



WHY SHOULD BURMA'S 2008 CONSTITUTION BE DECLARED NULL AND VOID BY THE UN SECURITY COUNCIL?

Introduction

A constitution, that reflects the will of the people, addresses the underlying issues of the respective state, fulfills the particular needs of society and is underpinned by the minimum standards of the Rule of law, can be valued as the supreme law of any respective state. With this background scenario, this compilation attempts to scrutinize the status of the Constitution of the Republic of the Union of Myanmar/Burma (2008) (hereinafter referred to as the 'Constitution' or '2008 Constitution') from the perspective of human rights, while seeking accountability.

To this end, the relationship between human rights and constitution is worthy observing. The Preamble in the Universal Declaration of Human Rights provides, inter alia, as follows:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

When the issue on drawing up a constitution is to be dealt with from the perspective of human rights, there are two extremes: one is that all human rights norms, which have been adopted by the international community, should be reflected in the national constitution of a respective state; and, another is that the constitution is a national law of the state and as such, it should address only the national issues and values of a respective society, without the necessity of having to reproduce human rights concepts. Both extremes should be avoided.

A reasonable middle path is that the constitution of a nation state should, at minimum, guarantee basic rights, in terms of liberty and basic freedoms of individual citizens, out of those enshrined in the UDHR, while addressing societal values, essential needs and underlying issues of a respective state with the underpinning of the minimum standards of the Rule of Law.

This analysis paper particularly explores the concrete factors on why Burma's 2008 Constitution should be declared null and void by the UN Security Council.

Part (A)

Major Flaws of the 2008 Constitution Which Strengthen the Rule of the Military Dictatorship

From the aspect of the Rule of Law, major flaws of the 2008 Constitution are found as follows:

(1) The Constitution does not guarantee equality. The military, as a privileged class, assumes state powers, in terms of the legislatureⁱ, executiveⁱⁱ and judiciaryⁱⁱⁱ, which is contrary to the major concept of the rule of law, that is, every person is equal before the law.

(2) The 2008 Constitution effectively subordinates legislative functions to the control of the military:

- (a) Out of the 440 representatives, 110 military personnel nominated by Chief of Staff of the Defense Forces will be the members of the People's Assembly.
- (b) Out of the 224 representatives, 56 military personnel nominated by Chief of the Staff of the Defense forces will be the members of the National Assembly.
- (c) Military personnel, submitted as representatives by Chief of Staff of the Defense Forces, whose number shall be equal to one third of the number of representatives, will be the members of the Regional and State Assemblies.

(3) Independence of the judiciary, which is also a major component for the Rule of Law, will never become a reality. Under the control and supervision of the NDSC, elaborated in paragraph (5) below, the chief executive^{iv} has power to appoint and dismiss the Supreme Court Justices at his own discretion^v while judicial tenure is not guaranteed. The existing judicial system, which is subservient to the military,^{vi} will remain in place in accordance with the said Constitution.

Section 299

The Union Assembly shall have no right to refuse the person nominated by the President for the appointment of Chief Justice unless it can clearly be proved that the persons do not meet the qualifications for post prescribed in Section 301.

Section 302 (1)

The Chief Justice of the Union or a Judge of the Supreme Court of the Union can be impeached by the State President -----for any of the following:

- (1) breach of allegiance to the State,
- (2) violation of any of the provisions of the Constitution,
- (3) moral turpitude,
- (4) being disqualified for the post of the Chief Justice of the Union or a Judge of the Supreme Court of the Union under the Constitution prescribed in Article 301.
- (5) In efficient discharge of duties assigned to him in accord with the law.

(4) In spite of superficially having the relevant provisions, almost none of the basic rights provided in the Constitution can be enjoyed by individual citizens because they include exception clauses which enormously limit the basic rights in their application. The Constitution deprives people of their basic human rights by stipulating 'exception clauses'^{vii} in the Chapter of fundamental rights and duties of Citizens. The effectively draconian laws^{viii}, which strictly prohibit three basic freedoms of citizen - freedom of speech, association and assembly – have already been provided; furthermore, additional oppressive laws, which will deprive people of their liberty, will come into

existence. The Constitution also lacks a rights protection mechanism. In 2009, the UN General Assembly made the following resolution:

The October 29, 2009 United Nations General Assembly Resolution condemned systematic human rights violations in Burma and called for the Burmese government to, “allow a full, transparent, effective, impartial and independent investigation into all reports of human rights violations, and to bring to justice those responsible in order to end impunity for such crimes.”

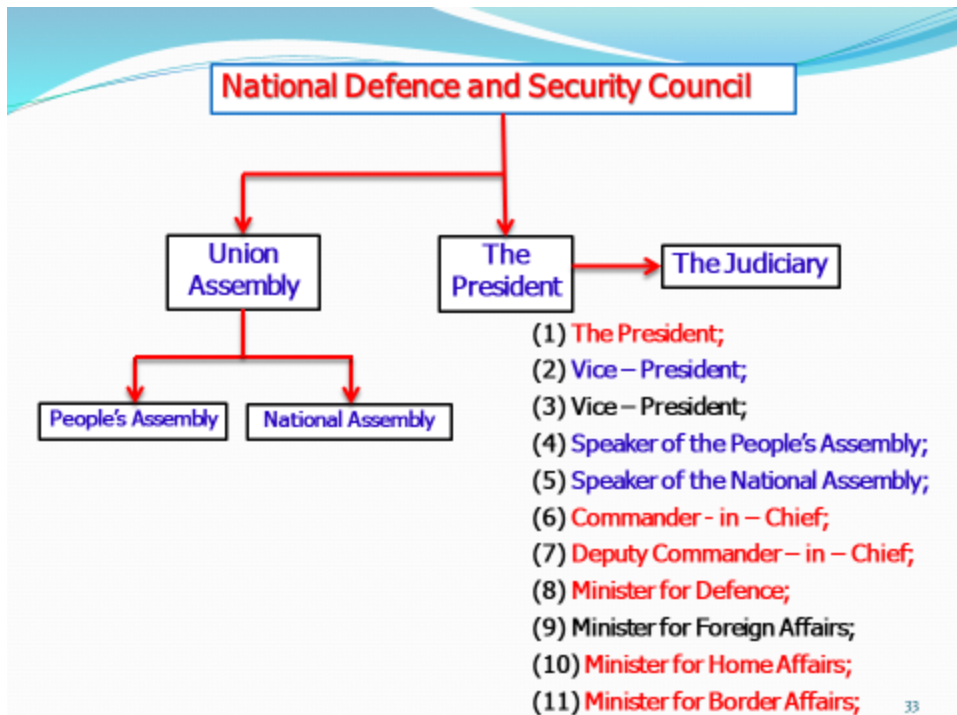
In 2010, the UN Special Rapporteur on Human Rights Situation in Burma/Myanmar, Tomas Ojea Quintana, submitted the following recommendation:

“Human rights violations in Burma are likely crimes against humanity and/or war crimes. The UN institutions should form a commission of inquiry (COI).”

Unfortunately, no accountable mechanism came to existence. As such, under the protection of the 2008 Constitution, impunity for Myanmar military perpetrators has continued prevailing in the country; and, repeated serious human rights violations have remained unabated. In this regard, a full report of the UN Independent International Fact Finding Mission (UN IFFM), submitted on September 17, 2018, should be observed.¹

(5) Equal rights and self-determination^{ix}, stipulated by the ethnic nationalities for some decades, is required for decentralization. It has already been denied. Instead, the Constitution, inter alia, guaranteeing the rule of the military dictatorship, formulates rigid centralization by creating a permanent military institution that will exercise the executive power indefinitely under the name of the National Defense and Security Council^x.

¹ <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx>



Under the 2008 Constitution, U Thein Sein, former military general, assumed the position of the State President from 2011 to 2016. In the aftermath of the 2015 elections, the civilian leaders have become the Presidents: previously U Htin Kyaw and, currently U Win Myint.

- (a) U Win Myint, the President
- (b) U Myint Swe, Vice-President (1)
- (c) U Henry Van Thio, Vice-President (2)
- (d) U Win Myint, Speaker of the Pyithu Hluttaw (Peoples' Assembly)
- (e) Mahn Win Khaing Than, Speaker of the Amyotha Hluttaw (National Assembly)
- (f) Senior General Min Aung Hlaing, Commander-in-Chief of the Defense Services
- (g) Vice-Senior General Soe Win, Deputy Commander-in-Chief of the Defense Services
- (h) Lieutenant General Sein Win, Minister for Defense
- (i) Daw Aung San Suu Kyi, Minister for Foreign Affairs
- (j) Lieutenant General Kyaw Swe, Minister for Home Affairs

(a) Legislative Aspect:

The Commander-in-Chief (C-in-C) of the Defense Services and his deputy lead the NDSC. Both the C-in-C and his deputy have the power to place army representatives into the legislative bodies. Army representatives will make up one fourth of the total number of representatives in each legislative body. The People's Assembly speakers and the National Assembly's speakers are also included in the formation of the NDSC. As such, speakers are under control of the army officials in the NDSC in all law making processes.

(b) Executive Aspect:

The NDSC's authority is not limited to the Legislative Chapter, but has been included in the Executive Chapter as well. It now appears that the NDSC will be above the elected government

of the Union of Burma. The Constitution does not prescribe that the executive power of the Union shall be vested in the Union Government but, instead, it states that the executive power shall be vested in the President.² In accord with a created presidential election system,³ which was never applied in any country across the world, an incumbent military official or the one that turned civilian will become the President. The President shall have power to appoint the Union Ministers who are not elected representatives.⁴ It connotes that the Constitution authorizes the President to form a Union Government only with the military personnel, who are not elected, if it is necessary to protect the military dictatorship effectively.

In fact, under the 2008 Constitution, the State President – if he is not a former or incumbent military official – cannot exercise authentic power. In accordance with the Constitution, the state power lies primarily with the National Defense and Security Council (NDSC). In the aforementioned diagram, (b) and (c) are former military officials and (f)(g)(h) and (j) are all high ranking military officials, still in service. As such, whenever there is a motion within the NDSC, the military officials constitute a majority quorum permanently. Minister for Defense and Minister for Home Affairs, who administer the country daily, are appointed, not by the State President, but by the Commander-in-Chief of the Defense Forces. As such, in addition to others, so long as the provision on the NDSC and related sections continue to exist, the emergence of a democratic regime in Burma/Myanmar will only be a myth.

Even if the President is a military officer or the one that turned civilian in order to enter the Presidential office, the President will still be dominated by the C-in-C as the President shall have to be constituted in the formation of the NDSC. Even out of the eleven NDSC members, six incumbent army officials will be under the direct command of the C-in-C⁵, whereas the remaining five will be under his indirect command. It is because the military officers, that turned civilians,⁶ and very few civilians, that are protege of the military dictators,⁷ may constitute the remaining five.⁸

The armed forces will not be under the control of the Union Government.⁹ However, the Union Government will be under the control of the C-in-C seeing as the Union Government's principal ministries, namely, the ministries of Defense, Foreign Affairs, Home Affairs, and Border Affairs, shall have to obey orders given by the C-in-C who will be operating the NDSC.¹⁰

² Article 217 of the Constitution of the Republic of the Union of Myanmar (2008).

³ Article 60 of the Constitution of the Republic of the Union of Myanmar (2008).

⁴ Article 232 (b) (i) of the Constitution of the Republic of the Union of Myanmar (2008).

⁵ According to the Article 60 of the Constitution, the military official will become the President or one of the two Vice-Presidents. In addition, according to the Article 232 (b) (ii), the C-in-C shall have power to appoint the Ministers of Defense, Home Affairs and Border Affairs, that will constitute the NDSC, from among the military officials.

⁶ General Thein Sein, General Shwe Mahn, Deputy General Tin Aung Myin Oo, and many other high ranking military officials have already turned the civilians recently and they will participate in the 2010 election through the Union Solidarity and Development Association (USDA). As of September 4, 2010, the USDA has already nominated over 1,000 election candidates.

⁷ Zay Kabar U Khin Shwe, who is a very rich business man and well-known crony of the military regime, publicly stated that he will participate in the election with the instruction of the SPDC.

⁹ Article 200 of the Constitution of the Republic of the Union of Myanmar (2008).

¹⁰ Article 201 of the Constitution of the Republic of the Union of Myanmar (2008).

Part (B) Impunity Issue

The Constitution provides blanket amnesty to all members of the State Law and Order Restoration Council (SLORC) and State Peace and Development Council (SPDC) military regimes for their previous commission of heinous crimes^{xi}; as such, impunity continues prevailing in the country; efforts of victims of crimes to seek justice have been perennially renounced; and, heinous crimes such as violations of the Geneva Conventions^{xii}, crimes against humanity^{xiii}, war crimes and genocide persist^{xiv}.

In connection with Article 445 of the 2008 Constitution, which provides blanket amnesty, the UN FFM commented in its report, inter alia, as follows:

1578. Impunity for human rights violations is enshrined in the 2008 Constitution and other domestic laws. Article 445 of the Constitution provides that no proceedings can be instituted against military officials or government members for “any act done in the execution of their respective mandate”. This blanket amnesty appears intended to shield the former military regimes, the SLORC and the SPDC, from prosecution for acts committed prior to March 2011, although the clause could be interpreted as also providing immunity for later conduct. In 2016, the outgoing government of Thein Sein also adopted the Former Presidents’ Security Act, providing presidents with legal immunity from prosecution for crimes committed during their term of office.¹¹



(Photograph of ten Rohingyas people whom were killed by the Myanmar Army soldiers in Inndin village near Maung Daw, Rakhine State, Burma/Myanmar in 2017.)

¹¹ Former Presidents’ Security Law (Pyidaungsu Hluttaw Law No. 25/2016, 28 January 2016).



(The photograph of the two young female Kachin national volunteers for Kachin Baptist Convention. They were raped, brutally tortured and murdered by the Myanmar Army soldiers on January 19, 2015.)

The essence of the Constitution is to guarantee impunity indefinitely. When impunity prevails, the Rule of Law does not come into existence. Without dealing with these challenging issues, a political dialogue that may lead to genuine national reconciliation will only be a myth. Should impunity prevail and criminal accountability be systematically denied even in the national legal system, Burma will be in a vicious circle and the commission of heinous crimes will continue to occur repeatedly, denying the rule of law and damaging the stability of the state. As a result, development will never become a reality.

In accordance with the doctrine of superior/command responsibility being practiced in international law, it is realized that 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 fulfill his duties to prevent and punish these crimes.

The superior commanders of the Myanmar Army have abused this doctrine. They have attempted to cover up their own responsibility, by taking action against subordinate soldiers who committed a heinous crime which may constitute genocide, arisen out of Inndin case first and foremost. They can thereby be seen to be fulfilling their duty to prevent and punish such crimes, and defend themselves if they are indicted in the International Criminal Court or an International Criminal Tribunal for Burma/Myanmar - similar to that of Yugoslavia. Unfortunately, it cannot happen inside the country due to separate existence of the military tribunals in addition to protection of the Article 445 of the 2008 Constitution.

In regard to all serious human rights violations taking place, especially in ethnic States including Rakhine State, responsibility lies with Hluttaws¹² and government authorities – on behalf of the State. Accountability particularly lies with the highest authorized body, namely the National Defense and Security Council (NDSC) – chaired by former President U Htin Kyaw.

In the NDSC, President U Htin Kyaw and State Counsellor Daw Aung San Suu Kyi are in positions of superior responsibility, while Senior General Min Aung Hlaing and Deputy Senior General Soe Win are subordinates; simultaneously, while Senior General Min Aung Hlaing, Deputy Senior General Soe Win, General Mya Tun Oo¹³, Lieutenant General Aung Kyaw Zaw¹⁴ and Brigadier Kyaw Zwa Lin¹⁵ (ordered from top to down as shown in Figure.1) are in superior positions in the OCCDS, Major General Maung Maung Soe¹⁶ is a subordinate.

12 Myanmar term which means Legislative Body

13 General Mya Tun Oo, Chief of General Staff (Army, Navy and Air)

14 Lieutenant General Aung Kyaw Zaw, (BC-17444)(DSA-24), Chief of the No. 3 Bureau of Special Operations (BSO) who oversaw all of the military operations under the Southern Command, Western Command and Southwestern Command, until he was transferred to be Chief of the No. 6 Bureau of Special Operations, in theory overseeing the operations of the Nay Pyi Taw Command, a virtually inactive post, on January 2, 2018.

15 Brigadier General Kyaw Zwa Lin (BC/25074)(DSA-35), General Staff (Brigadier General) Office of the Commander-in-Chief (Army) and Commander, No. 6 Military Operational Command (MOC) until he was promoted to Major General rank as the Commander of the Central Command on January 2, 2018.

16 Major General Maung Maung Soe became Commander of the Western Command in October, 2016 until he was removed from his post and put in reserve without portfolio in the second week of November 2017. He was put in a sanctions blacklist by the United States in December, 2017.

Figure. 1

Office of the Commander-in-Chief of Defense Services



Similarly, Major General Maung Maung Soe and Brigadier General Sonny Ohn¹⁷ are responsible as superiors in command of the Western Command, while Brigadier General Khin Maung Soe¹⁸, Colonel Maung Maung Win¹⁹ and Police Colonel Thura San Lwin²⁰ are responsi

17 Brigadier General Sonny Ohn, Deputy Commander, Western Command.

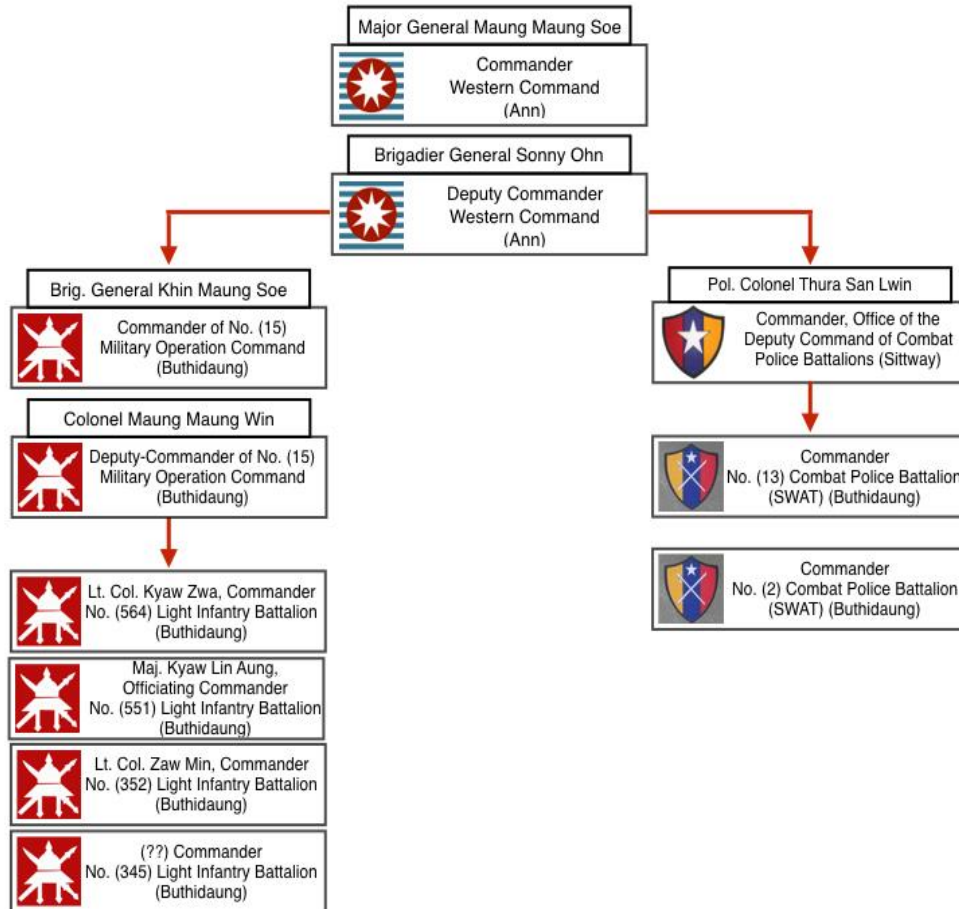
18 Brigadier General Khin Maing Soe, Commander, No. 15 Military Operational Command (MOC) based in Buthidaung, under which Light Infantry Battalions (LIBs) No. 564, 551, 352 and 345 conducted clearance military operations on the ground and have been alleged to have committed heinous war crimes against civilians.

19 Colonel Maung Maung Win (BC/27203) (DSA-37), Deputy Commander, No. 15 Military Operational Command (MOC) until he was promoted to Brigadier General rank as the Commander of No. 5 Military Operational Command (MOC) on January 2, 2018.

20 Police Colonel 'Thura' San Lwin (ex-Lt.Col.) Commander, Office of the Deputy Command of Combat Police Battalions (Sittway) under which No. 2 and No. 13 Combat Police Battalions (SWAT), both based in Buthidaung, conducted clearance operations on the ground collaborating with the army LIBs and which have been alleged to have committed heinous war crimes against civilians.

Figure. 2

Western Command



The military is above the law. To exacerbate the status of impunity, the Constitution has already established a permanent military tribunals^{xv}, for which the military Commander-in-Chief exercises appellate power.^{xvi} The entire structure and operation of the military tribunals are totally independent from oversight of the civilian Supreme Court Justices.



2008 Constitution



27

In this regard, the UN FFM continued to highlight as follows:

1579. Furthermore, article 20(b) of the Constitution gives the Tatmadaw the right to “independently administer and adjudicate all affairs of the armed forces”. Articles 293(b) and 319 establish permanent military tribunals. The 1959 Defence Services Act provides that military personnel on active service who commit serious crimes against a civilian (murder, culpable homicide, rape) shall be tried by military tribunals (article 72). The Act defines “active service” in such broad manner that military personnel would effectively always fall under military courts’ jurisdiction.²¹ Article 343(b) of the Constitution further makes decisions of the Commander-in-Chief concerning military justice matters “final and conclusive”, with no right of appeal. This effectively means that the Commander-in-Chief can also pardon anyone convicted by a military tribunal. The Mission has been unable to ascertain whether the rare soldiers convicted of serious crimes actually serve their sentences.

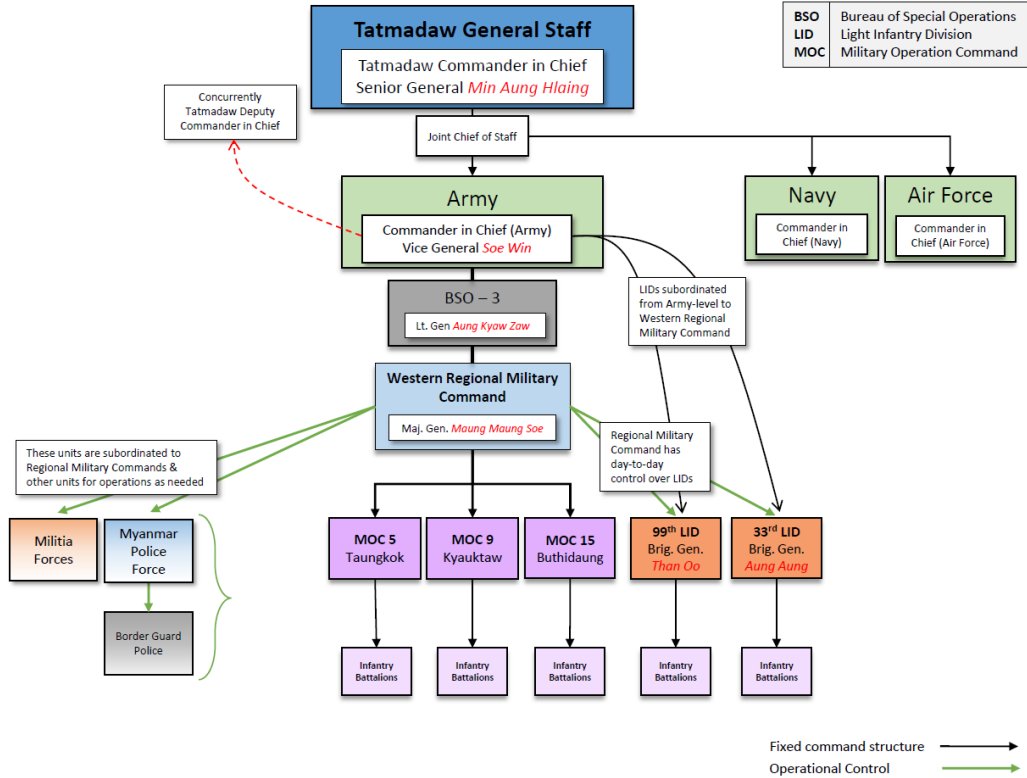
1580. These legal provisions provide broad immunities and make the Tatmadaw accountable only to itself. This is incompatible with the duty of States to ensure independent and impartial investigations for alleged human rights violations. It is inconsistent with international standards requiring that human rights violations fall within the jurisdiction of ordinary domestic courts.²² Military courts are inappropriate venues to adjudicate human rights violations.²³ In Myanmar in particular, military courts lack the

²¹ The provision reads: “The time during which [the person] (1) is attached to, or forms part of, a force which is engaged in military operations against an enemy, or (2) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or (3) is attached to or forms part of a force which is in military occupation of a foreign country”.

²² See Principles to Combat Impunity, principle 29; United Nations Commission on Human Rights, Draft Principles Governing the Administration of Justice Through Military Tribunals (E/CN.4/2006/58).

²³ See e.g. F. Ni Aolain, “Principle 29. Restrictions on the Jurisdiction of Military Courts”, in F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity – A Commentary* (Oxford, Oxford University Press, 2018), p. 322: “When military courts are deployed in fragile, transitional, and post-conflict states

independence and impartiality required to judge military officers for serious human rights violations. Additionally, trials in military courts are generally not open to the public; victims generally remain unaware or uninformed of any action taken against alleged perpetrators.



(The abovementioned diagram is copied from the UN FFM report. It indicates the responsible high ranking military officials – who are accountable in committing international crimes – in red color.)

1581. In short, under the current constitutional and legal framework, the civilian authorities cannot hold the military or its members accountable for human rights violations. Amending the Constitution requires more than 75 per cent of the votes in Parliament. Given that the Constitution also guarantees that 25 per cent of parliamentary seats are held by the military, any amendments would require their consent.²⁴

there is a clear and present danger that the modality of trial may compound rather than address serious human rights violations and the deficiencies of the rule of law.”

²⁴ The 2008 Constitution; s. 436.

Part (C)
The Issue of Amendment to the Constitution

Since a few weeks ago, the NLD has been initiating a process to amend the Constitution. However, the following backbone structures of the Constitution – which entrench the rule of military dictatorship – can never be amended:

- (1) The article which provides for the formation and existence of the National Defense and Security Council²⁵ – the most powerful institution, which indirectly assumes legislative, executive and judicial powers – in which the military Generals occupy a permanent majority, and other relevant articles which authorize this in one way or another;
- (2) Chapter (1) which authorizes rigid centralization, denying the sharing of sovereign power between the federal level governance institutions and those of the States, in terms of constituent units of the Federal Union;
- (3) Chapter (2) which prevents the emergence of a new federal union formed of national states and nationalities states, as demanded by the ethnic resistance organizations and leaders for decades;
- (4) Chapter (3) which provides for a fabricated presidential electoral system by which an army representative can become the President of the State, or at minimum, Vice-President;
- (5) The articles²⁶ which allow Army representatives to occupy 25% of the total number of seats in all legislative bodies in the country;
- (6) The article²⁷ which provides for the existence of the Military Tribunal – in which the Commander-in-Chief of the Armed Forces assumes appellate power – in parallel with the civilian Supreme Court and the Constitutional Court, the apex courts of the country, and other relevant articles which prevent the emergence of a Judiciary which is independent, impartial and efficient;
- (7) The article²⁸ which provides blanket amnesty for heinous crimes allegedly committed by former Burmese military leaders – the members of the SLORC²⁹ and the SPDC³⁰; and,
- (8) The article which provides for the amendment of the Constitution.³¹

²⁵ Chapter (5) Article 201 of the 2008 Constitution

²⁶ Article 109 and relevant articles

²⁷ Article 293 (b) and 343 of the said Constitution

²⁸ Article 445 of the said Constitution

²⁹ The State Law and Order Restoration Council

³⁰ The State Peace and Development Council

³¹ Article 436 of the said Constitution

Part (D)
The 2008 Constitution and the Citizenship Issue of Rohingyas

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 Rohingyas.³²

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 people³³ 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*³⁴ 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 Rohingyas, 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 Myanmar Army leaders, the ruling regime led by Aung San Suu Kyi has branded Rohingyas as ‘*Bengalis*’³⁵ 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.

³² Para 21 of the Report issued by the UN Independent International Fact Finding Mission on August 24, 2018.

³³ 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.

³⁴ 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.

³⁵ 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 ကာလာ. ‘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.

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 the Myanmar Army 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.

As an example, consider a community that abides by strict norms of honesty. A person who, upon entering the community, systematically violates these norms will certainly be met with hostility, if not utterly excluded from the group. But suppose that a large group of thieves makes its way into this community. In due time, people would cease to expect honesty on the part of others, and would find no reason to be honest themselves in a world overtaken by crime. In this case, probably norms of honesty would cease to exist, as the strength of a norm lies in its being followed by many of the members of the relevant group.³⁶

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)³⁷, but not those living officially in Burma/Myanmar. By describing Rohingyas as 'Bengalis', this connotes that they are immigrants who passed through the Bangladesh-Burma border area illegally and entered the country, Burma. If Rohingyas were regarded as 'Bengalis' officially by the Myanmar 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 Myanmar Army and government authorities in 2017, many Rohingyas were forcefully driven out to Bangladesh.³⁸ The agreement of the Myanmar government with two UN agencies for the return of Rohingya refugees who fled violence in Rakhine state, Burma, now in Bangladesh³⁹, is totally absurd while Rohingyas 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, it is clear that, as a state party to the 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.

³⁶ Stanford Encyclopedia of Philosophy, entry "social norms": <https://plato.stanford.edu/entries/social-norms/>

³⁷ <https://www.everyculture.com/wc/Afghanistan-to-Bosnia-Herzegovina/Bengalis.html>

³⁸ 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>

³⁹ <https://www.theguardian.com/global/2018/jun/01/myanmar-and-un-announce-deal-for-safe-return-of-rohingya>

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 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.

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Conclusion

With reference to particular situations, taking place under the legal framework of the 2008 Constitution, as stated above, it is evident that it will not suffice only if the underlying issues of the country are addressed from the aspect of 'sovereignty of a state'. It is time for the international community to deal with Burma/Myanmar from the aspect of the Rule of Law – national as well as international – transcending over the boundary of a sovereign state. The strategy of the UN, should not be contrary to previous resolutions of the UNSC^{xvii}, and also principles of the Charter of the United Nations. The 2008 Constitution is against that Charter as it grants the blanket amnesty for international crimes.

So long as the 2008 Constitution continues to exist, the rule of the military dictatorship will have been strengthened; the Rule of Law cannot be upheld; impunity will continue to prevail in the entire country; more serious human rights violations – to the extent that the Myanmar Army leaders commit international crimes repeatedly – can never be circumvented; achievement of peace is just superficial; and, development for all ethnic nationalities and their own States/Provinces will only be a myth. The 1983 Constitution of South Africa, in which Apartheid was systematically applied, was declared by the UN Security Council as null and void in accordance with its Resolution No. 554 (1984), as follows:

1. Declares that the so-called "new constitution" is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the "new constitution" will further aggravate the already explosive situation prevailing inside apartheid South Africa.
2. Strongly rejects and declares as null and void the so-called "new constitution" and the "elections" to be organized in the current month of August for the "coloured" people and people of Asian origin

as well as all insidious manoeuvres by the racist minority regime of South Africa further to entrench white minority rule and apartheid;

It is time now that similar action should be taken in relation to Burma by the UN Security Council.

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ⁱ In legislative bodies, one fourth of members will at least be occupied by army personnel, nominated by the Commander in Chief of the Defense Services, without necessity for being elected; Article 109, 141 and 161 of the SPDC's 2008 Constitution; Chapter (5) of the SPDC's 2008 Constitution.

ⁱⁱ The real power of executive will not lie with the State President but with the National Defense and Security Council (NDSC), which will stand as a permanent military institution, in the Chapter of Executive, in accordance with the constitution;

ⁱⁱⁱ The Judiciary is subservient not only to the NDSC but also to the President.

^{iv} The Chief Executive is most likely to be the military who may take responsibility as the State President, or at least the Vice President.

^v Appointment of judges: Article 299, 308 and 327 of the SPDC's 2008 Constitution.

Removal of judges: Article 302, 311, and 334 of the SPDC's 2008 Constitution.

^{vi} "Fourth Core Human Rights Element: Judiciary" elaborated by Mr. Tomas Ojea Quintana, UN Special Rapporteur on Human Rights Situation in Burma, in his report "Human Rights Situation in Myanmar" Special 5, 2008; P. 21.

^{vii} Article 354 of the 2008 Constitution:

Every citizen shall be at liberty in the exercise of the following rights, *if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality*;

(a) to express freely their convictions and opinions;

(b) to assemble peacefully without arms;

(c) to form associations and organizations;

Article 376 of the 2008 Constitution:

"No citizen shall, *except matters on precautionary measures taken in accordance with law for the security of the state or prevalence of law and order or the peace and tranquility and interests of the people or matters permitted under an existing law*, be held in custody for more than 24 hours without the remand of a competent magistrate"

^{viii} 1923 the Official Secrets Act, 2004 The Electronic Transaction Law, 2011 Law for Peaceful Assembly and Peaceful Procession, 2013 The Telecommunication Law, 2014 Printing and Publishing Law, 2015 The Religious Transaction Law, 2017 Law for Protection of Citizens' Personal Liberty and Personal Security, etc.

^{ix} One of the main objectives of the National Democratic Front established in 1974; NDF is a political alliance comprising ethnic armed organizations; One of the major agreements in Mae-tha-raw-hta Conference, attended by almost all major ethnic resistance organizations, held on January 7-14, 1997; Similar objective was mentioned at the conferences convened by the United Nationalities Federal Council (UNFC) in 2011 and 2014 respectively. It was also enshrined in the UNFC's Constitution. The UNFC was the largest alliance of the Ethnic Armed Organizations (EAOs), which existed during the period 2011 to 2018, in Burma.

^x Articles 201, 214, 340, 410, 412 (a), 427, 410, 412, 427 of the 2008 Constitution.

^{xi} Article 445 of the SPDC's 2008 Constitution:

"----- . No proceeding shall be instituted against the said Councils or any members thereof or any member of the Government, in respect of any act done in the execution of their respective duties."

^{xii} The International Committee of the Red Cross issued a global alert on Burma, on June 29, 2007, verifying the regime's criminal violations of the Geneva Conventions, stating that such violations were personally observed by ICRC delegates, that all confidential bilateral negotiations had broken down, and that the crimes by the government were likely to be ongoing.

^{xiii} Amnesty International released a report entitled, **Crimes Against Humanity in Eastern Myanmar**; June 5, 2008.

^{xiv} "Crimes in Burma" a report by International Human Rights Clinic at Harvard Law School, May, 2009.

^{xv} Article 293 of the 2008 Constitution

^{xvi} Article 343 of the 2008 Constitution:

"In the adjudication of Military Justice:

(a) -----

(b) the decision of the Commander-in-Chief of the Defense Services is final and conclusive."

^{xvii} The UN Security Council resolution 1325 has highlighted the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes.