



Legal Analysis Statement: On the Issue of Repatriation of Rohingyas to Rakhine State, Burma¹ (Myanmar)

1. Investigation of the UN FFM Required

Mere acceptance of repatriation by the Myanmar government is not a sufficient solution to deal with decades of serious human rights violations committed by the State against the Rohingyas. If such repatriation takes place, it will just serve to whitewash responsible perpetrators, government authorities and Myanmar military leaders. Impunity will continue to prevail, making an on-going mockery of the Rule of Law.

This time, in regard to these heinous crimes -- which may constitute genocide -- accountability must be sought effectively. To this end, investigation by the international community of these crimes in Rakhine and other Ethnic States is an essential requirement and of paramount importance. Our organization vigorously objects to the action of the Myanmar government in rejecting the visit of Mrs. Yanghee Lee, the UN Special Rapporteur on Human Rights, to Rakhine State. If the government authorities would like to prove that they did not commit any heinous crime, they must invite the UN Fact Finding Mission, which is an authorized international body, to investigate serious human rights violations in Burma.

2. Seeking accountability: State Obligations, Superior/command Responsibility, and the NDSC

With all serious human rights violations, the accountability of the State must be sought: Article 47 of the 2008 Constitution provides that the term 'State' means legislative and executive bodies or persons. As such, in regard to all serious human rights violations happening, especially in ethnic States including Rakhine State, Hluttaws² and government authorities – on behalf of the State – are responsible. Importantly, accountability particularly lies with the highest authorized body, namely the National Defense and Security Council (NDSC) – chaired by President U Htin Gyaw.

Mrs. Aung San Suu Kyi plays a crucial role in this, as she is not only a member of the said institution as the Foreign Affairs Minister but also as the State Councillor, who occupies the second highest position in the Union after the President. In accordance with the doctrine of superior/command responsibility being practiced in international law, it is realized that

¹ The Legal Aid Network (LAN) recognizes the name of the country, Burma, as an official term, which has been used since the time of its independence. Without seeking the agreement of the Ethnic States, which constitute the Union, and the ethnic nationalities, residing therein, the former military regime unilaterally changed it into 'Myanmar'.

² Myanmar term which means Legislative Body

superior/command responsibility is a form of responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfil his duties to prevent and punish these crimes.

The NDSC – the highest authorized body in Burma – is the superior, while Min Aung Hlaing, commander-in-Chief of the Armed Forces, is the subordinate; simultaneously, while Min Aung Hlaing is the superior, the local Myanmar military commanders in Rakhine State are his subordinates.

With regard to the serious violation of the human rights of Rohingyas by the Myanmar Army and the Myanmar Police Battalions in the name of the State, the superiors should be held criminally responsible for all heinous crimes committed by their subordinates. Even if there is not yet any submission of concrete evidence proving that those heinous crimes happened under their direct command, they are criminally responsible for two reasons: first, they culpably failed to conduct their duties to protect the victims immediately after receiving relevant information; and second, no sufficient proof has yet been found that the superiors are initiating legal proceedings to punish the perpetrators of those crimes.

3. Requirement to Create Legal Status for Rohingyas

The right to a nationality is protected in Art.15 of the Universal Declaration of Human Rights and reinforced in its interpretation by Human Rights Council Resolution 32/5 2016 and the 1961 Convention on the Reduction of Statelessness.

Even if the return of the hundreds of thousands of Rohingyas is facilitated and implemented by the ruling regime, as it has stated publicly and officially, serious human rights violations will continue unabated given that the incumbent civilian-camouflaged military government has not yet expressed any intention or announced any procedures to align the 1982 Myanmar Citizenship Law with international standards and obligations, such as compliance with the Convention on the Rights of the Child 1989, Art.7 and 8, which affirms the right of a child to acquire nationality. In the Myanmar Citizenship Law (MCL) this right is strictly limited by the nationality or citizenship status of parents (MCL, Sec.7, 9, Ch. III, IV). This is an evident breach of international law by the Myanmar government.

Also, the distinction between different types of citizens, provided for in the MCL, is not in line with international best practices. It is also impossible for associated and naturalized citizens to acquire full and equal citizenry. There will therefore be no hope for development for Rohingyas after their return. So long as the MCL continues to exist, they will never receive any legal status and will continue to suffer more serious human rights violations in one way or another under the 2008 Constitution, which grants citizenship status to applicants primarily in connection with the status of the ethnic nationalities.³

Thus a new citizenship law which ensures the equitable treatment of all citizens, and excludes links between ethnicity and citizenship, is absolutely necessary to address this underlying issue in the Rakhine State. This will enable the return of Rohingyas from Bangladesh to be facilitated actually,

³ Article 345 of the 2008 Constitution: All persons who have either one of the following qualifications are citizens of the Republic of the Union of Myanmar:

- (a) persons born of parents both of whom are **the ethnic nationalities** 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.

Note: The original English translation of Myanmar term တိုင်းရင်းသား (Taing-Yin-Tha) into ‘national’ in the 2008 Constitution is incorrect and vague.

legally and effectively, thereby preventing other related conflicts while protecting human rights without discrimination.

Recommendations

1. In attempting to deal with serious issues in Rakhine State suffered not only by the Rohingyas but also by the Rakhines themselves, the practice of human rights concepts by all people in Burma is a sine qua non, discarding 'extreme nationalism' while adopting a proper nationalistic approach and adhering to genuine principles of the Rule of Law;
2. It is time now for all genuine human rights organizations – national and international – and other civil society organizations which have adopted the value of human rights, to express their stand on human rights steadfastly. Even if Rohingyas are not regarded by them as one of the ethnic nationalities in Burma, it should not be used as a justification for ignoring their suffering from serious human rights violations, thereby causing the abetment of the perpetrators, which may result in repeated commission of similar heinous crimes against other ethnic nationalities, including Rakhine, in Ethnic States now and in the near future; and,
3. For the international community, the principle of the Responsibility to Protect (R2P) should not be kept only on paper. In order to bring perpetrators to justice, sufficient efforts should be made, at minimum, to the extent that the emergence of an International Criminal Tribunal for Myanmar (ICTM) can become a reality; the perpetrators should be indicted at the International Criminal Court in one way or another or at any other courts which practice universal jurisdiction.

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