.

On August 25, 2017, ARSA launched coordinated attacks on a military base and around 30 security force outposts across northern Rakhine State; 12 security personnel were killed. The security forces' response was immediate, brutal, and grossly disproportionate. Ostensibly the attack sought to eliminate the "terrorist threat" posed by ARSA, and the days and weeks that followed the attack encompassed hundreds of villages across Maungdaw, Buthidaung, and Rathedaung Townships. The operations targeted and terrorized the entire Rohingya population; and continued for more than two months, and for a considerable period after the government claimed on September 5, 2017, that the operation had been completed. Throughout the operation, more than 40 percent of all villages in northern Rakhine State were partially or wholly destroyed. The most intense phase was the first three weeks—during which more than 80 percent of the destruction occurred. As a result, over 725,000 Rohingya had fled to Bangladesh by September 2018.[37]

The *Tatmadaw*'s 33rd and 99th Light Infantry Divisions were also deployed to Rakhine State in August 2017. Between August 26 and 29, the soldiers carried out two "clearance operations" in the Rohingya villages of Wet Kyein and Pa Da Kar Ywar Thit, which are east of Min Gyi. In Wet Kyein, the soldiers used "launchers" to set houses on fire and shot at villagers attempting to escape toward the hills. The soldiers then moved to Pa Da Kar Ywar Thit and continued shooting at villagers and burning down houses. One villager who managed to escape from Wet Kyein recalled that the military was firing at the village from a bridge, using "launchers" and guns. As he tried to flee while carrying his 3-year-old son, the villager was shot in the thigh. The bullet went through his leg and entered his son's chest, causing the child to die instantly. Another interviewee, who owns a medical shop, said that he

37 ibid.

treated at least 20 people wounded by gunshots. He estimated that at least 100 people were shot and injured while fleeing. Based on similar accounts, many others were also shot and killed in both Wet Kyein and Pa Da Kar Ywar Thit.

On August 30, 2017, *Tatmadaw* soldiers entered Min Gyi, a village located across the river and west of Pa Da Kar Ywar Thit, along with armed ethnic Rakhine, members of other ethnic groups, and police security forces. The combined forces approached the village from the north, fired shots, and started setting houses on fire using "launchers" from the outskirts of the village. As the soldiers advanced, the villagers fled. Some managed to escape to the hills, while others ran toward a large sandbank area by the river. However, the soldiers then directly fired at the large group fleeing toward the shore. One interviewee shared that he was shot by soldiers but escaped by jumping into the river, where he witnessed another man being shot up close. Per the interviewee, he then swam across the river and saw bodies floating. He also heard gunshots and screams from the shore. Several accounts mentioned seeing bodies of men, women, and children floating in the river. Later, a group of men on the opposite side of the river recovered dozens of bodies.

Those who remained on the shore, numbering in the hundreds, were then rounded up. After separating women and children from the men, the soldiers proceeded to systematically kill the men. One witness described how the first round of shooting was like a rain of bullets. The second round was slower, with the soldiers killing the men individually. Each man was targeted and shot. Meanwhile, the women and girls had their jewelry and money taken after being brought into rooms. The women and girls were then beaten, brutally raped, and frequently stabbed. In the same rooms, children or infants with the women were also killed or severely injured, often by stabbing. The houses were then locked and set on fire. The few women who survived and spoke with the FFMM showed serious burn marks and stab wounds, consistent with their accounts. According to the survivors, dead bodies of men, women, and children left in the houses. The women were deeply traumatized.

According to credible information collected by Rohingya community volunteers in the refugee camps in southern Bangladesh, at least 750 people died in Min Gyi on August 30, 2017, including at least 400 who had been residents of Min Gyi. The total number includes villagers from Wet Kyein, Pa Da Kar Ywar Thit, and other places who had sought safety in Min Gyi. People died from gunfire, stabbing, throat-slashing, beating, drowning, and burning. While many of those who survived were injured, the whereabouts of many others remain unknown.

The FFMM documented a similar pattern of violations targeted at nearby Rohingya villages in northern Rakhine State. However, the most serious incidents occurred in the following villages: Chut Pyin, Maung Nu, Hpaung Taw Pyin, Gu Dar Pyin, Koe Tan Kauk, Kyauk Pan Du, Myin Hlut, Ah Lel Than Kyaw, Inn Din, Kun Thee Pyin, Tha Man Thar, Kha Maung Seik, Pa Da Ga Day, Wa Na

Li/Net Chaung, Kyein Chaung, Tin May, Mee Chaung Zay, and Nga Yant Chaung. Throughout the clearance operations, *Tatmadaw* soldiers and security forces committed acts of burning Rohingya property, looting, and killing and injuring civilians through indiscriminate shooting or targeted killing, rape, gang rape, and other forms of sexual violence. The attackers also committed serious violations against children.

As one survivor described, "If people were not killed by the gunshots, they were slaughtered to make sure they were really dead." Women and girls were also subjected to rape, gang rape, sexual mutilation, and sexual humiliation during the clearance operation in Chut Pyin; many survivors saw the military cutting off the breasts of women who later died. One of the most brutal scenes occurred in Min Gyi, Maungdaw Township. There, *Tatmadaw* soldiers took dozens of women and girls to large houses. Upon arrival, each group was taken to a different room, and once in the room, the women and girls were stripped and beaten with a stick, punched, or stabbed. They were then raped in groups of up to seven victims at a time. Many of the women and girls had infants and children who were killed or severely injured while their mothers were raped. In addition, the houses were then often locked and set on fire; most victims who were still alive were burned to death.

The clearance operation forced hundreds of thousands of Rohingya to flee and walk for days, sometimes weeks, through forests and over mountains to reach Bangladesh. On this journey, many more died or were killed or injured. *Tatmadaw* soldiers shot at groups of Rohingya who were escaping, in forested areas or when Rohingya were forced into the open, such as when crossing rivers. Data from *Medecins Sans Frontiers* indicates the scale of violent deaths while the fleeing Rohingya were en route to Bangladesh, noting that 13.4 percent of violent deaths occurred during the period between the Rohingya's displacement from their village and their arrival in Bangladesh. Continuing "clearance operations" and the presence of large numbers of *Tatmadaw* soldiers and other security forces made it dangerous for Rohingya to travel on the main roads or seek shelter or provisions in other villages. For days or weeks, Rohingya villagers walked through forest and mountain areas, sleeping in makeshift shelters or in the open, during heavy monsoon rains and without sufficient food or water. A survivor from Min Gyi, Maungdaw Township, recalled how she and her sister-in-law had to leave behind another woman:

PHOTO: REUTERS

Inn Din Massacre

It was very muddy and difficult due to the heavy rain. The other woman was injured, with stab wounds on her neck, and it was very difficult for her to walk. We were all slipping in the mud, and we realised that we could not drag her along with us anymore. We could hear the military and ethnic Rakhine talking nearby at a well, and we knew that, if we kept on waiting for the other woman, we would all be killed. We tried again to move her but we couldn't, and so we decided that we had no choice but to leave her there. My sister-in-law dragged me away and said, "Don't look back, there's no point."[38]

38 IIFFMM Report 2018 (n 31) para 991.

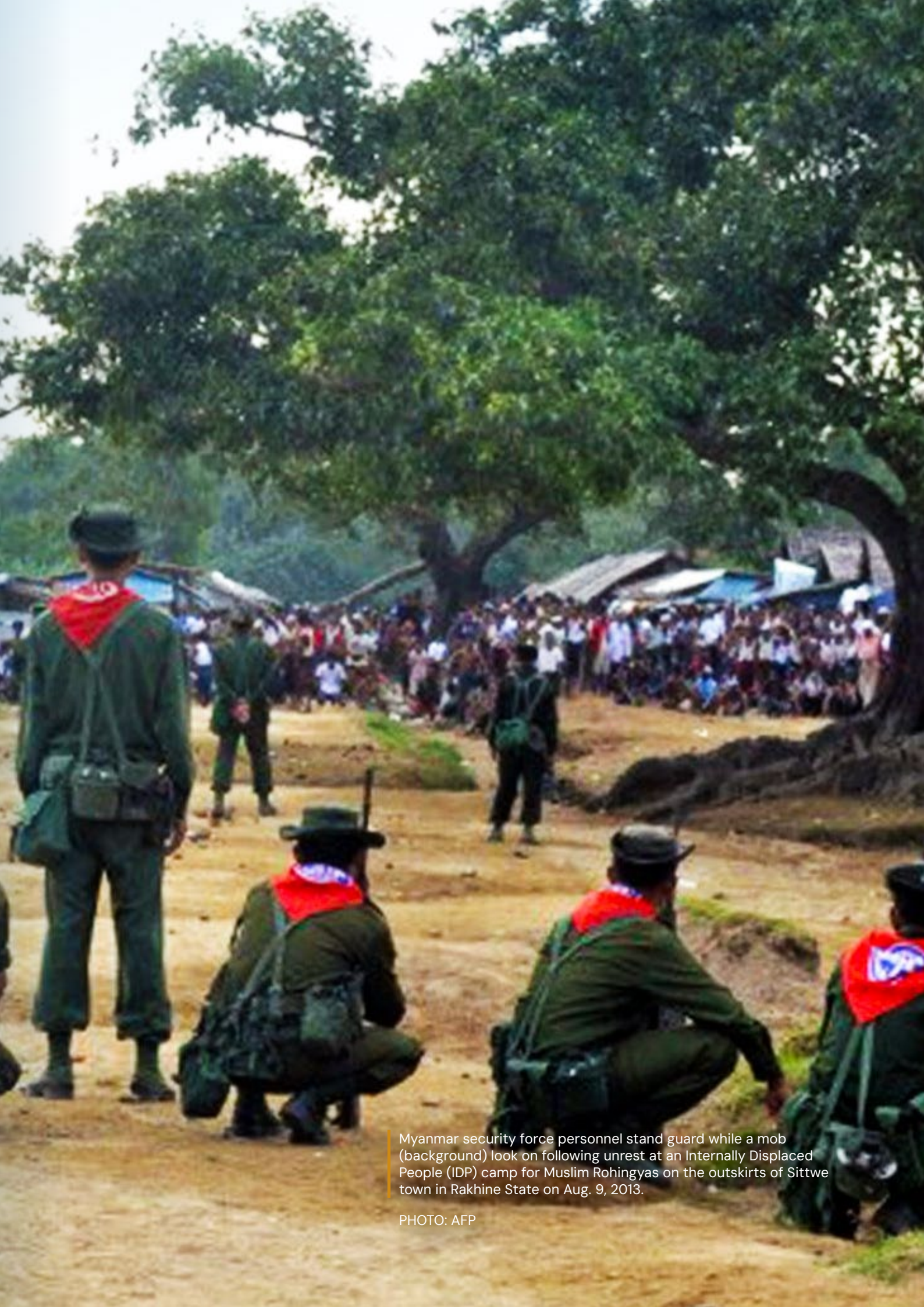
In various locations, the security forces burned the bodies of Rohingya who had been killed. One person from Koe Tan Kauk village, Rathedaung Township, saw *Tatmadaw* soldiers carrying bodies and putting them in a boat that was subsequently burned. Another witness saw many burned bodies in Kha Maung Seik, Maungdaw Township, which he said had been collected in one location. Another villager from Yae Khat Chaung Gwa Son village tract, Maungdaw Township, observed soldiers collecting dead bodies and putting them inside houses before setting the houses on fire. Similarly, in Chut Pyin, bodies were burned in a house. One witness watched for two hours as soldiers collected dead bodies and threw them into a burning house. Following the mass killing in Min Gyi, bodies were burned in three large pits dug for that purpose, while the bodies of multiple women were burned in the houses where the women had been subjected to mass gang rapes.

Gravesites have been documented in several locations where mass killings occurred, including Maung Nu, Gu Dar Pyin, and Inn Din. This information suggests that the *Tatmadaw* deliberately tried to dispose of Rohingya corpses following the "clearance operations" in villages. The way the bodies were disposed—such as through the preparation of large pits for burning or burial, the use of vehicles to transport corpses, and the use of other equipment—indicates both pre-planning and an intention to destroy any evidence of crimes. The stated criminal intention was further confirmed based on the subsequent terrain clearance through bulldozing, which removed any evidence of burned bodies and graves. Hundreds, and possibly thousands, of bodies were burned, buried, or otherwise destroyed.

On November 14, 2017, the *Tatmadaw*'s Investigation Team presented the results of its investigation into the "terrorist attacks" and subsequent "military operation." However, the report only mentions 520 people killed, the majority of whom were not Rohingya civilians. Those details clearly contradict the established and assessed facts, as determined by the Mission. Rohingya community volunteers in the refugee camps in southern Bangladesh compiled a list of names, ages, and villages of people who were killed or presumed killed. According to the assessment, 9,208 Rohingya were killed, and an additional 1,358 were missing or presumed disappeared or killed. The assessment also identified 2,157 people in detention and up to 1,834 victims of rape. Notably, these figures do not include non-violent deaths, such as those who drowned during their journey or perished in other ways.

As of September 2018, over 725,000 Rohingya had crossed the border into Bangladesh due to the 2017 "clearance operations," joining those who had previously fled. Today, over one million Rohingya are living in the refugee camps.[39]

39 IIFFMM Report 2018 (n 31)



Myanmar security force personnel stand guard while a mob (background) look on following unrest at an Internally Displaced People (IDP) camp for Muslim Rohingyas on the outskirts of Sittwe town in Rakhine State on Aug. 9, 2013.

PHOTO: AFP

PART 3: DISCRIMINATORY RESTRICTIONS ON ROHINGYA'S LEGAL RIGHTS

Throughout their lives, the Rohingya people have faced severe, systemic, and institutionalized oppression. This oppression mainly stems from the policies and practices of successive military regimes that have marginalized the Rohingya and undermined their enjoyment of human rights across many decades. The process of "othering" and discriminating against the Rohingya began as early as the 1960s. Over the years, the military regimes have consistently denied the existence of Rohingya people in Burma and have insisted on calling them "Bengalis," claiming that they do not belong in Burma. The Rohingya are not recognized as a national race and are often labeled as "illegal immigrants" from Bangladesh. Further, the laws and policies governing citizenship and legal status have also become increasingly exclusionary, arbitrary, and discriminatory in their application. The vast majority of Rohingya are thus effectively stateless, lacking any proof of legal status or identity.

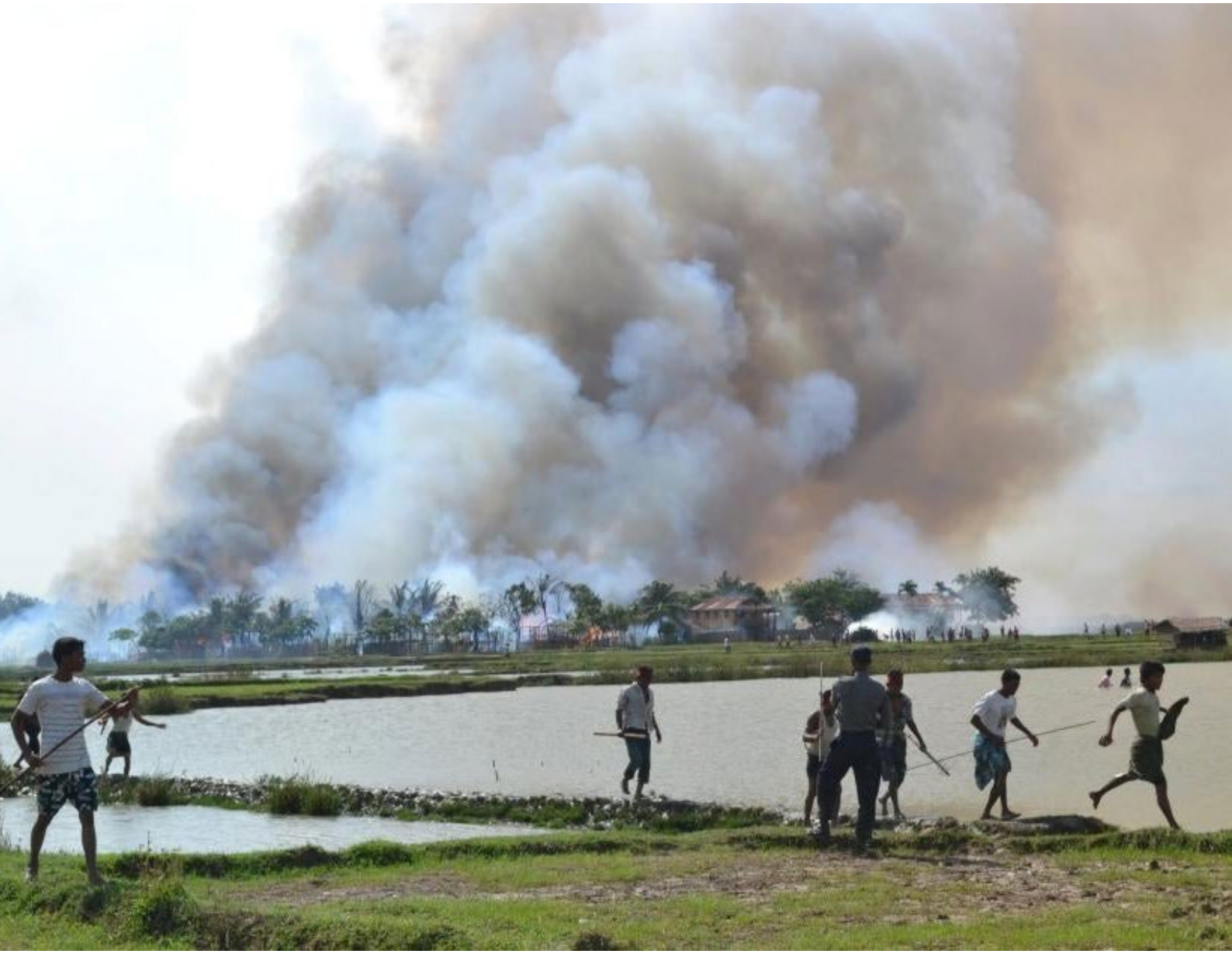
Since the violence in 2012, government has intensified restrictions on the Rohingya population, leading to the deprivation of fundamental liberties, denial of political participation, discrimination, and harassment. The Rohingya face restrictions on access to food, livelihoods, healthcare, and education. Limitations also exist on humanitarian access, while other restrictions negatively impact the general welfare and social life of the Rohingya.

In the past, Rohingya people had the right to participate in political processes. They could vote and run for office in the 1990 parliamentary elections, which resulted in the election of four Rohingya members of Parliament. In 2010, certain laws were passed to allow white card holders, despite not being officially recognized as citizens, to participate in the political process. Three Rohingya individuals were elected to Parliament and two to the Rakhine State Government.

However, in March 2014, the Political Parties Registration law was amended by the Legislative Assembly operating under the 2008 Constitution.[40] The amendment required political party leaders to be "full" citizens and party members to be "full" or "naturalized" citizens. Additionally, the Constitutional Court declared the provisions allowing white card holders to vote as unconstitutional. As a result, the election laws were amended by Parliament, removing white card holders from the list of eligible voters. The amendment resulted in the disenfranchisement of all white card holders, the majority of whom were Rohingya, for the 2015 general elections.

Moreover, Rohingya people in Rakhine State face significant limitations on their freedom of movement. The Rohingya have severe restrictions on the ability to travel between villages within the same township, between townships, and outside Rakhine State. These restrictions—imposed through a complex system of written or verbal instructions, security rules, physical barriers, abusive practices, and

40 The Second Amending Law of the Political Parties Registration Law, The Pyidaungsu Hluttaw Law No.38, 2014, available at: <https://www.mlis.gov.mm/mLsView.do?lawordSn=9626> accessed 13 June 2024.



Ethnic Rakhine with Weapons walk away from a village in flames while a soldier stands by, June 2012,
PHOTO: HUMAN RIGHTS WATCH

self-imposed restrictions based on fears—have detrimentally affected every aspect of the lives of Rohingya people. According to the Immigration and National Registration Department, all Rohingya individuals (referred to as the Bengali race) wanting to travel within Rakhine State must apply for a temporary permit, known as a "Form 4." The traveler is required to inform the authorities about their arrival and departure. With Form 4 only valid for a specific period, the traveler must hand the permit over to the issuing officer once the approved journey is completed.

Rohingya students also face discrimination in accessing education at all levels, from early primary schools to higher education. Due to being classified as "non-citizens," the students are not allowed to study professional subjects such as law, computer science, engineering, and medicine. Additionally, all Rohingya people are restricted from pursuing education beyond a bachelor's degree. Since 2012, Rohingya students have also been unable to enroll at Sittwe University due to unspecified "security reasons." Distance learning options were introduced for Rohingya and Kaman Muslim students in 2017, but the courses were limited to history and Myanmar language.

For the Rohingya in northern Rakhine State, targeted and discriminatory restrictions regarding marriage and childbirth have long existed. The Rohingya are required to comply with specific regulations regarding the number and spacing of children, which are not applied to others in Rakhine State. In 2015, national legislation was passed that supplemented these local provisions and targeted non-Buddhists in Burma. Ashin Wirathu, a monk, called for a law on inter-religious marriage, resulting in the creation of four bills (Buddhist Women's Special Marriage Law, The Population Control Healthcare Law, Religious Conversion Law, and Monogamy Law) aimed at protecting nationality and religion. With all four bills, the laws were based on stereotypes, including the belief that Rohingya are polygamous with high birth rates and that Buddhist women need protection from conversion to Islam and marriage to Muslims.

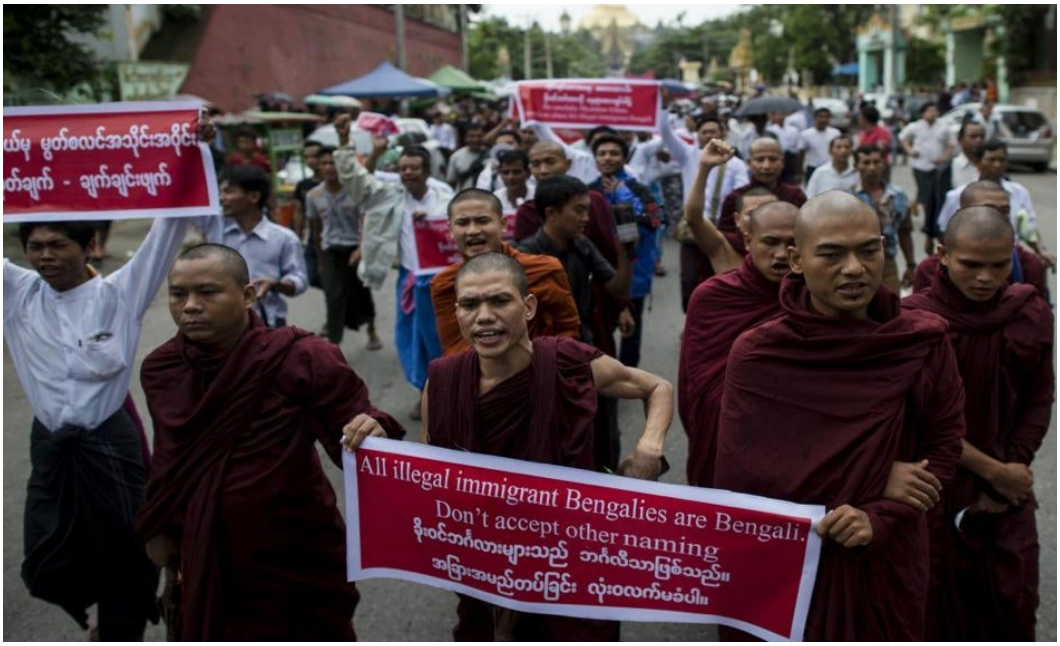
The control over the Rohingya extends beyond the denial of legal status and severe restrictions on movement and access to essential resources such as food, healthcare, and education. Specifically, the control also intrudes into the Rohingya's personal lives, imposing constraints on marriage, birth control, and even the construction and repair of their homes and religious structures. Cumbersome and unclear procedures govern every aspect of the lives of the Rohingya people, often enforced arbitrarily and requiring the payment of fees and bribes. These policies and practices have emerged in a context where the Rohingya are labeled "illegal immigrants" with "uncontrollable birth rates." Further, the mere presence of the Rohingya is perceived as a threat not only to local Buddhist communities, but also to the nation and its Buddhist identity. The discriminatory and persecutory nature of these policies is evident as they infringe upon various human rights, including the right to privacy, family life, and freedom from cruel, inhuman, and degrading treatment.

Chapter 3

SOCIETAL INFLUENCE

Anti-Rohingya and broader anti-Muslim sentiment, including "hate speech," is widespread in Myanmar[41] society generally and within the Buddhist community particularly. Leading up to the 2012 violence in Rakhine State, a campaign to dehumanize and incite hatred against the Rohingya had been ongoing for months. The Rakhine Nationalities Development Party (RNDP), various ethnic Rakhine organizations, radical Buddhist monk organizations (e.g., the 969 group), and several officials and influential figures spearheaded this campaign.

Although multiple actors have promoted messages of hatred, ultranationalist elements within the Buddhist monkhood are widely recognized as the most active, well-funded, and effective in this regard. Notably, the 969-movement established in 2012 and the Organization for the Protection of Race and Religion (known as MaBaTha) that emerged in 2014 play a prominent role in this field. Renowned monks such as Wirathu, Parmaukkha, and Sitagu Sayadaw have openly and actively advocated and promoted anti-Muslim narratives for many years. Hate speech targeting Muslims in general and the Rohingya community specifically has been disseminated through various platforms, including print media, broadcasts, pamphlets, CD/DVDs, songs, websites, and social media accounts.



A decade of detention for Rohingya in Myanmar's Rakhine State
PHOTO: HUMAN RIGHTS WATCH

41 We use the term 'Burma' to refer to the Country and 'Myanmar' to majority of the ethnic races in Burma. The name of the country was changed from 'Burma' to 'Myanmar' in 1989 by the then ruling military regime. The term Burma or Myanmar is still contested.

Numerous derogatory terms are used to refer to the Rohingya people or Muslims in general. Some common descriptors for Rohingya include the terms "Bengali," which implies foreign origins, and "Kalar." The term "Kalar" is often used as a racist slur to insult and highlight someone's dark skin or foreign ancestry, suggesting inferiority compared to other "ethnic" races of Burma. Additionally, a range of other terms, some more subtle than others—such as Mout Kalar (မွတ်ကုလား), Kway Kalar (ခွေးကုလား), Ro-lein-nyar (ရိုလိမ်ညာ), Ae Soe (ဧည့်ဆိုး), Khoe Win Bengali (ခိုးဝင်ဘင်္ဂလီ), and Kalarsoe (ကုလားဆိုး)—are also used. These terms were frequently used by monk Wirathu, sometimes targeting all Muslims and specifically the Rohingya. For instance, the late U Ko Ni, a well-known Muslim and legal advisor of the NLD, was often subjected to insults on Facebook. Such insults included "Mout Kalar MP" and "Mout Kalar Nga Ni," with "Nga Ni" being a disrespectful term usually attributed to dogs. In a post from March 2016, a photo of U Ko Ni next to President Htin Kyaw was captioned with the following text: "this Mout Kalar getting his foot in the door in Myanmar politics is not something we should sit by and watch. We need to do something right away." On January 29, 2017, U Ko Ni was assassinated at Yangon International Airport.[42]

In October and November 2017, the NLD government organized interfaith praying ceremonies in every state and region across Burma to enhance reconciliation among the diverse communities. However, the attempts attracted criticisms using negative and derogatory terms from the Buddhist community. In October 2017, a Facebook post by one influential and active disseminator of hate messages against the Rohingya stated: "Now that the Sarong-covered Government is in power [the NLD Government led by the State Counsellor], Pa Khote Khu's history gets desecrated." This post was in response to an interfaith event held in the town of Pa Khote Khu. The user talked about how, in the past, the local "Kway Kalar" never dared to raise their heads while walking outside in Pa Khote Khu, a town close to the so-called Muslim-free Kyauk Pa Daung city.

Moreover, the derogatory terms were also used to raise fear among the public in relation to immigration and "foreign invasion." On October 12, 2016, a few days after the first ARSA attacks, a well-known meteorologist named Dr. Tun Lwin with over 1.5 million followers on Facebook called on the Myanmar people to unite to secure the "west gate" and to be alert "now that there is a common enemy." He further stated that Myanmar does not tolerate invaders. Several comments called for immediate uprooting and eradication of the Rohingya, citing the situation in Rakhine State as a Muslim invasion.

The MaBaTha used inflammatory narratives to manipulate the Buddhist community, in which Muslims, particularly the Rohingya, are constantly represented as an existential threat to the country, a threat to Burmese racial purity, and a threat to Buddhist religious sanctity. Many such messages or posts under these narratives elicit profuse reactions and commentary online from sympathizers, often approving them in unambiguous language that includes death threats and explicit calls for violence. On September 29, 2017, a post from Shwewiki.com featuring a Twitter statement from ARSA elicited the following comments: "Accusations of genocide are unfounded, because those that the Myanmar army is killing are not people, but animals. We won't go to hell for killing these creatures that are not worth to be humans"; "If the *Tatmadaw* (the government's armed forces) is killing them, we Myanmar

42 IIFFMM Report 2018 (n 31) para 1312.

people can accept that… current killing of the Kalar is not enough, we need to kill more!"; and "If we can't clear them now, we will eradicate them with a world war."[43]

The overall narrative is that "ethnic" people of Burma should not tolerate mass illegal Muslim immigration because "Bengali immigrants" or "terrorists" will violently alter the Buddhist character of the country and cause its demise. This sentiment is often made explicit with references to Afghanistan or Indonesia, underscoring how these countries were once Buddhist and are now majority Muslim.

The responsibility to address the proliferation of hate speech in the country and the coordinated campaigns of hatred directed at Muslims and particularly the Rohingya lies with the government. In this regard, the response has been utterly inadequate. In fact, the authorities have not only condoned such practices, but also actively participated in and fostered them. This response has contributed to and exacerbated a climate in which hate speech thrives and individuals and groups may be more receptive to calls of incitement to violence. A wide variety of government officials, representatives, politicians, and military and security forces have made public statements against Muslims and the Rohingya. The followings are some of the statements examined by the UN- IIFFMM:

> *Bengali do not have any characteristics or culture in common with the ethnicities of Myanmar. The tensions (in Rakhine State/Province) were fuelled because the Bengali demanded citizenship.*
>
> **Senior-General Min Aung Hlaing, Commander-in-Chief of the *Tatmadaw*, on 19 March 2018**

> *[….] Regarding this issue, we don't want to hear any humanitarian or human rights excuses. We don't want to hear your moral superiority, or so-called peace and loving kindness.*
>
> *… I'm talking to you, national parties, MPs, Civil Societies, who are always opposing the president and the government.*
>
> **Zaw Htay, then attached to President Thein Sein's Office, currently Director General in the Office of the State Counsellor and Spokesperson of the Office of the President, on 1 June 2012**

43 IIFFMM Report 2018 (n 31)

There were about five hundred thousand non-religious and evil soldiers, who died in the war. Because of that, the King was not able to sleep at night, since, in Buddhism, killing humans is one of the worst sins. The eight monks who knew about this, told the King "Don't worry, your Highness. Not a single one of those you killed was Buddhist. They didn't follow the Buddhist teachings and therefore they did not know what was good or bad. Not knowing good or bad is the nature of animals. Out of over five hundred thousand you killed, only one and a half were worth to be humans. Therefore, it is a small sin and does not deserve your worry.

Quoting a story from Buddhism by Sitagu Sayadaw, one of Myanmar's most revered monks, on 30 October 2017, at the Bayintnaung military garrison and military training school in Thandaung, Karen State/Province

I won't say much, I will make it short and direct. Number one, shoot and kill them! (the Rohingya). Number two, kill and shoot them! (the Rohingya). Number three, shoot and bury them! (the Rohingya). Number four, bury and shoot them! (the Rohingya). If we do not kill, shoot, and bury them, they will keep sneaking into our country!

Nay Myo Wai, Chairman of the Peace and Diversity Party, on 27 May 2015 in Bo Sein Menn football ground in Bahan township, Yangon

They are very dirty. The Bengali/Rohingya women have a very low standard of living and poor hygiene. They are not attractive. So neither the local Buddhist men nor the soldiers are interested in them.

Aung Win, Arakan National Party's MP and Chairman of Rakhine Investigation Committee, on 7 November 2016 in interview with BBC responding to allegations of large-scale rape and sexual violence against Rohingya women

In fact, extremists, terrorists, ultra-opportunists and aggressive criminals can be likened as fleas that we greatly loathe for their stench and for sucking our blood. Those human fleas are destroying our world by killing people and harming others' sovereignty. [...] We should not underestimate this enemy. At such a time when the country is moving toward a federal democratic nation, with destructive elements in all surroundings, we need to constantly be wary of the dangers of detestable human fleas.

Op-Ed column published in the Global New Light of Myanmar, a government newspaper, 26 November 2016

In fact, extremists, terrorists, ultra-opportunists and aggressive criminals can be likened as fleas that we greatly loathe for their stench and for sucking our blood. Those human fleas are destroying our world by killing people and harming others' sovereignty. [...] We should not underestimate this enemy. At such a time when the country is moving toward a federal democratic nation, with destructive elements in all surroundings, we need to constantly be wary of the dangers of detestable human fleas.

Op-Ed column published in the Global New Light of Myanmar, a government newspaper, 26 November 2016

Wirathu's sermons are about promoting love and understanding between religions. It is impossible he is inciting religious violence.

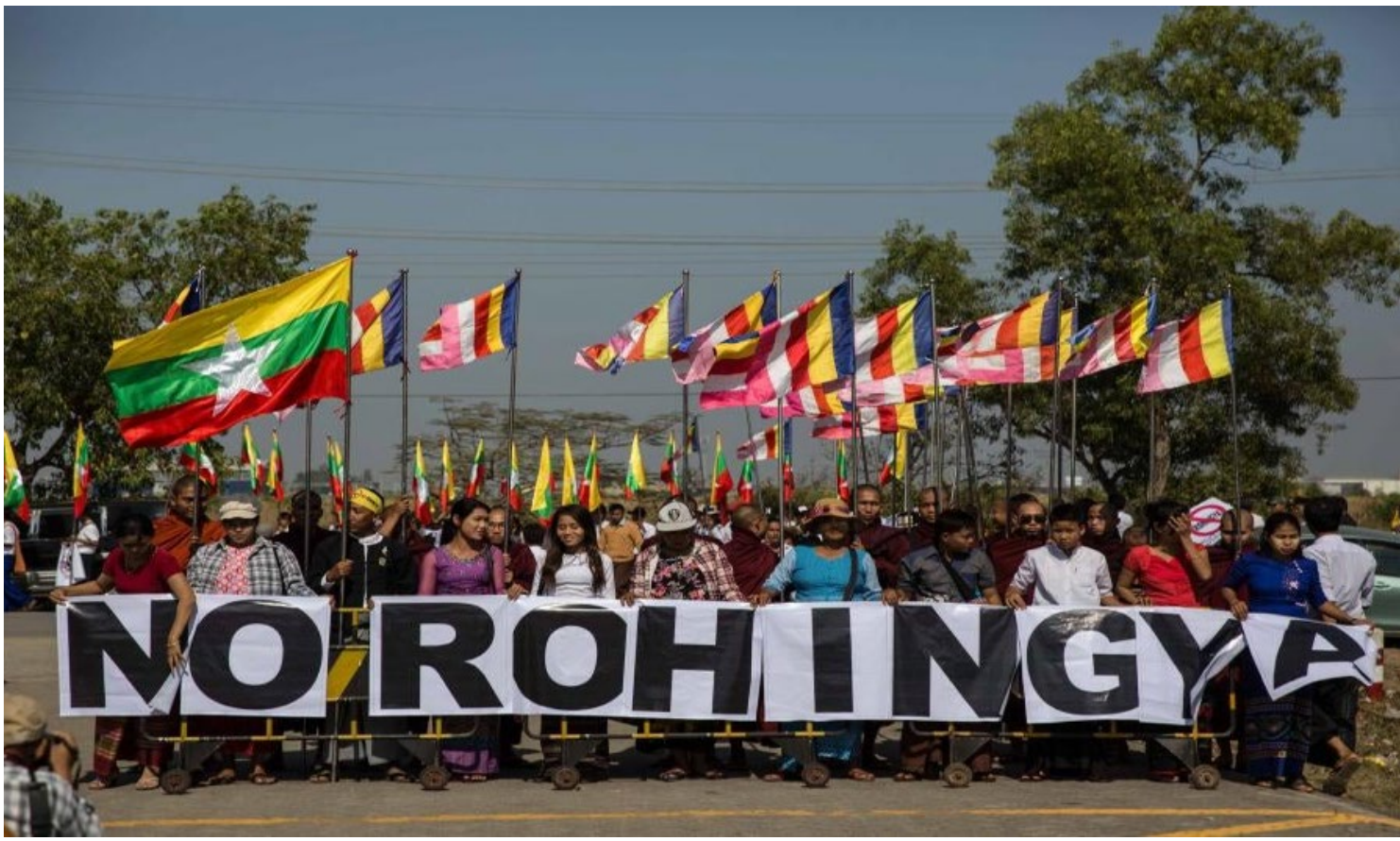
Sann Sint, USDP Religious Affairs Minister, in an interview with Reuters in June 2013

> *How can it be ethnic cleansing? They are not an ethnic group.*
>
> **Win Myaing, Rakhine State/Province Government Spokesman, in his interview with Reuters in May 2013**[44]

The fact that figures of authority chose to echo hateful narratives spread by ultranationalist movements, rather than actively opposing them, may reveal the sentiments and intentions of the authority figures. In July 2012, then President Thein Sein stated publicly that "the last resort to this issue is to hand in the Rohingya who sneaked into UNHCR to stay in the refugee camps." In October 2017, Sitagu Sayadaw, one of Myanmar's most revered monks, addressed members of the military at a training school, seemingly absolving them of any guilt or responsibility for the killing of the Rohingya. Senior-General Min Aung Hlaing, the *Tatmadaw*'s Commander-in-Chief since 2011 and the most powerful person in Burma, has repeatedly made public statements denying the existence of the Rohingya; labeling them as illegal immigrants, terrorists, and extremists; denying any wrongdoing by the *Tatmadaw* in operations in Rakhine State/Province; disregarding the suffering of the Rohingya, and calling on the Myanmar "ethnic people" to take patriotic action.

The successive military government authorities, including the incumbent regime led by Min Aung Hlaing have implemented active measures to limit independent media commentary, and suppress legitimate dissent and human rights defenders. At the same time, the authorities have created an environment that allows radical individuals and associated organizations, such as 969 and MaBaTha, to openly spread hate speech and incite violence, hostility, and discrimination against the Rohingya. The authorities have permitted these developments, and despite generally using less inflammatory language, the rhetoric reflects and promotes radical narratives. Both the government and the *Tatmadaw* in Burma have cultivated a climate in which hate speech flourishes, human rights violations are justified, and incitement to discrimination and violence is facilitated.[45] As a result, those who preach hatred and intolerance have been empowered, while those who advocate for tolerance and human rights have been silenced.

44 IIFFMM Report 2018 (n 31) para 1328.
45 ibid.



A decade of detention for Rohingya in Myanmar's Rakhine State

PHOTO: HUMAN RIGHTS WATCH

Chapter 4

PART 1: THE CITIZENSHIP ISSUE OF ROHINGYA

Citizenship has become focal point in attempting to resolve the issue of repatriation of over 725,000 Rohingyas from the Bangladesh-Burma border area into Arakan/Rakhine State, where they originally resided.

Most Rohingya have become** de facto **stateless, arbitrarily deprived of nationality. This cannot be resolved through the 1982 Citizenship Law – applied as proposed by the Government through a citizenship verification process. The core issue is the prominence of the concept of "national races" and the accompanying exclusionary rhetoric, originating under Ne Win's dictatorship in the 1960s. The link between "national races" and citizenship has had devastating consequences for the Rohingya.[46]

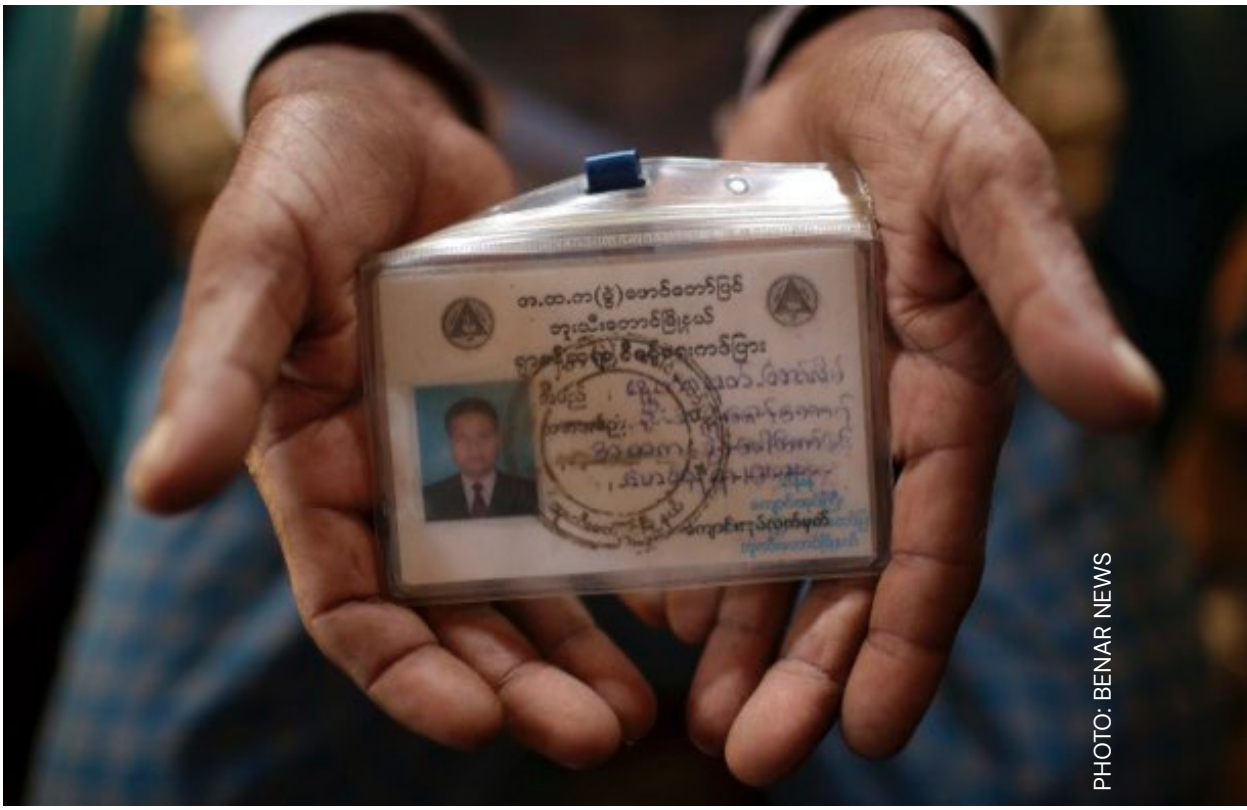


PHOTO: BENAR NEWS

A file photo shows a Rohingya man displaying an identification card belonging to his late son whom he said was slain by members of Myanmar's armed forces in Rakhine state, during an interview at the Kutupalong refugee camp in Bangladesh.

46 UN Independent International Fact-Finding Mission, 'Report of the Independent International Fact-Finding Mission on Myanmar' (24 August 2018) para 21.

Existing laws – the 2008 Constitution as well as the 1982 Burma Citizenship Law – have already denied the right to citizenship of all children born to Rohingya people[47] in Rakhine State. Article 345 of the 2008 Constitution provides as follows:

> ***All persons who have either one of the following qualifications are citizens of the Republic of the Union of Myanmar:***
>
> ***(a) person born of parents both of whom are indigenous races[48] of the Republic of the Union of Myanmar;***
>
> ***(b) person who is already a citizen according to law on the day this Constitution comes into operation.***

Under the 2008 Constitution and its legal framework, the Rohingya, regardless of whether children or adults, can never become citizens because they are not recognized as an indigenous race. This is a discriminatory practice against not only the UN Convention on the Rights of the Child but also national law, namely Section 2 (b) of the Child Law 1993, by which definition a child is simply a person, and not needing to be a descendant from any indigenous race.

Along with *Tatmadaw* leaders, the ruling regime led by Aung San Suu Kyi has branded Rohingyas as *'Bengalis'*[49] who migrated from Bangladesh. However, the term 'Bengalis' is used officially by government authorities primarily in domestic, but not in international spheres. The influence of this domestic description promoted by power holders should not be underestimated.

As far as Burma is concerned, society's influence on law is much greater than its dependence on law. When racism, along with an extreme Buddhist nationalist movement, fueled by *Tatmadaw* (military) government authorities, prevails in almost the entire society, equality before the law is discarded while social discrimination against human rights norms has come to the fore.

In fact, the term 'Bengalis' refers to the people living mostly in Bangladesh (106 million) while the remainder live in the Indian state of West Bengal (68 million)[50], but not those living officially in Burma. By describing Rohingyas as 'Bengalis', this connotes that

47 The total number of Rohingya people from Arakan/Rakhine State, Burma, who are currently taking refuge in the territory of Bangladesh is around 725,000. This is in accordance with the Statement made by Mr. Marzuku Daruslam, the chairperson of the UN Independent International Fact Finding Mission.

48 In the official translation of the Article 345 (b) of the 2008 Constitution, the term 'indigenous race' has been omitted. Instead, 'national' is used. Translation of Myanmar language, 'တိုင်းရင်းသား' into 'national' is incorrect. The term 'national' is rather closer to 'citizen'. Myanmar language, 'တိုင်းရင်းသား' was officially translated into 'indigenous race' in the 1947 Constitution of the Union of Burma, the most legitimate Constitution, drawn up right before independence of Burma and was effective in the country up to the time that the Myanmar Army staged a military coup on March 2, 1962, and abrogated that Constitution.

49 When the term 'Bengali' is promoted by the Myanmar authorities, it is commonly understood by a large number of people in Burma, as 'Ka-Lar' in Burmese ကုလား. 'Bengali' and 'Ka-Lar' are identical. 'Ka-Lar' is a derogatory term, and 'Ka-Lar' are those who have the lowest social origin and own nothing.

50 'Bengalis' (EveryCulture) https://www.everyculture.com/wc/Afghanistan-to-Bosnia-Herzegovina/Bengalis.html accessed 5 July 2024.

they are immigrants who passed through the Bangladesh-Burma border area illegally and entered the country, Burma. If Rohingya were regarded as 'Bengalis' officially by the Burmese government and military leaders, legal action should have been taken against them, and they should have been deported back to Bangladesh. This was not the case.

On the contrary, the Rohingyas have been living in Rakhine State, Burma, peacefully for a long time, without legal action being taken against them by the authorities systematically and officially in accordance with immigration laws. Rather, the authorities have undertaken illegal means many times in the past to wipe out Rohingyas; following the heinous crimes committed by the *Tatmadaw* and government authorities in 2017, many Rohingyas were forcefully driven out to Bangladesh.[51] The agreement of the Burmese government with two UN agencies for the return of Rohingya refugees who fled violence in Rakhine state, Burma, now in Bangladesh [52], is totally absurd while Rohingya are designated as 'Bengalis'. This is because foreigners cannot be accepted and taken back home without applying legal procedures under the effective immigration law of Burma.

Anyway, as a state party to the Convention of the Rights of the Child (CRC), the government of Burma is obliged to ensure that children acquire a nationality. However, this may become a reality only after Article 345 of the 2008 Constitution, which permanently prohibits the right of Rohingya children to become citizens, has been completely nullified.

Under Article 5 of the 1982 Burma Citizenship Law, every *indigenous race* and every person born of parents both of whom are *indigenous races*, are citizens by birth. This provision is just and fair for all indigenous races in Burma. However, Rohingya children are deprived of their right to citizenship since their parents are not recognized as one of the indigenous races in the country.

Even though a similar promulgation was enshrined in Article 11 (1) of the 1947 Constitution, there was another significant provision which created an opportunity for persons born of parents both of whom were not indigenous races so that they could acquire citizenship. Accordingly, a person – who had resided in any of the territories included within the Union for a certain period, who intended to reside permanently therein, and who signified his election of citizenship of the Union in the manner and within the time prescribed by law – would be eligible for citizenship. Unfortunately, such a constitutional guarantee has been thrown away with the abrogated 1947 Constitution.

Under Article 7 of the 1982 Burma Citizenship Law, the potential to become citizens for Rohingya children is quite slim as well. Accordingly, persons born in or outside the State can apply for

51 For some details, the preliminary report of the UN Independent International Fact-Finding Mission for Myanmar, issued on August 24, 2018 is worth observing: https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/ReportoftheMyanmarFFM.aspx

52 Hannah Ellis-Petersen, 'Myanmar and UN Announce Deal for Safe Return of Rohingya' The Guardian (London, 1 June 2018) https://www.theguardian.com/global/2018/jun/01/myanmar-and-un-announce-deal-for-safe-return-of-rohingya accessed 5 July 2024.

citizenship only when their parents are *citizens or associate citizens or naturalized citizens*. Their parents, who are Rohingyas, lack the required status. So long as the 2008 Constitution and the 1982 Burma Citizenship Law continue to exist, not only Rohingya children but also the entire Rohingya community will face a vicious circle of statelessness, and human rights violations will continue unabated.

PART 2: THE FLAWS OF THE ENTIRE LAW-MAKING PROCESS UNDERTAKEN BY THE RESISTANCE FORCES

Formed in February 2021 following the military coup, the Committee Representing Pyidaungsu Hluttaw (CRPH) emerged as a legislature in exile.[53] The committee included only parliamentary members elected in the 2020 elections and aimed to continue fulfilling the functions of the dissolved parliament. Despite not being an official parliament, the CRPH has attempted to legislatively counter the military junta's rule. This effort includes declaring the 2008 constitution invalid, convening plenary sessions[54] and promulgating the Federal Democracy Charter (hereafter "the Charter"). In April 2021, the CRPH announced the formation of the National Unity Government (NUG) a few days after adopting the Charter. The Spring Revolution has since been driven by the CRPH, NUG and National Unity Consultative Council (NUCC), though the pre-existing EROs continue to take their own independent paths while staying loosely aligned with the stated entities.

Even if the Charter establishes a roadmap for a constitutional convention to draft a federal democratic constitution, this approach is flawed. Such a process should be "bottom-up" rather than "top-down," meaning the ethnic states/provinces of Burma should be involved. Otherwise, the top-down approach enshrined in the Charter could hinder the establishment of a genuine federalism suited to Burma.[55] The Charter is neither legally binding nor sufficient to establish trust among ethnic nationalities and their respective states/provinces in Burma. Therefore, provisional/interim constitutions at the federal and provincial levels are necessary.

The Charter also does not establish specific legislation or authorize the CRPH to make laws. Rather, the Charter represents only a declaration of principles and legislative goals for a future democratic Burma. Legally, a state organ like the legislative branch must be operated with the underpinning of the Constitution, the source of all legislative power. The CRPH, acting as a legislative body, is thus unconstitutional and lacks legitimacy. Hence, the committee cannot assume sovereignty over the entire country. The CRPH even raises political concerns regarding its representation.

53 Committee Representing Pyidaungsu Hluttaw (CRPH), 'History and Formation' https://crphmyanmar.org/history-and-formation-of-crph/ accessed 5 July 2024.

54 Since its formation, the CRPH has convened 6 plenary sessions of the Union Parliament. See more at <https://crphmyanmar.org/the-first-session-of-union-parliament/> accessed 8 July 2024.

55 Legal Aid Network, 'Analysis of the Federal Democracy Charter' (29 March 2023) https://www.legalaidnetwork.org/Statement/March%2029%202023%20LAN's%20Analysis%20of%20the%20Federal%20Democracy%20Charter.pdf accessed 5 July 2024.

The Charter fails to establish the nexus between the appropriate representation of ethnic nationalities in the central legislatures. In fact, among the 20 current CRPH members, 17 are from NLD; the other 3 include one member each from the Ta'ang National Party (TNP), Kachin State Peoples' Party (KSPP) and Kayah State Democratic Party (KSDP). Accordingly, the ostensible legislative function is inconsistent with the provincial sovereignty principles outlined in the Charter.

Due to the lack of provisional constitutions at both the state/province and federal levels, legislative power-sharing between levels remains highly uncertain. The CRPH, but not the Union Parliament, has seemingly been producing federal laws since 2021. In the CRPH 2022 annual report, submitted to the 3rd Plenary Session of the Union Parliament, the committee reported that the following seven laws were amended twice in 2021 and 2022, as of February 2022: Law Amending the Taxation of the Union Law, Law Repealing the Myanmar Police Force Maintenance of Discipline Law, Law Amending Public Debt Management Law, Law Amending the Gambling Law, Taxation of the Union Law, and Counsellor of the State Law.[56]

Whether these laws are effective across the country, including the liberated areas in the ethnic states/provinces, however, remains unclear. Nonetheless, some EROs – such as KIO, KNPP, KNU, ULA/AA, TNLA and MNDAA – have begun to evolve as state/province governments by establishing state-/province-level organs and institutions in the territories controlled by the respective EROs. The current position suggests the federal/central and state/province governments are advancing on a parallel track without a focal point, which should be a federal constitution. Therefore, concurrent legislative power cannot be exercised by either federal/central-level or state/province-level legislative assemblies, which has weakened the CRPH's claim for legitimacy.

In the formation and operation of the three sovereign powers – legislative, executive and judiciary – inconsistency also exists. The NUG exercised the combination of de jure and *de facto* standards, as reflected in its current composition. It includes political parties, EROs (NMSP, CNF, KNPLF, KNPP), representatives from CSOs and individuals, a composition also found in NUCC. As for the judiciary, the FDC recognized the existing judicial mechanisms of the respective EROs as part of the interim judiciary.[57]

Meanwhile, the legislative branch – the CRPH, according to chapter (5) of the Charter – lacks *de facto* features. The Charter vested ultimate legislative powers solely to the CRPH composed mostly of NLD lawmakers, undermining representation of other

56 Committee Representing Pyidaungsu Hluttaw (CRPH), 'Report of the Committee Representing Pyidaungsu Hluttaw Submitted to the 3rd Plenary Session of the Union Parliament' (5 February 2022) 3 https://crphmyanmar.org/publications/revolution-1-year-report-of-crph-6-2-2022/ accessed 5 July 2024.

57 'Federal Democracy Charter Part II, Interim Constitutional Arrangements 2021, Chapter 7: Interim Judiciary' https://crphmyanmar.org/legislation/federal-democracy-charter/fdc-part-2/ accessed 5 July 2024.

ethnic states/province-based political parties elected in the 2020 elections and the participation of delegations proportionately sent by the ethnic state/provinces. The relationship between the federal/central body and state/province bodies was loosely defined in article (53) of the Charter, which stipulates that federal and state/province governments must seek coordination at the NUCC, in terms of administration, legislation and judicial matters.[58]

Since the Charter is not a fully-fledged constitution and lacks legal enforcement power, the federal/central-level and the state/province-level entities cannot build trust or form a unified front for both fighting the junta at home and seeking recognition and legitimacy abroad. The lack of federal and state/province constitutions has benefited neither side. Specifically, the NUG has failed to convince the international community that NUG is the actual federal government; similarly, the EROs have struggled to gain legitimacy despite their *de facto* status.

Among others, the situation of ULA/AA in Rahkine state/province posits a significant example. The entire state/province could soon fall under the complete control of AA amid its advancing military operation in Rakhine. Even if the CRPH adopts any interim/provisional constitution, unless the ULA/AA – an ANSA that has become the *de facto* government in the Rakhine state/province – sends its representatives, the legislative assembly formed by the CRPH alone would not be legitimate, at least for Rakhine state/province. At the same time, the ULA/AA cannot unilaterally form a legitimate legislative assembly in Rakhine state/province due to still being a part of the Union of Burma.

As a notable feature of the NUG and NUCC, both promote inclusiveness and serve as a political platform for cooperation and coordination among the member organizations, ranging from elected lawmakers to EROs, CSOs, political parties and individuals in the revolution. Thus, both entities reflect societal values and show the interconnectedness between society and State (NUG). According to chapter 2 of the Charter part 2, the NUCC is responsible for calling Peoples' Assembly, in which policy, directives and strategy are discussed and adopted. However, this gathering is just a political one and not a legitimate legislative assembly. The Assembly thus neither assumes legislative power nor makes any law. Composed mostly of NLD lawmakers, the CRPH exclusively retains the power to make laws. Article 30 and 31 of the Charter part 2 lays out that the CRPH, which stands as an interim law-making body, must seek consultation and make laws in compliance with the policy and directives adopted by the NUCC. While this stipulation shows the relationship between law and society, the reality on the ground suggests otherwise.

In the first week of April 2024, the second Peoples' Assembly was convened. The Assembly, among others, admitted the motion to abrogate the 1982 Citizenship Law and allowed the CRPH to do so in accordance with the interim legislation provisions outlined

58 ibid, Chap.8, Art.53

in chapter 5 of the Charter.[59] The motion was to be officially adopted on April 9, the last day of the Assembly. However, the CRPH refused to attend, claiming the Assembly overstepped the Charter's provisions and was trying to adopt resolutions beyond the power of the NUCC.[60] Even when expressing the will to abrogate the stated law, a major part of society still cannot do so due to the institutional conflict and complexity.

The entire movement is overwhelmed by a lack of balance, inconsistency and internal conflicts stemming from the vagueness of the Charter. Neither NUG nor EROs alone can overthrow the SAC. For over three years, the Charter has failed to bring the divided groups together to form a unified force. Therefore, all relevant stakeholders must now consider the emergence of new interim governments along with legislatures and judiciaries at both federal/central and states/province levels. Adopting a provisional federal constitution and state/province constitutions, in which provincial sovereignty is primarily guaranteed, is the only step forward. Only those actions will ensure a proper combination of de jure and *de facto* standards and establish unified executive and legislative branches. Otherwise, the EROs, in terms of Armed Non-State Actors (ANSA), could shift from *de facto* to de jure standards.

59 National Unity Consultative Council, 'ဒုတိယအကြိမ် ပြည်သူ့ညီလာခံမှ ပြည်သူလူထုသို့ အစီရင်ခံစာ' (9 April 2024) https://www.facebook.com/share/p/PAaPCwkNNHnwpnSv/ accessed 21 June 2024.

60 Channels New Independent, 'ပြည်သူ့ညီလာခံကို မတက်ရောက်နိုင်ဟု CRPH စာပို့' (9 April 2024) https://www.cnimyanmar.com/index.php/political-2/politics-local/21499-crph-5 Accessed 21 June 2024.

Chapter 5

UPDATE SITUATIONS IN RAKHINE STATE/PROVINCE (FROM LEGAL AND SOCIETAL ASPECTS)

Since last November, renewed fighting between Myanmar's military and the Arakan Army in Rakhine State is forcing people to flee their homes. The Rohingya community has once again been caught in the crossfire, facing severe violence, abuse, discrimination, and even forced recruitment.[61] Intense clashes reported in Buthidaung Township have displaced thousands, primarily Rohingya civilians, along with Rakhine and Hindu communities.[62]

> **"Testimonies, satellite images, and online videos and pictures indicate that Buthidaung town has been largely burned. We have received information indicating that the burning started on 17 May, two days after the military had retreated from the town and the Arakan Army claimed to have taken full control. Our Office is corroborating information received about who is responsible."**[63]

The IIMM stated it is closely monitoring civilian attacks across the country, including the recent fighting in Rakhine. They are interviewing victims and witnesses and analyzing information to determine if crimes against humanity or war crimes have occurred. From the Buthidaung clashes to the alleged massacre in Byaing Phyu village, they are investigating potential crimes regardless of the ethnicity or affiliation of the perpetrators or the victims.[64]

61 United Nations High Commissioner For Refugees (UNHCR), 'Statement by the United Nations High Commissioner for Refugees to the United Nations Security Council' (31 May 2024) https://www.unhcr.org/hk/en/news/press-releases/statement-united-nations-high-commissioner-refugees-united-nations-security accessed 1 July 2024.

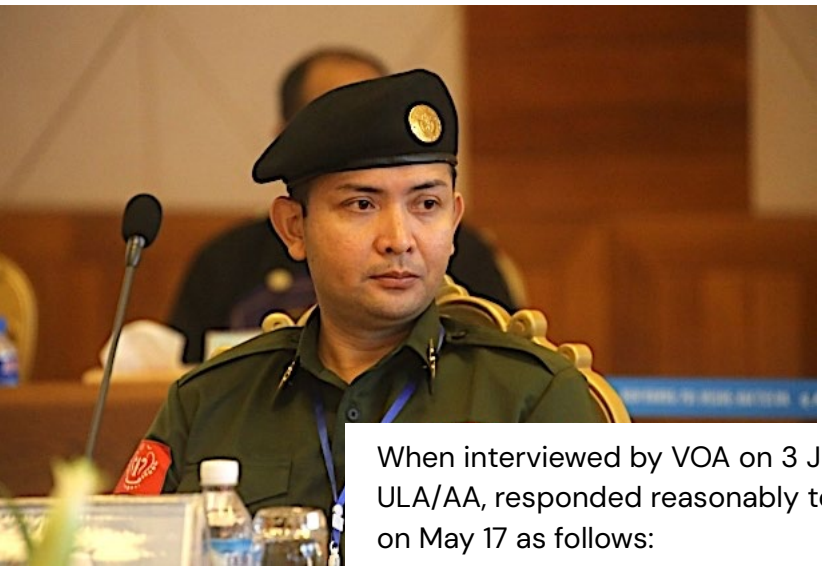
62 Independent Investigative Mechanism For Myanmar (IIMM), 'Statement on the escalation of conflict in Rakhine State, Myanmar' (23 May 2024) https://iimm.un.org/statement-on-the-escalation-of-conflict-in-rakhine-state-myanmar/ accessed 1 July 2024.

63 Office Of The High Commissioner For Human Rights, 'Myanmar: Growing human rights crisis in Rakhine state' (24 May 2024) https://www.ohchr.org/en/press-briefing-notes/2024/05/myanmar-growing-human-rights-crisis-rakhine-state accessed 1 July 2024.

64 Independent Investigative Mechanism For Myanmar (IIMM), 'Message From The Head Of The Mechanism' (25 June 2024) https://iimm.un.org/wp-content/uploads/2024/06/2024-June-Bulletin-EN.pdf, accessed 1 July 2024.

The UN Office of the High Commissioner for Human Rights addressed to the 56th Session of the Human Rights Council as follows:

> *"I am very concerned about the situation in Maungdaw. The Arakan Army this weekend gave all remaining residents – including a large Rohingya population – a warning to evacuate. But Rohingya have no options. There is nowhere to flee. Following a similar pattern in Buthidaung, where Rohingya were ordered to flee, and then the town burned, I fear we are – yet again -- about to bear witness to displacement, destruction and abuses. The military also reportedly ordered evacuation of ethnic Rakhine villages around Sittwe, where they have been conducting mass arrests in recent days."*[65]



Major General Twan Mrat Naing

PHOTO: IRRAWADDY

When interviewed by VOA on 3 June, Major General Twan Mrat Naing, Chief of ULA/AA, responded reasonably to the allegations of atrocities that took place on May 17 as follows:

> *"We make sure the civilians are warned to evacuate before the fighting starts. It is done through local community leaders, including Muslim community, our administrators and police officers serving under ULA. We also disseminate messages using loud-speaker village after village that the genocidal Tatmadaw is trying to deceive the public by giving them false hope, and to evacuate immediately to a safer place. We have records of this. However, some international lobbyists*

65 Office Of The High Commissioner For Human Rights, 'Myanmar: a breakneck speed "disintegration of human rights," says High Commissioner" (18 June 2024) https://www.ohchr.org/en/statements-and-speeches/2024/06/myanmar-breakneck-speed-disintegration-human-rights-says-high accessed 1 July 2024.

do not appreciate our attempt to protect the civilian, instead they spread false accusations such as the AA forcibly displaces the people, they are trying to commit another genocidal act by forcing mass displacement. There are people who always criticize you when you are in politics or for the things you do during armed conflict, yet we are going to continue doing what we strongly believe. Before May 17, there are as many as 2,322 houses burnt in Buthidaung according to our records, most of them belong to non-Muslim civilians. The Muslim houses were caught on fire due to the spreading flames in the neighbourhood."[66]

Legal Aid Network highly appreciates the public statement made by Major General Twan Mrat Naing, the Commander in Chief of the AA, after the meeting with the SAC military leaders in China. It is the first time in the 76-year long civil war history of Burma that one of the top leaders of the revolutionary forces, who listened to the admission of the belligerent party SAC leaders on why the latter committed war crimes, retold the public frankly as follows.

"We have been saying this to the Tatmadaw for multiple times, only to direct the attacks against armed combatants, army to army in a civilized manner. However, the SAC claimed that they attacked the hospitals because they received specific information that our soldiers were in the hospitals. This was said by those who know more about the law of war. In negotiation meetings, especially before the Chinese delegations, the Tatmadaw blatantly put the blame on us for attacking hospitals. So, we gradually came to understand that they are unreliable and there is no prospect in negotiation with them."[67]

It connotes that Major General Twan Mrat Naing is ready to uncover the truth and even to testify before any national or international criminal tribunal in this regard, if necessary.

66 Thar Nyut Oo, Interview with Twan Mrat Naing, ULA/AA Chief, VOA (3 June 2024) https://burmese.voanews.com/a/7640273.html

67 ibid.

Chapter 6

PART 1: RESPONSIBILITY OF EROS TO COMPLY WITH INTERNATIONAL LAW

The SAC, which styles itself as a "Caretaker Government," is competing with the NUG for legitimacy.[68] Meanwhile, in Ethnic States/Provinces, the EROs—which control territories and can carry out public administration in their respective territories—have become, at a minimum, local *de facto* governments. The accountability issue arising from international legal obligations is relevant to both State actors and ANSAs.

Among roughly 21 EROs, almost half have established regular armies, controlled areas, and administered a judicial mechanism in their respective states/provinces. The stronger EROs may attempt to ask for independent status by invoking their historical background and the right of self-determination, which falls in a grey area of international law. The 1947 Constitution guaranteed the right of states/provinces to secede from the Union 10 years after national independence.[69] During the AA's 11th anniversary celebrations on April 10, 2020, the organization affirmed their goal of restoring the sovereignty of the Rakhine people through a struggle for the independence of Rakhine State/Province.[70]

In Burma, at least five EROs could empirically achieve State status. Whatever the status of the ANSAs, all must comply with international law. Even if later becoming independent States, ANSAs remain responsible under international law and can be held accountable for the obligations of the pre-existing State.[71]

68 State Administrative Council, 'The Formation of the Caretaker Government of The Republic of the Union of Myanmar' (Order No.152/202, 1 August 2021/Waso Ninth Full Moon Day 1383).

69 Constitution 1947 (n 12) Chapter 10: see the major provisions related to the right of secession at articles 201, 202 and 206, available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79573/85699/F1436085708/MMR79573.pdf accessed 7 April 2023.

70 Twan Mrat Naing (Commander in Chief of the AA), 'Speech by Commander-In-Chief at 11TH anniversary day of arakan army' (Arakan Army, 11 April 2020) https://www.arakanarmy.net/post/speech-by-commander-in-chief-at-11th-anniversary-day-of-arakan-army accessed 7 April 2023.

(…) The struggle for national liberation and the restoration of the Arakan's sovereignty to the people of Arakan is our legitimate resistance in accordance with our natural and historic right. We are not asking the consent of the enemy; we are practically implementing our collective determination to throw off the shackles of the Burmese racism and colonialism in Arakan. This is our morale and faith in our own strength that we are going to attain the independence of Arakan whether the Burmese war criminals grant us or not; nothing can stop us. (…) From this year of 2020, the entire oppressed people of Arakan irrespective of religious, race, sex, minority or majority must struggle for the successful revolution in order to attain the sovereignty and liberation of Arakan. (…)

71 UN International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001): Article 10, Conduct of an insurrectional or other movement

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

The status of the ANSAs is unclear under international law. The traditional approach of international law which excludes ANSAs is unfruitful.[72] Nevertheless, it does not mean that they have no obligations under international law: (1) The historic practice has confirmed that they had 'international rights and obligations that were to be respected'; (2) According to Common Article 3 of the Geneva Conventions 'each Party to the conflict' is bound to apply the Conventions; (3) the Security Council increasingly urges them to respect international law.[73]

The ANSAs 'which retain the potential to deploy arms for political, economic and ideological objectives', can be realized as any 'challengers to the state's monopoly of legitimate coercive force'; and, they are 'to challenge or reform the balance and structure of political and economic power, to avenge past injustices and/or to defend or control resources, territory or institutions for the benefit of a particular ethnic or social group'.[74]

Even if they constitute parts of an insurrectional movement, their status will change when, as new governments, they are able to control the territory of a pre-existing State and establish a new State.[75] If so, they will be culpable for their previous acts, in terms of commission or omission, committed during the resistance and also for any acts committed by the previous government;[76] and, they are also responsible to comply particularly with international humanitarian law.[77]

Although the Genocide Convention does not specify whether ANSAs are bound by the duties to prevent and punish genocide, their individual members are bound to refrain from any act listed in Articles II and III and could be held criminally responsible if they violate those prohibitions; otherwise, under customary international law, the effectiveness of the Genocide Convention would be greatly diminished.[78]

Their legal personality, in terms of the source and scope of their obligations and culpabilities, needs to be examined[79] notwithstanding the lack of State responsibility for the acts

72 Andrew Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: the Legal Landscape & Issues Surrounding Engagement' (Geneva Academy of International Humanitarian Law and Human Rights, SSRN 1569636, February 2010) 3 <https://repository.graduateinstitute.ch/record/16583?_ga=2.80525973.349534180.1680893062-1818628998.1680893062> accessed 7 April 2023.

73 Ibid 5.

74 Annyssa Bellal, 'What Are 'Armed Non-State Actors'? A Legal and Semantic Approach' in Ezequiel Heffes and others (eds), International Humanitarian Law and Non-State Actors (Springer, Berlin 2020) 27.

75 Kaczorowska (n 1020) 436.

76 Ibid.

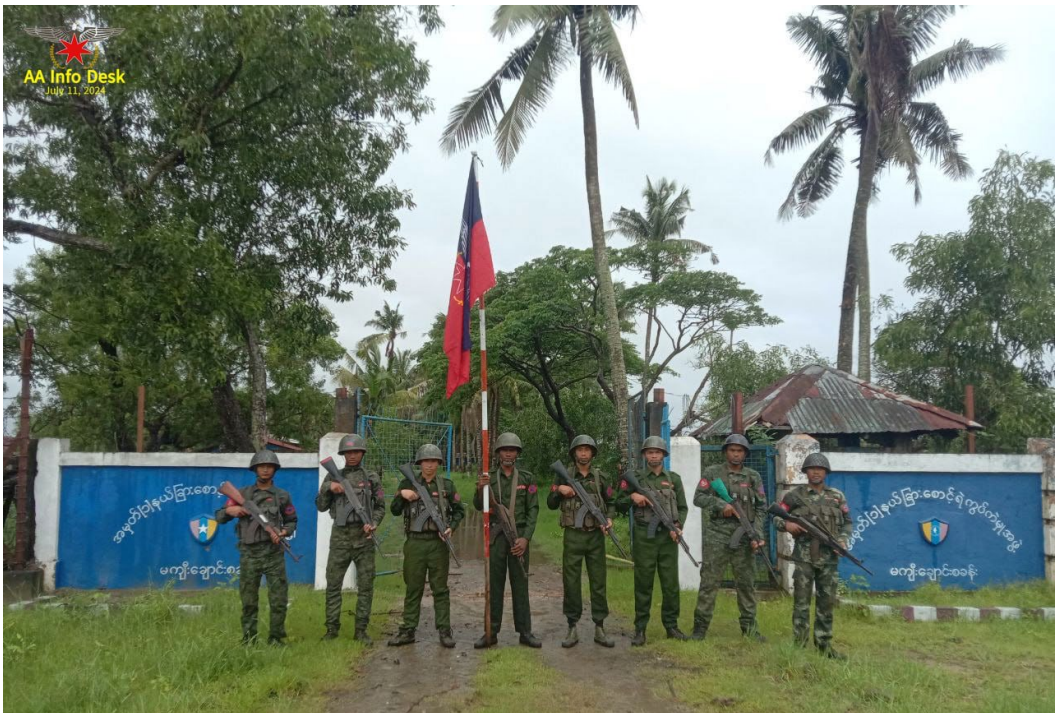
77 ibid 23.

78 Guénaël Mettraux, International Crimes: Law and Practice: Volume I: Genocide (Oxford Public International Law, Oxford University Press 2019) 154.

79 Katharine Fortin, 'The Relevance of Article 9 of the Articles on State Responsibility for the Internationally Wrongful Acts of Armed Groups' in James Summers and Alex Gough (eds), Non- State Actors and International Obligations: Creation, Evolution and Enforcement (Brill Nijhoff, Leiden 2018) 371.

of armed groups.[80] Article 9[81] could apply to the acts of a local *de facto* government set up by an insurgent group, existing contemporaneously with the legal government, and controlling territory in the absence of that government.[82]

The International Law Commission highlighted the hierarchical superiority of peremptory norms of general international law *(jus cogens)* norm, and they are hierarchically superior to other norms of international law in terms of both characteristic and its effect.[83] The applicability of *jus cogens* norms does not depend on the consent of States, nor ANSAs, to be bound. They are universally applicable. States cannot derogate from them by creating their own special rules.[84] The Commission's criteria for *jus cogens* norms are drawn from the definition contained in Article 53 of the 1969 Vienna Convention. Accordingly, any treaty provisions are void if they conflict with *jus cogens* norms, accepted and recognized by the international community of States as a whole.[85]



AA capture Maungtaw Township

PHOTO: AA INFO DESK

80 ibid 372.

81 UN ILC 2001 (n 1343):

Art 9: Conduct carried out in the absence or default of the official authorities.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

82 Fortin (n 1351) 378.

83 UN General Assembly, 'Draft Report of the International Law Commission on the Work of its Seventy-First Session' (12 June 2019) UN Doc A/74/10, ch 5, Peremptory norms of general international law (jus cogens) Conclusion 8.

84 UN International Law Commission, 'Report of the International Law Commission on the Work of its 71st Session' (29 April-7 June and 8 July-9 August 2019) UN Doc A/74/10, 155, Conclusion (3), Commentary, para 12.

85 Vienna Convention on the Law of Treaties 1969, Arts 53, 64.

Chapter 7

CASE STUDIES ON THE HUMAN RIGHTS ACCOUNTABILITY OF AN INDEPENDENT STATE FOR THE OBLIGATIONS OF THE PRE-EXISTING STATE

In international law, state succession remains one of the most indefinite cases, including due to the reluctance of states to define the case of secession. The precise extent of the international obligations depend on *'whether a successor State is bound by the obligations contained in international human rights instruments that were binding on the predecessor State or whether it is free to accept or not to accept those obligations'*.[86] However, the peremptory and/or special character of human rights treaties is generally accepted to represent a clear motive for their application to new states.

Under customary international law, successor states generally inherit the human rights obligations of predecessor states as part of the principle of state succession.[87] This principle is rooted in the universality and binding nature of fundamental human rights, such as prohibitions against genocide, slavery, and torture – all of which are considered peremptory norms *(jus cogens)*.[88]

According to a general judicial and academic consensus, some parts of the Universal Declaration of Human Rights (UDHR) – including the right to life (Art 3) and the prohibition of both slavery (Art 4) and torture (Art 5) – have obtained customary international law status and are therefore binding on all States.[89] Similarly, many provisions of the Geneva Conventions have been considered customary international law regardless of ratification, as exemplified below. The following case studies illustrate the varying approaches to accountability.

Eritrea and Ethiopia

Eritrea was an Italian colony from 1889 to 1941, federated with Ethiopia after World War II and eventually annexed by Ethiopia in 1962, triggering an armed independence struggle until 1991.[90] Following an almost unanimous referendum, Eritrea achieved independence in 1993.[91] The newly independent country

86 Menno T Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 European Journal of International Law 469 https://doi.org/10.1093/ejil/7.4.469 accessed 29 June 2024.

87 'Customary IHL' (International Committee of the Red Cross, 2024) https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law accessed 17 June 2024; Audry L Comstock, 'Succession: New States, Old Laws, and Legitimacy' in Committed to Rights: UN Human Rights Treaties and Legal Paths for Commitment and Compliance vol 1 (Cambridge University Press 2021) 148-87.

88 'Peremptory Norms of General International Law (jus cogens)' (International Law Commission) 155 https://legal.un.org/ilc/reports/2019/english/chp5.pdf accessed 17 June 2024.

89 Michael P Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments (CUP 2013) 228.

90 Terrance Lyons, 'Eritrea: The Independence Struggle and the Struggles of Independence' (Center for Strategic and International Studies, 24 Jan 2019) https://www.csis.org/analysis/eritrea-independence-struggle-and-struggles-independence accessed 17 June 2024.

91 US Department of State, Bureau of Democracy, Human Rights, and Labor, 'Eritrea: Country Reports on Human Rights Practices' (23 Feb 2001) https://2009-2017.state.gov/j/drl/rls/hrrpt/2000/af/782.htm accessed 17 June 2024.

immediately inherited and was, in theory, bound by customary international human rights law. However. Eritrea has continued to display an extremely poor human rights record, with widespread reports of systematic human rights abuses.[92] Whilst Eritrea drafted a constitution in 1997 which guaranteed civil rights and limited executive power, the constitution has not yet been implemented.[93] Human Rights Watch has also confirmed that no elections have occurred since 1993 and that the authorities continue to suppress basic rights – including freedom of opinion, expression and religion – with heightened rules and restrictions on forced mass conscription.[94] Forced labour, detention without trial, arbitrary arrests, and the torture and inhumane treatment of prisoners have all been well-documented.[95]

Accordingly, the United Nations and various human rights organisations have condemned Eritrea's human rights practices,[96] but these criticisms have been largely dismissed by the government.[97] The country has also remained isolated from the international community and made no efforts to impose accountability.[98] Despite theoretically inheriting human rights obligations under customary international law from Ethiopia, Eritrea's success in upholding these obligations and ensuring accountability has been extremely limited. Key contributing factors include a combination of the country's authoritarian governance, suppression of civil liberties, lack of judicial independence, international isolation and persistent impunity.[99]

92 'Human Rights Council Hears That the Human Rights Situation in Eritrea Remains Dire and Shows No Sign of Improvement, and That the Situation of Human Rights in Afghanistan Continues to Deteriorate' (OHCHR, 6 March 2023) https://www.ohchr.org/en/news/2023/03/human-rights-council-hears-human-rights-situation-eritrea-remains-dire-and-shows-no accessed 17 June 2024.

93 'Eritrea' (Freedom House) https://freedomhouse.org/country/eritrea/freedom-world/2022 accessed 17 June 2024.

94 'World Report 2024: Rights Trends in Eritrea' (Human Rights Watch, 14 December 2023) https://www.hrw.org/world-report/2024/country-chapters/eritrea accessed 17 June 2024.

95 ibid.

96 OHCHR, 'UN Inquiry Finds Crimes against Humanity in Eritrea' (8 June 2016) https://www.ohchr.org/en/press-releases/2016/06/un-inquiry-finds-crimes-against-humanity-eritrea?LangID=E&NewsID=20067 accessed 4 July 2024; 'Eritrea: Events of 2022' (Human Rights Watch) https://www.hrw.org/world-report/2023/country-chapters/eritrea accessed 4 July 2024; 'Eritrea 2023' (Amnesty International) https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/eritrea/report-eritrea accessed 4 July 2024.

97 Amnesty International, 'Eritrea: 'You Have No Right to Ask' - Government Resists Scrutiny on Human Rights' (May 2004) 5 https://www.amnesty.org/en/wp-content/uploads/2021/09/afr640032004en.pdf accessed 17 June 2024.

98 'Human Rights Council Hears That the Human Rights Situation in Eritrea Remains Dire and Shows No Sign of Improvement, and That the Situation of Human Rights in Afghanistan Continues to Deteriorate' (OHCHR, 6 March 2023) https://www.ohchr.org/en/news/2023/03/human-rights-council-hears-human-rights-situation-eritrea-remains-dire-and-shows-no accessed 17 June 2024.

99 Ilze Brands-Kehris, Assistant Secretary General United Nations Office of the High Commissioner for Human Rights, 'Dire Human Rights Situation in Eritrea' (Speech given at 55th session of the Human Rights Council - Enhanced Interactive Dialogue on Human Rights in Eritrea, 28 February 2024) https://www.ohchr.org/en/statements-and-speeches/2024/03/dire-human-rights-situtation-eritrea accessed 17 June 2024; Service for Life: State Repression and Indefinite Conscription in Eritrea (Human Rights Watch, 16 April 2009) https://www.hrw.org/report/2009/04/16/service-life/state-repression-and-indefinite-conscription-eritrea accessed 17 June 2024.

Bosnia and Herzegovina and Yugoslavia

After Yugoslavia dissolved in the early 1990s, Bosnia and Herzegovina (hereafter "Bosnia") declared independence following a referendum in March 1992.[100] On 29 December 1992, Bosnia informed the UN Secretary-General that, by virtue of State succession, it considered itself to be bound by the 1949 Geneva Conventions and two additional protocols to which the former Yugoslavia had been a party.[101] Amongst a backdrop of growing nationalist rhetoric alongside ethnic groups' fear and mistrust, a brutal conflict broke out among Bosnia's three main ethnic groups.[102] The Bosnian War from 1992 to 1995 saw widespread atrocities, including ethnic cleansing and genocide,[103] and eventually ended with the Dayton Peace Agreement in 1995.[104]

In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) with a mandate to prosecute individuals for serious violations of international law, including grave breaches of the Geneva Conventions, genocide, crimes against humanity and war crimes during the Bosnian War.[105]

A comparative analysis of South Sudan and Rakhine state/province in Burma

On 9 July 2011, South Sudan declared independence from Sudan following a referendum in which nearly 99% of South Sudanese endorsed secession.[106] This declaration of independence marked the end of decades-long civil war between the predominantly Muslim and Arab north and the largely Christian and Animist south.[107]

To understand the Rakhine state/province in Burma, a brief historical background should be considered. The Myanmar King annexed the independent kingdom of Mrauk U, currently Rakhine state/province, in 1784–85. Afterward, Rakhine was under the rule of the Konbaung dynasty in the Myanmar kingdom. In 1824, the first Anglo-Burmese war erupted; in 1826, Rakhine state/province became a part of Burma in British India. Rakhine remained part of the newly independent state when Burma gained independence in 1948.

100 International Criminal Tribunal for the former Yugoslavia, 'What Is the Former Yugoslavia?' (April 2009) https://www.icty.org/en/about/what-former-yugoslavia/conflicts%3E accessed 25 June 2024.

101 'Declaration of Succession by the Republic of Bosnia-Herzegovina to the Geneva Conventions and Their Additional Protocols' (1993) 33(293) International Review of the Red Cross 182 https://doi.org/10.1017/S0020860400071606 accessed 25 June 2024.

102 ibid

103 Hana Walasek, 'Cultural Heritage and memory after ethnic cleansing in post-conflict Bosnia-Herzegovina' (2019) 101(910) International Review of the Red Cross 273 https://doi.org/10.1017/s1816383119000237 accessed 4 July 2024.

104 ibid 282.

105 'International Criminal Tribunal for the Former Yugoslavia' (International Criminal Tribunal for the Former Yugoslavia) https://www.icty.org/ accessed 25 June 2024.

106 Paul Aufiero, 'South Sudan at a Crossroads' (Human Rights Watch, 9 July 2021) https://www.hrw.org/news/2021/07/09/south-sudan-crossroads accessed 17 June 2024.

107 Alex de Waal, Sudan: What Kind of State, What Kind of Crisis (Social Science Research Council 2007) 2 https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-occasional-papers/OP2-Sudan-what-kind-of-state-what-kind-of-crisis.pdf accessed 4 July 2024.

Formally known as Arakan State, Rakhine state/province is situated on the western coast, through which Rakhine can establish a direct relationship with any foreign countries. Being under the powerful leadership of ULA/AA, a prominent ANSA, gives Rakhine the most potential to establish a new Rakhine independent state, in contrast to other ethnic states/provinces which constitute Burma. A comparative analysis of Rakhine, in which the Rohingya issue originated, and South Sudan may be meaningful.

Notwithstanding South Sudan becoming an independent state, no protection of human rights has yet been found. The civil society organizations complained about human rights violations, as detailed below:

> **(.....) some of the main humanitarian concerns in the area include ongoing human rights violations and abuses along with violations of international humanitarian law, including rape and sexual and gender-based violence, intentional starvation of civilians, recruitment of children in armed conflict, and attacks on civilian infrastructure, intercommunal violence, severe humanitarian challenges such as displacement, serious food insecurity, arbitrary denial of humanitarian access, and attacks against humanitarian personnel, attacks on civil society and civic space, evidenced by routine violations of the right to freedom of opinion and expression which are just some examples of the numerous cases observed.**[108]

Similar human rights situations have been occurring in Rakhine state/province, but they are much more atrocious than in South Sudan, insofar as the commission of the gravest crimes of international concern – genocide, crimes against humanity, war crimes and torture. Regardless of whether Rakhine becomes an independent State or continues to form part of the federal union of Burma, the perpetrators[109] must be held accountable by the (new) government authorities now and in the future. Even if an independent State approach is adopted by the ULA/AA, *a unilateral declaration that contravenes a rule of jus cogens would be invalid.*[110]

Regarding South Sudan, the Human Rights Council highlighted dealing with the past and building sustainable peace in connection with a transitional

108 Human Rights Agency, Human Rights in South Sudan: Main Challenges and Recommendations (Agence pour les Droits de l'Homme ADH report for UNHRC periodic review 2022) https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=9225&file=EnglishTranslation accessed 26 June 2024.

109 Human Rights Council, 'Report Independent International Fact Finding Mission on Myanmar' (12 September 2018) UN Doc A/HRC/39/64 para 92 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/64> accessed 3 July 2024. Perpetrators:
1. *Tatmadaw* Commander-in-Chief, Senior General Min Aung Hlaing
2. Deputy Commander-in-Chief, Vice Senior General Soe Win
3. Commander, Bureau of Special Operations-3, Lieutenant-General Aung Kyaw Zaw
4. Commander, Western Regional Military Command, Major-General Maung Maung Soe
5. Commander, 33rd Light Infantry Division, Brigadier-General Aung Aung
6. Commander, 99th Light Infantry Division, Brigadier-General Than Oo

110 Javier Chinchón Álvarez, 'Secession, International Responsibility and Human Rights' in Carlos Fernández de Casadevante Romani (ed), Legal Implications of Territorial Secession in Spain (Springer, Cham 2022) 165 <https://doi.org/10.1007/978-3-031-04609-4_11> accessed 4 July 2024.

justice process.[111] The HRC affirmed the Cabinet's approval of draft legislation for the Truth Commission and the Compensation and Reparations Authority.[112] In addition, the HRC encouraged the practice of universal jurisdiction[113] while reminding of the impunity being enjoyed by South Sudanese officials.[114] The HRC initiatives are notable and remarkable. However, the above actions would be insufficient for Rakhine state/province, where the gravest crimes of international concern occurred.

In Burma, unless the accountability issue can be resolved effectively with the underpinning of the rule of law, genuine peace might never be achieved. In many countries with armed conflicts, all the perpetrators could not be held accountable even if dialogue processes brought a noticeable achievement, so the rule of law could not be upheld completely. However, the accountability issue was somewhat addressed in these countries, by applying the transitional justice concept.[115]

In addition to conducting normal transitional justice measures, the EU has become focused on ending impunity and seeking accountability, thereby contributing more to re-establishing and strengthening the rule of law[116] rather than justice. The EU program is notable in three ways: First, the importance of criminal justice is highlighted, and states are reminded that it is their obligation to investigate and prosecute "serious crimes under international law."[117] Second, the role of the ICC is underlined, and effort is exerted to fill the gap between international and national legal mechanisms while invoking the complementarity principle provided for under Article 1 of the Rome Statute.[118] Finally, to guarantee non-recurrence, the significant role of institutional reform—an instrumental foundation for the rule of law—is accentuated.[119]

Rakhine state/province – as a part of Burma, which has been practicing under the British common law system – inherited the same legal tradition. Nevertheless, due to the lack of a provisional/interim state/province Constitution, whether the ULA/AA would establish an independent judiciary, the cornerstone of the rule of law, and exercise judicial review power to examine the operation of the legislative and executive branches remains unknown, despite both civil and criminal jurisdictions having been adopted.

111 UN Human Rights Council, 'Report of the Commission on Human Rights in South Sudan' (55th Session, 13 March 2024) UN Doc A/HRC/55/26, para 72 <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session55/list-reports> accessed 3 July 2024.

112 ibid para 73.

113 ibid para 75.

114 ibid para 77.

115 Sylvia Rognvik and Enrique Sánchez, 'Workshop report: Building Just Societies: Reconciliation in Transitional Settings' (United Nations, Accra, Ghana 5-6 June 2012) 6 <https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/12-58492_feb13.pdf> accessed 7 April 2023; the stated reconciliation concept and process unequivocally lacked in Burma at least over the previous three decades despite having a rhetoric term 'national reconciliation'.

116 European External Action Service, 'The EU's Policy Framework on Support to Transitional Justice (European Centre of Excellence for Civilian Crisis Management 2015) <https://www.coe-civ.eu/kh/the-eus-policy-framework-on-support-to-transitional-justice?tx_felogin_login%5Baction%5D=login&tx_felogin_login%5Bcontroller%5D=Login&cHash=446bf63cccabb23a727b5e260489bf08> accessed 7 April 2023.

117 ibid 5.

118 ibid 3: The EU and its Member States provide support to third countries in order to assist them in developing and strengthening their capacities to meet the obligations arising out of the Rome Statute by, e.g. promoting national legislation implementing the Rome Statute and supporting justice and rule of law programmes with a focus on criminal justice, as underlined in the Toolkit for bridging the gap between International and National Justice.

119 ibid 7.

South Sudan's legal system is based on common law tradition, with judiciary headed by [the] chief justice. The judiciary budget is charged directly from the country-consolidated funds. The Supreme Court is the highest court of the land. All other courts in the State have both civil and criminal jurisdictions.[120]

In conclusion, the HRC's recommendations are highly relevant not only to South Sudan but also to Rakhine state/province in Burma as follows: the requirement of functioning, independent and effective justice system to end impunity;[121] the adoption of a permanent constitution, the unification of the armed forces and the establishment of transitional justice institutions;[122] victims must be released and perpetrators punished, not rewarded;[123] violence against women and girls ends and the social fabric is restored;[124] and the requirement of urgent societal changes.[125]

120 UN, Common Core Document Forming Part of the Reports of States Parties: South Sudan (30 January 2020).
121 UN Human Rights Council (n 26) para 94.
122 ibid (n 26) para 90.
123 ibid (n 26) para 91.
124 ibid (n 26) para 92.
125 ibid.

Chapter 8

CONCLUSIVE ANALYSIS

PART 1: THE UNLAWFUL ENFORCEMENT OF PEOPLE'S MILITARY SERVICE LAW BY THE STATE ADMINISTRATION COUNCIL (SAC): NEGATIVELY IMPACTING ON CIVILIANS INCLUDING ROHINGYA

The most obvious suffering from plunging morale amid offensives launched by the EROs and PDFs has resulted in mass surrenders of the *Tatmadaw* (SAC) soldiers – including six high ranking military officials.[126] It has prompted the unlawful enforcement of People's Military Service Law (2010),[127] by the SAC. The law is illegal or unlawful as it was provided by Senior General Than Shwe alone, while he was taking position as the chairperson of the State Peace and Development Council (SPDC), which got into power by a military coup, but not by any legitimate legislative assembly operated in accordance with the Constitution. The concern is that, albeit being illegal law,[128] the public commonly regard it as a legally binding document which is still effective. Taking advantage of this situation, the SAC abuses the rights to life, liberty and security of civilians, including Rohingya, in Burma.

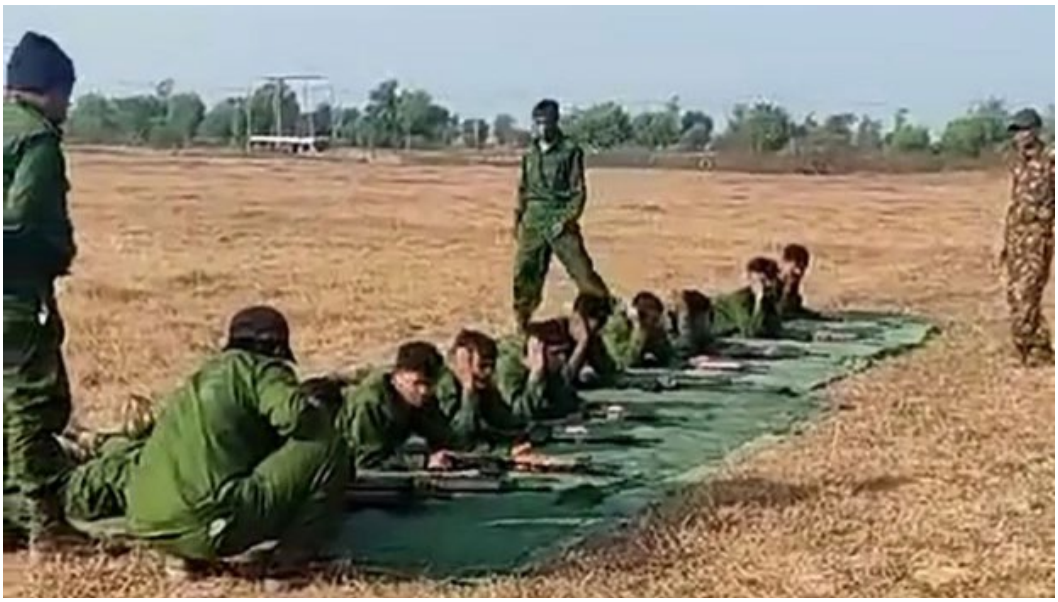


PHOTO: RFA

People who appear to be Rohingya Muslims in Rakhine state undergo weapons training by junta military personnel on March 10, 2024.

126 The Washington Post, 'Rebel Offensives Taking Toll on Myanmar Military's Cohesion' (February 14, 2024) <https://www.washingtonpost.com/world/2024/02/14/myanmar-war-military-rebels-surrenders/> accessed 7 July 2024.

127 Online Burma/Myanmar Library, People's Military Service Law – SPDC Law No. 27/2010. <https://www.burmalibrary.org/en/the-peoples-military-service-law-spdc-law-no-272010-english> accessed 7 July 2024.

128 LAURA GUIDI, 'Illegal Laws: Understanding the Consequences and Legal Ramifications' (2023). <https://www.lauraguidi.pl/illegal-laws-understanding-the-consequences-and-legal-ramifications/> accessed 7 July 2024.

Given the SAC's above 'systematic' acts, the following appalling scenes are witnessed: (1) the conscripted civilians, having been transformed into soldiers, are to kill other civilians or die in the battles;[129] (2) 'widespread' forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law, and 'enforced disappearance of persons' have been taking place.[130] (3) There is a close nexus between the armed conflict and the acts of the SAC and the stated acts have occurred within the frame of that armed conflict.[131]

The above situations are the legal prerequisites for the commission of crimes against humanity and the degree of culpability can be determined.[132] 'Article 5 of the ICTY Statute covering crimes against humanity refers to acts "directed against any civilian population."[133] 'The notion of crimes against humanity has evolved under customary international law and through the jurisdictions of international courts.'[134] In spite of lacking an overall specific intent, the SAC's stated acts constitute crimes against humanity as it has been committing with knowledge of the attack against the civilian population,[135] including Rohingya.

The Myanmar Military has forcibly abducted and recruited more than 1,000 Rohingya Muslims men and boys from across Rakhine State since February 2024. The junta is using a conscription law that only applies to Myanmar citizens, although Rohingya has long been denied citizenship under the 1982 citizenship law.[136]

PART 2: REVIVAL OF SOCIETAL INFLUENCE

On 19 June 2024, a senior religious figure in Myanmar's Buddhist community, Bhaddanta Muninda Bhivamsa, was shot and killed while traveling with another monk and a driver in a car in Mandalay Region's Ngazun Township. The 78-year-old was the head abbot of Win Neinmitayon Monastery in Bago Region. According to the surviving monk, the shooting occurred around 10:30 am as the group was traveling through a checkpoint.[137] The driver lost three fingers in the attack; fellow monk Sayadaw

129 Tom Andrews, special rapporteur on human rights situations in Myanmar: 'Military junta even greater threat to civilians as it imposes military draft, warns UN expert' (21 February 2024) <https://www.ohchr.org/en/press-releases/2024/02/myanmar-military-junta-even-greater-threat-civilians-it-imposes-military> accessed 7 July 2024.

130 Rome Statute of the International Criminal Court, art 7, para 2 (d) and (i).

131 International Criminal Tribunal for Former Yugoslavia: Krstic – Judgment – Part III. <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e-3.htm> accessed 7 July 2024.

132 ibid.

133 ibid.

134 The United Nation: Office on Genocide Prevention and Responsibility to Protect: <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> accessed 7 July 2024

135 ibid.

136 Human Rights Watch, 'Myanmar: Military Forcibly Recruiting Rohingya' (April 9, 2024) <https://www.hrw.org/news/2024/04/10/myanmar-military-forcibly-recruiting-rohingya> accessed 7 July 2024.

137 Amnesty International, 'Myanmar: Promised Investigation into Senior Monk's Shooting Must Actually Take Place' (25 June 2024 <https://www.amnesty.org/en/latest/news/2024/06/myanmar-promised-investigation-into-senior-monks-shooting-must-actually-take-place/> accessed 27 June 2024.

Bhaddanta Gunikabhivamsa sustained head injuries from the smashed glass. At the scene, the surviving monk's phone was confiscated by those who fired and then fled before other soldiers arrived and interrogated Gunikabhivamsa at a camp in Mandalay Palace for five hours.[138]

Initially, junta-controlled media blamed opponents of the coup for Bhivamsa's killing, whereas the senior monk who witnessed the incident quickly revealed that security forces were responsible. After the accusation went viral on social media, the junta announced an investigation into the incident.[139]

The Samgha Samagga, a monk's association in Mandalay, also released a statement condemning the shooting and labeling it terrorism.[140] On 23 June 2024, the fifth day after the monk from Win Nim Mattatang Monastery was killed, about fifteen monks from Chaung U Township started the Pattanikkuzjana strike. On 24 June, more than thirty monks from thirty monasteries in Dipayin Township participated. On 25 June, some monks from Sar Lingyi Township and Tan Se Township also participated in the strike. The monks leading this strike are calling on local, state and local authorities to hold the SAC accountable for the crimes committed. Leaders also encouraged foreign monks to participate in the movement.[141]

SAC's Head Min Aung Hlaing apologized for the *Tatmadaw*'s recent killing of a senior Buddhist monk but blamed the victim for allegedly failing to comply with security measures. Rather than providing an in-person apology, Min Aung Hlaing sent his Religious Affairs and Culture Minister Tin Oo Lwin to read an apology statement to monks at the slain abbot's monastery in Bago on 24 June (Monday). The apology reads: 'The vehicle transporting Sayadaw was a private vehicle with no religious emblems and was speeding with its windows closed. I sadly learned that Sayadaw was hit and passed away in the shooting when the car drove away after being told to pull over for a security check. I am deeply grieved at the loss of the renowned Sayadaw, who was prized for Pariyatti Sāsana [scriptural theory for Buddhist monks and missionary work], and we offer profuse apologies.' Min Aung Hlaing ended his statement by saying, 'I would like to humbly and respectfully state that we will continue to serve the interests of Sasana [Buddha's teaching] by ensuring harmonious cooperation between Sayadaws [senior monks] and us disciples.'[142]

138 The Diplomat, 'Killing of Monks Raises Fear of a Holy Conflict in Myanmar' (25 June 2024) <https://thediplomat.com/2024/06/killing-of-monks-raises-fear-of-a-holy-conflict-in-myanmar/> accessed 27 June 2024.

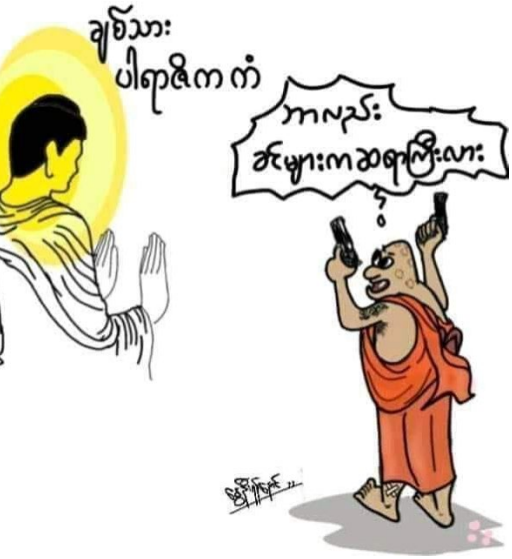
139 The ASEAN Daily, 'Myanmar Junta Chief Apologizes for the Killing of Prominent Buddhist Abbot, Promises Investigation' (26 June 2024) <https://theaseandaily.com/myanmar-junta-chief-apologizes-for-killing-of-prominent-buddhist-abbot-promises-investigation/> accessed 27 June 2024.

140 RFA Burmese, 'In Rare Backtrack, Junta Says It Will Investigate Senior Monk's Shooting Death' (21 June 2024) <https://www.rfa.org/english/news/myanmar/junta-will-investigate-monks-shooting-death-06212024172502.html> accessed 27 June 2024.

141 RFA, 'Monks in Four Townships Went on Strike Because of the Shooting Death of the Monk Win Nim' (26 June 2024 <https://tinyurl.com/4trddfk7> accessed 29 June 2024.

142 The Irrawaddy, 'Myanmar Junta Chief Apologizes for Slaying of Buddhist Abbot, Blames Victim' (25 June 2024) <https://www.irrawaddy.com/news/burma/myanmar-junta-chief-apologizes-for-slaying-of-buddhist-abbot-blames-victim.html> accessed 27 June 2024.

On 22 June 2024, in Bago, pro-junta monk Sitagu Sayadaw urged the mournful Buddhist monks to tolerate, forgive and move forward 'as the country would be in serious trouble if the government (currently SAC) and the monks are not united.'[143] Sitagu Sayadaw – despite being one of Myanmar's most revered monks – is notorious for creating false narratives against Rohingya.[144] Later, he reappeared in public and delivered an appeasement speech between the SAC and opponent monks who were unsatisfied with the arbitrary killing of Bhaddanta Muninda Bhivamsa, a senior religious figure.



In terms of societal influence – apart from other political leaders, ostensible academicians and government authorities, as stated in chapter 3 – the power of Sitagu Sayadaw and his disciples, including Ashin Wirathu, should not be underestimated.

Ashin Wirathu said "Local Muslims are crude and savage because extremists are pulling the strings, providing them with financial, military and technical powers.—Based on the text, Wirathu's intention is the type of assertive speech act. Assertive represents a state of affairs. Wirathu gives his statement in front of his followers about conflicts in Rakhine and about Muslims on there.[145]

Hundreds of Buddhist monks and others from the Rakhine Buddhist community participated in an anti-Rohingya protest in November 2014. The protest occurred three years before the 2017 genocidal incidents in Rakhine state/province.[146] Society's negative influence – primarily created by Buddhist monks' community, under the initiative of Sitagu Sayadaw and his disciple Wirathu, who led the MaBaTha monk association – has spread across the country, in which Rakhine constitutes a small part. Even if declaring an independent state under the leadership of ULA/AA, Rakhine state/province could not withstand such powerful influence over all Rakhine and other ethnic nationalities who domicile there. This situation would hinder efforts for seeking peace, justice, stability and development in Rakhine State.

143 The Irrawaddy – English Edition, 'Sitagu Sayadaw Calls for Unity among Regime and Buddhist Clergy after Senior Monk's Killing' (22 June 2024). <https://tinyurl.com/uaj9kxau> accessed 27 June 2024.

144 See chapter 3.

145 Ifah Wadani, 'Power and Ideology of Ashin Wirathu's Speeches toward Muslims in Rohingya, Critical Discourse Analysis' (April 2018) <https://eprints.ums.ac.id/62286/1/PUBLICATION%20ARTICLE%20r.pdf> accessed 5 July 2024.

146 United States Holocaust Memorial Museum, 'Burma's Path to Genocide' (2014) <https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-3/weakened> accessed 7 July 2024.

Invoking the right of self-determination for the secession of Rakhine from Burma is neither prohibited nor encouraged under international law.[147] In this regard, various nationalities would primarily make any political decision in Rakhine state/province, under the leadership of the ULA/AA. Facilitating this consideration in-depth requires heeding *The 'Montevideo Criteria' as the First Parameter of Statehood.*[148]

PART 3: THE 'MONTEVIDEO CRITERIA'

Although no universal definition of a state exists, the Montevideo Convention (1933) outlines basic factors for determining the formation of a state and is widely accepted by states internationally. According to the convention, a state requires four elements: a permanent population, a defined territory, a government and the ability to have relationships with other countries.[149] How countries typically recognize new states strongly refers to the conditions outlined in Article 1 of the Montevideo Convention. Even court decisions predating the convention emphasized similar requirements. For instance, a 1929 ruling stated that a state needs territory, human inhabitants, and functioning government. Eventually, these criteria to establish a state have been further accepted as customary by the international community.[150]

Regarding population, some nations are largely homogenous, but most have diverse populations with differences in race, religion or economic status. An important concern is how minorities – groups distinguished by race, religion, language, etc. – are treated. International law protects minorities and requires states to respect minority identities and rights. Therefore, an aspiring state that seeks to gain statehood must, besides having a permanent population, heed the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provisions adopted by the General Assembly in 1992.[151]

The defined territory constitutes an essential element in the formation of a state. While the territory size may not be considered, a physical geographic area is required for a state to be conceived so that it can exercise exclusive sovereignty and perform government activities.

The third element required for forming a state is government. The Montevideo Convention does not specify the term 'government' and thus needs a more nuanced definition

147 Dr. David Fisher, Prof. of International Law, Faculty of Law, Stockholm University, Sweden.
148 Jan Klabbers (ed) 'Montevideo Convention on Rights and Duties of States' in International Law Documents (Cambridge University Press, 2016) 142 <https://doi.org/10.1017/9781316577226.005> accessed 5 July 2024.
149 ibid 2–4.
150 Ana Gemma, López Martín, 'The Formation of the State in the International Legal Order. Proceedings for Secessionist Entities' in Carlos Fernández de Casadevante Romani (ed), Legal Implications of Territorial Secession in Spain (Springer, Cham 2022) 143 <https://doi.org/10.1007/978-3-031-04609-4_11> accessed 7 July 2024.
151 ibid 144.

for statehood. For example, the government of the aspiring state must have a well-developed political, institutional and effective organization of executing government functions over the territory and population. A state therefore needs the key branches of government – executive, judicial and legislative and the institutional apparatus under the branches. This structure allows for exercising sovereignty, both internally and externally, and legally backing and enforcing government decisions, including use of force if necessary.[152]

The fourth requirement for statehood is sovereignty, or the ability to have relationships with other countries. Sovereignty refers to a state's complete independence and freedom from being controlled by any other higher power. This ability is especially crucial when a new state is formed through secession. To be considered a real state, the secessionist state must be completely independent from its original country. The original state can therefore no longer have any influence, politically or militarily, over the territory. Similarly, if another country supports the secession and gains influence or control over the territory, in the case of puppet states, the new state is not considered truly independent and would not be recognized internationally.[153]

PART 4: THE IMPORTANCE OF 'NATIONAL RIGHTS SYSTEM' THAN 'INTERNATIONAL HUMAN RIGHTS'

In relation to human rights, Henkin underlined the status of 'society', by claiming that human rights are claims upon 'society', not 'against society' against the interest of society – rather, in practical term 'state' or against the state – as insurer to provide individuals if the latter cannot provide freedoms and immunities for themselves.[154] He continued to elaborate that the state is obliged to satisfy individuals' claims by maintaining domestic laws and institutions and creating legal rights and remedies.[155]

Connections between human rights, international law, and national rights systems, highlighted by Henkin over two decades ago, have become more relevant today.

> **A comprehensive study of human rights recognizes that the international law and institutions of human rights depend heavily on national rights system. In a real sense, there are no "international human rights"; human rights are claims by human beings upon and within their national societies.**[156]

152 ibid 145.
153 ibid 147.
154 Louis Henkin, Gerald L Neuman, Diane F Orentlicher, David W Leebron, Human Rights: University Casebook Series (Foundation Press, New York NY 1999) 4-6.
155 ibid.
156 ibid, viii.

PART 5: THE LACK OF INTERCONNECTEDNESS BETWEEN LAW, SOCIETY, AND STATE: LAW RESISTING SOCIETAL INFLUENCE

Following the independence of Burma in 1948, the interconnectedness between law, society, and state emerged under the 1947 Constitution coupled with the 1948 Union Citizenship Act, as mentioned in chapter (2) part 1. The Rohingya, alongside other nationalities enjoyed constitutional and legal protections at the time. Then, after the 1962 military coup, the two constitutions – the 1974 and 2008 Constitutions fabricated by the successive military junta – came into existence. The interconnectedness between law, society, and state has since disappeared: as a negative result, among others, Rohingya have suffered the most.

Even if the rule of the military dictatorship can be eradicated in Burma, whether the atrocities inflicted on the Rohingya, primarily due to the denial of citizenship, can be alleviated remains uncertain. This uncertainty is also related to the lack of interconnectedness between law, society, and state.

If the ultra or extreme nationalism or cultural parochialism overwhelmed society, the practices would resemble those espoused by fascists.[157] Such practices include political violence – committing mass murder and arbitrarily exercising power while abandoning the rule of law – that cannot be deterred.

'NO ONE IS ABOVE THE LAW', 'EQUALITY OF INDIVIDUAL SUBJECTS BEFORE AND IN THE LAW', 'EQUAL SITUATIONS SHALL BE TREATED EQUALLY', AND 'NON-DISCRIMINATION IN PRACTICE'

The four norms, stated above, are the minimum standards of the Rule of Law. They are inextricably connected but also support each other: if an individual subject is above the law, if discrimination is practiced among individuals or groups or social strata, or if an equal situation is not treated equally, equality—a formal equality that stands for the suppression of privileges[158]—cannot be achieved. But if equality before the law (from the procedural perspective) and equality in the law (from the perspective of the substance of law) are guaranteed, then no one can be above the law.

Of the four minimum standards of the rule of law, two norms – "equality of individual subjects before and in the law" and "non-discrimination in practice" – have been denied since the emergence of the 1974 and 2008 Constitutions. This denial

157 Britannica, History and Society, "Extreme Nationalism." <https://www.britannica.com/topic/fascism/Extreme-nationalism> accessed 14 July 2024.

158 Danilo Zolo, 'The Rule of Law: A Critical Reappraisal' in P Costa and D Zolo (eds), The Rule of Law History, Theory and Criticism (Springer, Dordrecht 2007) 3.

occurs due to a range of other pathways to citizenship listed in the 1948 Union Citizenship Act under the 1947 Constitution, benefited by, inter alia, Rohingya no longer being effective. Article 145 of the 1974 Constitution[159] deprived its article 147[160] of guaranteeing "equality of individual subjects before and in the law." Instead, only those born of parents who are both nationals (or ethnic nationals) can become citizens and enjoy equality. In the 1974 Constitution, discriminatory practice is connected to the requirement of citizenship existing only for nationals (or ethnic nationals).

Analogous text appears in the 2008 Constitution, which inherited the citizenship norms from the 1974 Constitution. Accordingly, on the one hand, the 2008 Constitution guarantees any person to enjoy equal rights.[161] On the other hand, it denies equality norms, stated above, by repeatedly evoking the same requirement for citizenship.[162]

With the underpinning of the 1974 Constitution, the draconian citizenship law, namely Myanmar citizenship law, was produced in 1982 and remains effective today given the same constitutional background related to citizenship found in the 2008 Constitution. This constitutional background has fortified the status of the Myanmar Citizenship Law (1982). Consciously or unconsciously, the CRPH formed with the lawmakers elected in the 2020 elections has adopted the validity of the draconian citizenship law even though they daringly abrogated the 2008 Constitution.[163]

As stated in chapter 4, part 2, even if the NUCC acts in accordance with societal influence in convening the second People's Assembly, the CRPH and NUG rejected calls to cancel the Myanmar Citizenship Law (1982). This dynamic shows that, at least in the case of Burma, the fortification of a statute law – even one violating human rights and the rule of law – results in society being controlled as if trapped by an iron net. Ultimately, the rights and freedoms of the Rohingya will never become a reality if the stated citizenship law and its concept continue to exist in any form.

159 The Constitution of the Union of Burma (1974): Article 145: (a) All persons born of parents both of whom are nationals of the Socialist Republic of the Union of Burma are citizens of the Union. <https://www.myanmar-law-library.org/IMG/pdf/constitution_de_1974.pdf> accessed 14 July 2024.

160 ibid Article 147: All citizens are equal before the law irrespective of race, status, official position, wealth, culture, birth, religion, or sex.

161 2008 Constitution: Article 347: The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection. <https://www.myanmar-law-library.org/law-library/laws-and-regulations/constitutions/2008-constitution.html>

162 ibid Article 345: All persons who have either one of the following qualifications are citizens of the Republic of the Union of Myanmar: (a) person born of parents both of whom are nationals of the Republic of the Union of Myanmar;

163 ibid (n 54).

Recommendations

1. HUMAN RIGHTS VERSUS EXTREME NATIONALISM

If nationalism and ethnic nationalism are activated with the underpinning of the rule of law – at least the minimum standards with an independent, impartial, efficient and resource-rich judiciary at the centre – both state and society would be peaceful, just, stable and developed while denying atrocities attributed to ultra- or extreme nationalism. Conventional wisdom dictates that overcoming violent or nonviolent conflicts arising from extreme nationalism requires the promotion and protection of human rights to be sine qua non.

2. COMPLIANCE WITH PEREMPTORY NORMS *(JUS COGENS)*

Whether the people in Rakhine State, primarily led by the ULA/AA, choose to become an independent state or continue forming part of a new Federal Union of Burma wherein provincial sovereignty is exercised, Rakhine must undertake the human rights obligations of the predecessor or existing state in compliance with peremptory norms *(jus cogens)*.

3. THE IMPORTANCE OF THE KEY BRANCHES OF GOVERNMENT

To deter criticism made by the international community (see chapter 5) regarding international human rights, Rakhine may consider the emergence of a national rights system, as highlighted by late human rights icon Prof. Louis Henkin. Such a system requires establishing the key branches of government (executive, judicial and legislative) and the related institutional apparatus, and practicing the limited government concept, which has become a global value.

4. TRANSFORMING INTO A CONSTITUTIONAL MECHANISM BY PRACTICING CONSTITUTIONALISM

If the ULA/AA stands as a government of independent Rakhine State or as part of a new Federal Union of Burma, convincing the national and international communities, insofar as the ULA/AA stands as a rights protection mechanism, will be difficult. The ULA/AA needs to independently transform as a constitutional mechanism by practicing constitutionalism through the constitution of an independent Rakhine State or a provisional/interim constitution of the Rakhine state/province.

5. PROMOTING THE VALUE OF CITIZENSHIP

In Burma, two types of violent or nonviolent conflicts exist: one is a major conflict between resistance forces – such as EROs, PDFs and other democratic revolutionary forces – and the Military Council or the SAC primarily from military aspect; another is non-major conflicts among the resistance forces, particularly within the EROs, as ANSAs from both political and legal aspects. To help resolve the latter, the value of citizenship should be promoted and maintained by heeding human rights norms. The 1982 Citizenship Law must be repealed, and a new citizenship law must be produced, at a minimum, by properly invoking the provisions, *inter alia,* enshrined in section 11 (iv) of the 1947 Constitution.

6. ERADICATING THE ENTIRE MILITARY DICTATORSHIP

The key to facilitating the resolution of ethnic or other related conflicts, including the Rohingya issue, is permanently eradicating the entire military dictatorship. Accomplishing that requirement, a major strategy objective should be to achieve legitimacy to rule the country, based on the provincial sovereignty concept. For this purpose, the ULA/AA should work with the NUG to repeal negative societal influence occurring throughout Burma. Before achieving such collaboration, NUG should be reformed with the major participation of representatives from the ethnic states/provinces, by not only adopting the provincial sovereignty norm superficially but also exercising it empirically based on the bottom-up approach.

7. THE RULE OF LAW CONCERN

The underlying issues surrounding 'the rule of law' have arisen with the constitution or without the constitution since independence. A major immediate cause of civil war in Burma is relevant to the violation of human rights, in terms of the right to freedom of expression, association, and assembly, at the background of ideological conflict; and non-compliance of Article 17 of the 1947 Constitution by the then government authorities resulted in the lack of the rule of law. A lesson learnt from this experience is that, even if any type of a federal democratic constitution suited to Burma, along with the constitutions of the Ethnic States/Provinces, emerges in the near future, a genuine peace is achievable only when the government authorities, all stakeholders and the general public observe them.

8. DISCARDING DISCRIMINATION PRACTICES

The definition of "discrimination" needs to be incorporated into domestic laws. As a result, political, religious and racial extremism would be deterred, thereby positively facilitating the right to life, liberty and security of many ethnic nationalities, including the Rohingya.

9. THE EMERGENCE OF A NEW JUSTICE SYSTEM

A legal aid system – which provides free legal assistance to rape victims and others who were abused sexually after the filing of First Information Reports (F.I.R.) and to the suspects whom were arbitrarily arrested by the government or ANSAs' authorities – needs to be in place. A witness protection law should be provided. A new justice system should come into existence: accordingly, a legally authorized civilian institution should oversee whether the police conduct their tasks systematically, justly, legally, and without unreasonable delay.

10. GUARANTEE OF NON-RECURRENCE

The *Tatmadaw* has become a single robust institution which has negatively influenced other state institutions. In regard to the gravest crimes of international concern, seeking a guarantee of non-recurrence is a sine qua non. From the 8888 popular democratic uprising to date, the heinous crimes allegedly committed by the *Tatmadaw*, have indicated that reformation of existing state security institutions no longer suffices. Hence, to achieve a genuine peace, the emergence of new state security institutions is a must.

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