Diplomatic Briefing on Burma Bulletin

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In this Issue

A general overview of the approaches of States, international organizations, and the international community to peace seeking in Burma

The armed conflicts in Burma should be observed for achieving peace through protecting human rights and adhering to the rule of law. In the aftermath of the 1962 military coup, the Tatmadaw aggrandized its power and embedded its military institution, with or without a constitution, insofar as the military exists as the most powerful state institution in the country. While practicing rigid centralization and causing disagreements among both democratic and ethnic resistance groups, the Tatmadaw has created divided and fragile societies in a weak state, resulting in the commission of the gravest crimes of international concern, the most serious human rights violations.

To reverse the above situation, now more than ever, the international community, or at least States, which get involved in the underlying issues of Burma in one way or another need to extensively accentuate the rule of international law and legal doctrines. Such efforts must start with seeking a sovereign or sovereigns who have law-making power in the country. Conversely, a major component of the global society – whether consciously or unconsciously, or directly or by implication – is reinforcing the Tatmadaw's grip on power rather than facilitating a resolution to the stated underlying issue.

Against the backdrop of self-serving illusions, UN teams and Western diplomats have begun to rebuild relations with the Tatmadaw or SAC. This relationship-building transpires alongside similar relations established by neighboring countries of Burma especially China, India and Thailand, some countries in ASEAN, the Republic of Korea, and Japan. Even though some States reiterate societal values – including human rights, the right of self-determination, humanitarian assistance etc. – many States are exercising their own sovereignty and doing whatever they want, without sufficiently heeding the rule of international law and legal doctrines.

The international community must implement a sovereign approach for Burma by facilitating the enactment of and compliance with laws that encompass both federal- and provincial-level governmental institutions under their respective Provisional/Interim Federal Democratic Constitutions, thereby upholding the rule of law. When the sovereign approach falls short, concern has arisen to the extent that non-lethal support for EROs, the PDFs, and other similar groups potentially provided by the US government under its NDAA law may not be worthwhile, contrary to expectations.

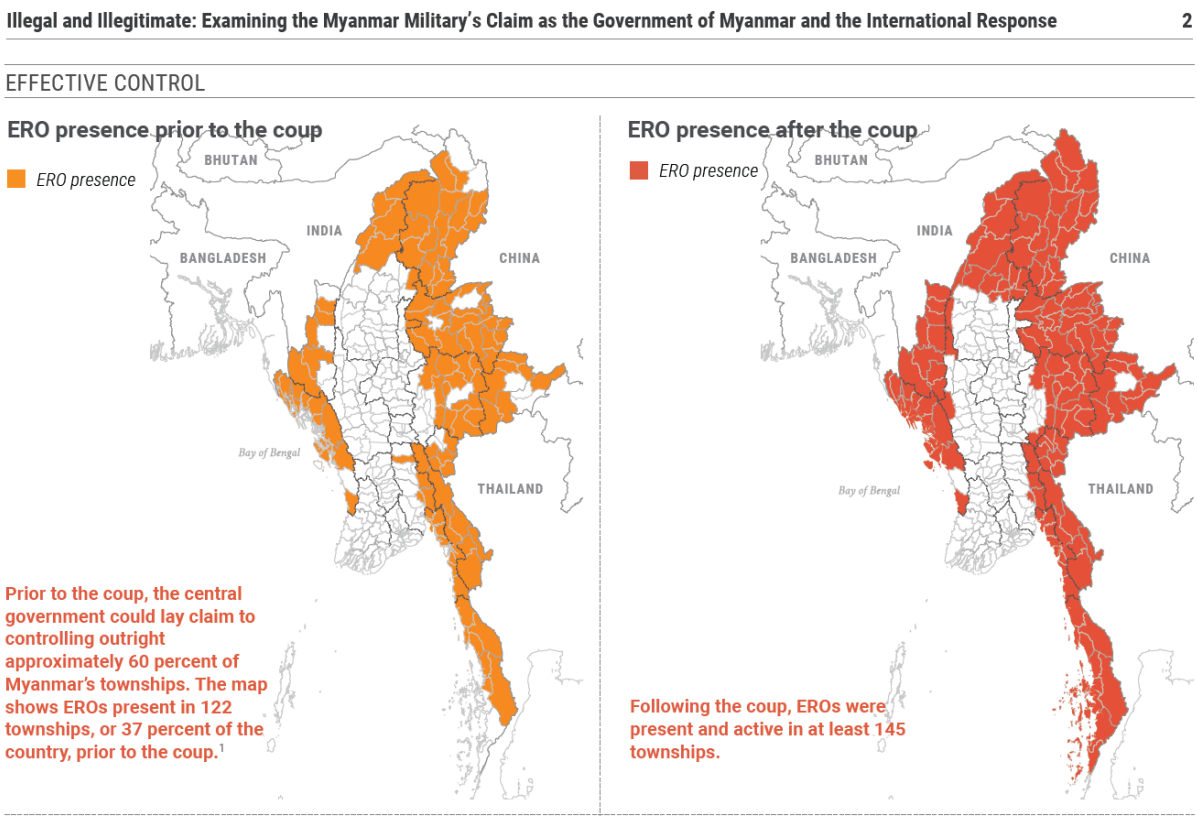
Who will be recognized as sovereign?

Burma is facing a severe crisis in search of a sovereign. Apart from adhering to the 2008 Constitution, the SAC is preparing to hold a new election in 2023 or 2024. The party that wins the election held with the underpinning of a formal constitution normally and generally occupies the position of a sovereign in the modern world. This elevation of a sovereign occurs even if the stated political party is not a king or queen who has the power not only to make laws but also to rule the country. Regarding law, Jeremy Bentham refers to "command," "prohibition," "permission to do," and "permission to abstain" ("non-command") as "mandates." These mandates can be realized as restrictive and proactive aspects of law: the

first listed two mandates are primarily related to criminal laws, while the latter two are applied within the development of society.

In Burma, experiences spanning more than six decades have illustrated that the Tatmadaw has, in one way or another, occupied the position of a sovereign. The incumbent SAC led by Min Aung Hlaing is undoubtedly attempting to take the same position. The UN Special Rapporteur extensively objected to the action of the SAC and recommended that all UN member states reject the SAC's attempt to hold sham elections. His recommendation can be regarded insofar as the SAC may not be allowed any opportunity to provide the status of a sovereign. However, he cannot pinpoint how sovereign issues can be resolved by democratic and ethnic resistance forces struggling to unequivocally manifest the emergence of a federal democratic union.

Yet the CRPH, NUCC, and NUG – which all materialized after the 2021 February attempted coup – have not been unanimously, nor by a simple majority, recognized as a sovereign by constituent units of the federal union, in terms of the Ethnic States/Provinces and various ethnic nationalities residing therein. They are also in limbo. The map shown below, depicted by the Special Rapporteur[1], is encouraging as the territory controlled by the SAC has shrunk. However, this map cannot be construed that the Ethnic States/Provinces in which EROs are present, illustrated in red, have formally recognized the CRPH, NUCC, and NUG as their sovereign.



[1] https://www.ohchr.org/sites/default/files/documents/countries/mm/2023-01-27/infographic-sr-myanmar-2023-01-31.pdf

So long as the CRPH, NUCC, and NUG underpinned by the NLD, which is playing a leadership role, continues adhering to its Federal Democracy Charter alone, the group may never achieve the status of a sovereign. From the aspect of seeking a sovereign or a group of sovereigns – democratic but not authoritarian – almost all Ethnic States/Provinces face a similar hardship as well. Although such situations are neither an insurmountable problem nor an impossible mission, it tremendously depends on the stand of the international community, particularly States, insofar as who will be recognized as sovereigns so that law making power can be exercised. In this regard, in the context of Burma, **the provincial sovereignty concept** needs to be applied. If so, the influence of the international community, in terms of global society, on law will be meaningful for Burma. Those situations need to be discussed in greater detail to find an effective solution for Burma.

Federalism Suited to Burma

To facilitate the emergence of a federal union suited to Burma, the production of, and compliance with, the provisional/interim constitutions in both federal and provincial levels is a sine qua non even during the struggle against the military dictatorship. It will undoubtedly be a daunting task given the lack of constitutional culture in Burma, but not impossible. The stated provisional/interim constitutions are required to reflect core values contained in some priceless parts of the Federal Democracy Charter, the NCUB's Federal Constitution (First Draft), the FCDCC Constitution (Second Draft), and the provisions legitimizing the combinations of de jure and de facto standards and the others dealing with, or resolving, the current underlying issues taking place on the ground. In support of this, the following characteristics of a federalism suited to Burma may be worth observing:

1. To facilitate the emergence of a successful federal union, promotion and protection of human rights must be a top priority and human rights must be protected by the rule of law;
2. The power of judicial review must be practiced by the independent, impartial, efficient and resource-rich judiciaries on federal and states/provinces levels of governments, as an implementation of constitutionalism that accentuates limited government;
3. The independent formation and operation of political parties and Civil Society Organizations (CSOs) need to be guaranteed;
4. The formation of transparent and accountable democratic governments, primarily representing the diverse ethnic minorities and indigenous peoples, is required in all three levels of the Federal Union; and,
5. Having met the above situations, with the participation of the Ethnic States/Provinces – as the constituent units, including Myanmar State/province, which exercises provincial sovereignty –a new federal union may be formed.

The deadliest airstrikes against civilians

On April 11, 2023, during an air strike carried out by the Tatmadaw or SAC military junta in Pazigyi Village, Kantbalu Township, Sagaing Region, more than 100 civilians were killed, while they were gathering to attend the opening ceremony of Township People's Administration office under the initiative of the NUG authorities.[2] The UN Secretary General strongly condemned attack.[3]

> "Initial reports on deadly air strikes in Sagaing Region are horrifying. Unlawful air attacks killing and injuring civilians and destroying homes are a trademark of the Myanmar military, which goes to despicable lengths to crush resistance and instill fear in the population. Myanmar's civilians bear the brunt of these sickening tactics.[4]

UN High Commissioner for Human Rights Volker Türk noted that "it appears school children performing dances, as well as other civilians" were among the victims.[5] Five months and 19 days later – after aerial bombardment launched by the Tatmadaw at A Nang Pa village in Kachin State – the stated Kantbalu massacre, the worst attack on civilians as of today, occurred. When the action of the international community on A Nang Pa case was ineffective, the Tatmadaw leaders enjoyed impunity and did not hesitate to continue committing more grave crimes of international concern against civilians by using airstrikes or aerial bombardments.

UN Special Rapporteur Tom Andrews' Interview on Tatmadaw's Airstrikes at Kantbalu Township, Saigaing Region on April 11, 2023

Tom Andrews (Given the struggle of resistance forces and people) it is more and more difficult for them (the Tatmadaw) to move around on the ground. So, they are using gunships to attack people from the air to protect their soldiers. Innocent people are going to be killed. That is exactly what happened yesterday.[6]

Q: You are the UN Special Rapporteur, beyond passing resolution. What can the UN do about it actually?

Tom Andrews The UN Security Council passed a strong resolution in December. It is a step forward. But it is simply not enough. We have learnt from the Ukraine situation. Even if UNSC cannot or will not act, that does not prevent those countries which stand with the people of Myanmar and oppose this brutal military regime to stand together in a coordinated faction.

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[2] Mizzima, 'NUG condemns junta's airstrike on village, over 100 civilians killed' (11 April 2023) <https://www.mizzima.com/article/nug-condemns-juntas-airstrike-village-over-100-civilians-killed>

[3] United Nations, 'Secretary-General Strongly Condemns Attack on Township by Myanmar Armed Forces' (11April 2023) <https://press.un.org/en/2023/sgsm21759.doc.htm>

[4] Amnesty International: Myanmar: Urgent need to suspend aviation fuel as air strikes wreak havoc (11 April 2023). <https://www.amnesty.org.uk/press-releases/myanmar-fresh-air-strikes-highlight-urgent-need-suspend-aviation-fuel-exports>

[5] United Nations, 'UN Human Rights Chief Volker Türk condemns Myanmar attacks' (11 April 2023) <https://www.ohchr.org/en/statements/2023/04/un-human-rights-chief-volker-turk-condemns-myanmar-attacks>

[6] Channel 4 - Myanmar military is 'more criminal gang than regime' says UN rapporteur (4min): https://www.channel4.com/news/myanmar-military-is-more-criminal-gang-than-regime-says-un-rapporteur

We have yet to see the kind of strategic focused coordinated action that we see in Ukraine to apply in the crisis in Myanmar.[7]

LAN's Comment of Tom Andrews' Interview

Tom Andrews is a wonderful special rapporteur for Burma. He is notably active, highly intelligent, and remarkably enthusiastic to promote human rights in Burma. Regarding the position of the UNSC, he is right. As far as Burma is concerned, the UNSC cannot and will not act insofar as a radical change for promoting human rights, democracy and the right to self-determination of the ethnic nationalities and their own States/Provinces can be acutalized. It is because the five permanent UNSC members will never reach a common consensus to take an effective action on the Tatmadaw or SAC even if the latter has evidently committed the gravest crimes of international concern. This is not the issue of international law but the question of the interest of some UNSC members.

Tom Andrews is also right at focusing on the role of many UN member States as they have been unitedly standing with Ukraine. Unfortunately, however, he is unable to differentiate between Ukraine and Burma from the aspect of international law and international human rights laws. Looking at the case of Ukraine, it is a significant act of aggression by another State, Russia. Therefore, it may not be difficult to seek international unity to stand against Russia's aggression.

Since the case of Burma is not an act of aggression like Ukraine, it should, therefore, be dealt with a different approach. As far as Burma is concerned, the serious human right violation issue has arisen within the boundary of a sovereign State. Therein, a group of military personnel, who is leading the Tatmadaw, is forcibly taking over the government and also committing the gravest crimes against their citizens and people.

Regarding Burma, the international community of States is obligatory to deal with human rights issue in Burma and lay a rule of law foundation. The States are required to invoke, and comply with, Responsibility of States for Internationally Wrongful Acts, provided by the International Law Commission, in connection with international legal doctrine jus cogens. According to peremptory norms of general international law, *jus cogens*, each state is responsible to take actions, in accordance with international criminal law, against the Tatmadaw or military leader perpetrators committing the gravest crimes of international concern occurring in Burma. Each State is responsible to comply with the stated norms. If their approach is shifted to this end, unity and solidarity among the States could be sought like in the case of Ukraine.

The EU is not a State and so are the UN and ASEAN. Nonetheless, each member State of the EU and ASEAN could take action against the military junta, complying with the stated law and legal doctrines. What is more, the EU may impose pressure on ASEAN, pointing out the flaws of the ASEAN Charter.

[7] Ibid.

Jus cogens Peremptory norm of general international law

The International Law Commission highlighted the hierarchical superiority of peremptory norms of general international law (*jus cogens*) norms, and they are hierarchically superior to other norms of international law in terms of both characteristic and its effect.[8] 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.[9] 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.[10]

Image source - https://bit.ly/386BbKN

8 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, Chapter 5 Peremptory norms of general international law (jus cogens) Conclusion 8.

9 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, p 155, Conclusion (3), Commentary, para 12.

10 Vienna Convention on the Law of Treaties 1969, Art. 53 and 64.

Analysis of the Legal Status of the Nationwide Ceasefire Agreement (NCA) Part (1)

Introduction

The SAC, or the Tatmadaw, is attempting to revive the NCA – which was the most overarching, but controversial, agreement – arose out of several hundreds of so-called political dialogues starting from 2011, and influenced all ostensible peace seeking processes until the 2021 military coup. If the Tatmadaw complied with the NCA actually, a military coup must not be activated. The 2001 military coup has proved that any dialogue with the leaders of the Tadaw, currently SAC led by Min Aung Hlaing, now and future, will never be meaningful as the SAC will undoubtedly violate any agreement if MAL and top leaders of the SAC construe that the latter stand against their interest. Non-compliance of the NCA by the SAC is a case study which is crystal clear.

Unfortunately, the international community never provided a sufficient time to make an in-depth analysis of the NCA as of today. As such, concern has arisen that the international community may be hoodwinked by the regime repeatedly by convincing that it will continue implementing the NCA. If so, a vicious circle will never end. To facilitate avoiding this, Legal Aid Network exerts efforts and presents our analysis below.

The nature of peace-related agreement

If peace-related agreements with a powerful enforcement mechanism have legal status, breaches of those agreements can be reduced, thereby effectively facilitating the peace-seeking process. Kant stated that "no treaty of peace shall be held valid in which there is tacitly reserved matter for future war."[11] To avoid the creation of such peace-related agreements, some influential factors must be identified while still accounting for the particular situations of the respective countries.

In the aftermath of the Second World War, the international community has become increasingly involved in addressing internal conflicts.[12] Ceasefire agreements are envisioned by academics as the first link in a chain between war and peace, creating space for negotiations to lead to long-lasting agreements.[13] Notably, though, ceasefire agreements or peace accords executed between state and non-state parties are not normally considered international agreements. The Vienna Convention on the Law of Treaties (VCLT) excluded agreements concluded with or between non-state actors.[14]

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[11] Martin Wählisch, 'Peace Settlements and the Prohibition of the Use of Force' in Marc Weller (ed), The Oxford Handbook of the Use of Force in International Law (Oxford University Press, Oxford 2015) 975; Immanuel Kant, Zum Ewigen Frieden: Ein Philosophischer Entwurf ([1795], Leipzig: Reclam, 1996) 2.

[12] International Alert and Women Waging Peace, 'Conflict prevention, resolution and reconstruction, institutional security and sustainable peace, advocacy toolkit - vol 2 Conflict Prevention, Resolution and Reconstruction' (Hunt Alternatives Fund and International Alert 2004) <https://peacemaker.un.org/sites/peacemaker.un.org/files/ToolkitWomenandConflictPreventionandResolution_InternationalAlert2004.pdf> accessed 6 April 2023.

[13] Beatrice Walton, 'The U.S.-Taliban Agreement: Not a Ceasefire, or a Peace Agreement, and Other International Law Issues' (Just Security 19 March 2020) <https://www.justsecurity.org/69154/the-u-s-taliban-agreement-not-a-ceasefire-or-a-peace-agreement-and-other-international-law-issues/> accessed 6 April 2023.

[14] Alina Kaczorowska, Public International Law (fourth edn, Routledge, Oxon 2010) 81.

However, some academics, such as Beatrice Walton, consider that Article 3 of the VCLT provides that the Convention does not affect agreements concluded between states and "other subjects of international law."[15] This view is partly shared by Laura Betancur Restrepo. She believes that Common Article 3 of the 1949 Geneva Convention shall not affect the legal status of the parties to the conflict and that non-state armed groups (NSAG) are subjects of international humanitarian law, but not of general international law.[16] Christine Bell also invoked Common Article 3 and argued that an agreement in Aceh was similarly stated as a special agreement for the purposes of humanitarian law.[17] The Columbia Peace Agreement has been concluded to be a special agreement under Common Article 3, which is part of all four Geneva Conventions.[18]

The legality of special agreements

Ultimately, with respect to traditional sources of international law, the legality of special agreements remains controversial. Even more controversial is whether the NCA in Burma meets any of the above-stated characteristics of special agreements.

(i) special agreements cannot be considered international treaties because AGs do not have the capacity to conclude treaties and the contrary would inevitably modify their legal status; or (ii) AGs have a limited international legal personality which allows them, at least a priori, to conclude only the agreements referred to in CA3 and only to the extent that they refer to and concern IHL.[19]

Enshrined in Common Article 3 is the provision for "the case of armed conflict not of an international character," a provision that applies to each party in a conflict, creating equal obligations for both states and armed groups (AGs) who are subjects of IHL. The scope of Common Article 3 has, from this aspect, been recognized by a number of international tribunals,[20] but unfortunately, the NCA was not concluded to be a special agreement under Article 3, common to the four Geneva Conventions. Over the past eight years, neither the civilian or military parts of the ruling regime has worked toward getting the NCA recognized as a special agreement by the UN or the international community, unlike the case of Colombia.

Basic characteristics of a peace agreement

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[15] Beatrice Walton (n 12).

[16] Laura Betancur Restrepo, 'The Legal Status of the Columbian Peace Agreement' (Symposium on the Columbian Peace Talk and International Law 2016) 110 AJIL Unbound 188. Available at <https://doi.org/10.1017/S2398772300003056> accessed 6 April 2023.

[17] Christine Bell, 'Columbia Peace Accord in Comparative Perspective' (Symposium on the Columbia Peace Talks and International Law 2016) 110 AJIL UNBOUND 165, 169. Available at <https://doi.org/10.1017/S2398772300003019> accessed 6 April 2023.

[18] Silvia Scozia, 'Columbia Peace Agreement', (excerpts from Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace 24 November 2016, and Law 1820 of 30 December 2016, ICRC, How does law protect in war 24 November 2016) <https://casebook.icrc.org/case-study/colombia-peace-agreement> accessed 6 April 2023.

[19] Ezequiel Heffes and Marcos D Kotlik, 'Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime' (2014) 96 (895/896) International Review of the Red Cross 1196, 1217. Available at <https://international-review.icrc.org/articles/special-agreements-means-enhancing-compliance-ihl-non-international-armed-conflicts> accessed 6 April 2023.

[20] ibid.

Although the term "peace agreement" has not yet been defined, Christine Bell qualifies the Lusaka Ceasefire Agreement as a peace agreement.[21] The following basic characteristics for facilitating peace-seeking are found in that agreement:

1. A clearly defined ceasefire with built-in human rights protections
2. A relatively comprehensive plan for national dialogue and reconciliation
3. Formally adopted and incorporated involvement of a regionally influenced and powerful organization (i.e., the Organisation of African Unity)
4. A third-party enforcement and protection mechanism for an agreed-upon deployment of an international peacekeeping force under the auspices of the United Nations, and
5. A calendar for implementing the ceasefire agreement.[22]

The NCA in Burma lacks all of these basic characteristics. Hence, the NCA could not be applied in any legal framework, including courts and tribunals, in Burma over the past eight years.

Note: Analysis of the NCA (part two) will be presented in the Diplomatic Briefing on Burma Bulletin (second issue)

Different Policy Approaches among Democratic & Ethnic Forces *struggling against the junta*

The State Administrative Council (SAC) has been taking advantage of unjust and abusive laws, practicing **the rule by law**, and adhering to the 2008 Constitution to prolong and embed its power.

1. The NLD/CRPH/NUCC/NUG have not yet stepped forward to the stage of enacting just laws, of upholding **the rule of law** and of activating **constitutionalism**. They are all in a stalemate situation by simply embracing a federal democracy charter which is not legally binding. As such, they have been unable to establish trust effectively with the Ethnic States/Provinces in which EROs primarily operate.

2. The EROs and many ethnic and ostensible democratic parties are also facing a policy crisis below:

(a) Will an independent sovereign state be established? Otherwise, will the respective entity continue to be a part of the federal union, formed by the Ethnic States/Provinces which practice provincial sovereignty? The policy is unclear.
For instance, ULA/AA.

(b) Apart from unclear policy, the Peace Process Steering Team (PPST) is being used as a

[21] Andrej Lang, '"Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution' (2007) 40 New York University Journal of International Law and Politics 107, 114-115. Available at <https://nyujilp.org/wp-content/uploads/2013/02/40.S-Lang.pdf> accessed 6 April 2023.
[22] Lusaka ceasefire agreement 10 July 1999: Available at <https://peacemaker.un.org/drc-lusaka-agreement99> accessed 6 April 2023.

political platform while, one the other hand, the group is appeasing SAC and cooperating with it whenever possible. For instance, RCSS.

(c) The group is claiming for achieving the status of an Ethnic State/Province under whatever situations even bolstering the operation of the SAC in one way or another, totally ignoring political groups and analogous EROs horizontally existing in the same State/Province. For instance, UWSP.

(d) In spite of claiming that some thousands of battles have been launched, in practice, the group has not yet officially withdrawn from being a part of the Nationwide Ceasefire Agreement (NCA). For instance, the KNU.

(e) While embracing the NCA, which has legally and empirically collapsed, the group is waiting for a possible dialogue to be established with the SAC. For instance, PPST.

(f) The inside political parties have actually and explicitly realized that the 2008 Constitution embeds the military dictatorship and that, under it, Burma will never become a just, free, stable, peaceful and developed democratic State. Despite such knowledge, they are preparing to participate in the elections to be held by the SAC in 2023 or 2024, just for the benefits of their own groups and leaders. There are over 50 political parties.

Mission Impossible Vicious Circle of Ostensible Dialogues

For over 75 years, the civil war in Burma has proved that, if the Tatmadaw continues to exist as a major state institution, serious human rights violations amounting to the gravest crimes of international concern will never be deterred. Continued Tatmadaw rule would also mean no process for genuine peace—nor justice, freedom, or development for all ethnic nationalities—can ever be activated and achieved. Lessons learnt from the roughly 60 years of ostensible peace-seeking processes starting in 1963 following the 1962 military coup vividly indicate that all so-called peace-related dialogues, including various types of ceasefires with the Tatmadaw, have unequivocally failed due to the lack of the rule of law. As far as Burma is concerned, the concept of institutional reform no longer suffices. Rather, a new Federal Union Army may replace the position of the Tatmadaw and ultimately uphold the rule of law.

ASEAN needs to review and get rid of its incorrect policy on constructive, but empirically non-constructive, dialogue

LAN's Statement on the ASEAN Leaders Meeting convened on April 24, 2021

1. The invitation of the coup leader Min Aung Hlaing to the April 24 meeting and treated him equally as other countries' leaders would legitimize the Military Council, by implication. The ASEAN has ignored the legitimacy of the National Unity Government by excluding it from the meeting and showing no serious attention to the result of the 2020 elections. As such, the ASEAN itself has denied the principles of democracy noted in paragraph (2) of the Chairman's Statement on the meeting. Legal Aid Network, therefore, objects to the ASEAN summit as far as Burma/Myanmar is concerned.

2. Paragraph (8) of the same statement includes some optimistic points such as the release of all political prisoners including foreigners as well as the immediate cessation of violence. However, the exact timeframe for the release of all political prisoners is not specified nor does it include what action will be taken if the political prisoners are not released or the violence is not ceased. Hence, it is highly unlikely for the military council to comply with these recommendations. It would only allow the military council to buy time to repress the pro-democracy protests.

3. In the first point of the five-point consensus, "*immediate cessation of violence*" is mentioned, yet it does not indicate who is inflicting violence on whom nor does it exactly point out that the military council shall stop repressing the peaceful protestors using deadly forces. Therefore, the ASEAN has put the people of Myanmar and Ethnic Resistance Organizations, who are resisting the brutal repression of the military council in self-defense, on a par with the military council. It is the utmost denial of justice by the ASEAN.

4. Paragraph (2) of the Chairman's Statement affirms that the principle of rule of law is highly enshrined in the ASEAN Charter. The International Independent Fact-Finding Mission for Myanmar, chaired by Marzuki Darusman who served as Indonesia's attorney general, submitted a comprehensive report,[23] covering the period 2011 to 2018, highlighting that the six senior military leaders including Min Aung Hlaing are allegedly responsible for the commission of heinous crimes.

5. *Due to the grave nature of these crimes, and their **jus cogens status –*** a peremptory norm, a fundamental principle of international law – *from which no derogation **is** permitted, an amnesty or **pardon** purporting to immunize **perpetrators** of such crimes **cannot** be upheld under international law*.[24] The ASEAN itself is undermining the principles of the rule of law by encouraging constructive dialogue with the military council led by Min Aung Hlaing to seek a solution for the current crisis. It is the utmost ignorance of the serious crimes against the people committed by the military council. In this regard, the National Unity Government should not follow the tread of ASEAN denying the rule of law norms.

6. In fact, the ethnic political forces and major Ethnic Resistance Organizations (EROs) have superficially expressed their support for the formation of National Unity Government; however, in practice, they have not yet joined the Government effectively or in the formation of Federal Army as they might still be skeptical about the CRPH/NUG. Additionally, the ethnic forces might doubt that the CRPH/NUG might reconcile with the military council again, ignoring all heinous crimes they committed and abandoning all the potentials for the

[23] https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf
[24] https://sas-space.sas.ac.uk/2563/1/Amicus79_Ahmed%26Quayle.pdf

emergence of a Federal Union in return to the release of Aung San Su Kyi and other NLD senior leaders by the military council after negotiation.

Recommendations

1. The National Unity Government (NUG) should never enter into a negotiation with the military council led by Min Aung Hlaing, whom the Committee Representing the Union Parliament (CRPH) itself declared as a terrorist organization and being investigated by the ICC prosecutor for crimes against humanity.
2. The NUG should support and welcome other military leaders who would side with the CDM movement and surrender to NUG after capturing Min Aung Hlaing and his accomplices; and it should also commit to the emergence of a new Federal Army and replace the Myanmar Army.
3. The NUG should issue a daring statement affirming that it would never conciliate the military council led by Min Aung Hlaing, which has been declared as a terrorist group, upon the release of Aung San Su Kyi and NLD senior leaders; and shall ensure that the perpetrators be held accountable for the grave crimes they committed.

Legal Aid Network 25 April 2021

Analysis of the Federal Democracy Charter

Introduction

The emergence of the Federal Democracy Charter (FCD), produced under the initiative of the Committee Representing Pyidaungsu Hluttaw (CRPH), which was formed mostly by the NLD leaders, elected in the 2020 elections, has been two years now. In struggling against the State Administration Council, also known as the Military Council, and attempting to lay foundations for federalism, the NLD, CRPH, NUCC and NUG generally articulate, refer to, or invoke, the FDC whenever it is necessary. Unfortunately, for all Myanmar and non-Myanmar ethnic nationalities, the road to freedom, justice and peace is still vague. It is time to scrutinize the major factors that hinder unyielding efforts of people, in terms of various ethnic nationalities, who have been sacrificing their countless lives.

From this aspect, our LAN analyses the FDC, proposes a federal union suited to Burma, and recommend the two factors:

1. For the emergence of the provisional/interim constitutions;
2. For the international community of states as a whole to take their obligation for seeking accountability and ending impunity in Burma in a way that *jus cogens* norms are effectively observed and enforced.

1. Background of the Charter

In a democracy, although "majority rule" is indisputable, the rights of minorities must be guaranteed in accordance with the constitution.[25] The NLD barely focused on protecting "minority rights," particularly the rights of ethnic minorities, under a federal democratic constitution. Until the military coup on February 1, 2021, the NLD leaders expected that amending the 2008 Constitution one step after another would bring about a federal union. To this end, they exerted efforts but failed. Hence, the party lacked any concrete proposal for a federalism suited to Burma.

Contrary to NLD expectations, when the military coup transpired, the party lacked any systematic preparation on how to approach the ethnic forces, particularly the EROs. Afterward, by urgently consulting with available ethnic leaders, efforts were made to hastily produce a Federal Democracy Charter within a few weeks. On April 1, 2021, two months after the coup, the CRPH officially publicized the Charter.[26] On the one hand, some valuable federalism principles appeared in the Charter; on the other hand, significant flaws exist as well, as further developed below.

2. The characteristics of the Charter

The Charter remains unclear regarding whether it posits a political commitment, indicates a political roadmap, or lays a constitutional foundation. The political commitment is not required given the existence of the historic Pang Long Accord, which is legally binding within both

[25] Barbara Thomas-Woolley & Edmond J. Keller, 'Majority Rule and Minority Rights: American Federalism and African Experience' The Journal of Modern African Studies (1994). <https://www.jstor.org/stable/161982> accessed 21 March 2023.

[26] Federal Democracy Charter, Declaration of Federal Democracy Union (2021). <https://crphmyanmar.org/wp-content/uploads/2021/04/Federal-Democracy-Charter-English.pdf>
accessed 21 March 2023.

national and international law. How the Pang Long Accord would be actualized, however, needs to be established. If the Charter is regarded as a political roadmap, including the convening of a constitutional convention to draft and approve a federal democratic constitution,[27] such a process is incorrect even if it is stated in the Charter. It is because such a process should involve a "bottom-up" approach rather than a "top-down" one. Regarding final approval of the Federal Democratic Constitution, as with the experience in the US,[28] the decision shall be made by the constitutional units of the Ethnic States/Provinces in Burma; Unfortunately, given that the Charter adopts a top-down approach, serious concern can be expressed that a genuine federalism suited to Burma may never be achieved.

3. The valuable federal constitutional foundations in the Charter

In the Charter, in terms of reasonable federal constitutional foundations, some valuable provisions are found. Constitutionalism is guaranteed,[29] and the values of the Union are sought.[30] Within the member states, equal rights and self-determination are ensured;[31] the right to draw up constitutions by the respective member states is recognized,[32] and civilian supremacy is asserted.[33] As the most crucial value, the sovereignty of member states and that of people in the states is safeguarded;[34] the application of residual power by the member states is also affirmed.[35] Fiscal federalism is practiced as well,[36] and the rights of member states/provinces to manage land and natural resources are enshrined;[37] in extraction and production of natural resources, the right of the local communities to express their will is provided as well.[38] Gender equality is stipulated.[39] Diversities of the ethnic nationalities are addressed.[40] And finally, a federal union security system is explored,[41] and inter-governmental relations are introduced.[42]

4. Charter vagueness

Vagueness characterizes the entire Charter. For instance, who are the drafters? The phrase "organizations and individuals"[43] does not suffice to determine who they are. The stated vagueness has implications for the formation of the Constitution Drafting Committee. Which body would have power to form such a highly significant committee? According to the Charter,

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[27] *The Federal Democracy Charter*, pt 1, ch 3, para 10, 11.

[28] Constitution Daily, 'The day the Constitution was ratified', (21 June 2021): Under Article VII, it was agreed that the document would not be binding until its ratification by nine of the 13 existing states. <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> accessed 21 March 2023.

[29] *Federal Democracy Charter, Part I*, ch 3, para 12.

[30] ibid ch 3, pt 1.

[31] ibid ch 4, pt 2 para 2; ch 4, pt 3, para 1, 2.

[32] ibid ch 4, pt 2, para 3..

[33] ibid ch 4, pt 2. para 5..

[34] ibid ch 4, pt 3, para 4..

[35] ibid ch 4, pt 3, para 6..

[36] ibid ch 4, pt 3, para 18..

[37] ibid ch 4, pt 3, para 20..

[38] ibid ch 4, pt 3, para 23..

[39] ibid ch 4, pt 3, para 27. .

[40] ibid ch 4, pt 3, para 43,44,45,46. .

[41] ibid ch 4, pt 3, para 55-60..

[42] ibid ch 4, pt 3, para 63,64..

[43] ibid 'Preamble'..

the stated body shall comprise "the members who participate and collaborate in this Charter."[44]

The entities mentioned under the title of "Members of the Charter"[45] are too general—for instance, *inter alia*, "political parties"[46] and "ethnic armed revolutionary organizations."[47] Fifty-three political parties joined the meetings of the new UEC, formed by the SAC,[48] to participate in the next elections to be held under the sponsorship of the SAC. Their political stance indicates continued adherence to the military rule concept created under the 2008 Constitution. The term "Ethnic Armed Revolutionary Organizations" (EAROs)[49] is even more controversial. What does "revolutionary" mean? What about the EROs still adhering to the NCA while facing the demands of the SAC? To maintain the NCA, almost all the stated organizations need to refrain from providing security to their local populations. Can such organizations still be regarded as revolutionary?

Another term characterized by vagueness is "collective leadership."[50] Which organizations and/or individuals will participate in the collective leadership? What are the criteria, or minimum paradigm or required capacity, for the stated entities to participate in the leadership group? Which body will select or elect those candidates? The term "collective leadership" is akin to the words "all-inclusive principle" used under the NCA.[51] Invoking the latter, the UPDJC, which is heavily influenced by the military leaders or ex-military personnel, selected organizations and individuals to participate in the NCA process.[52]

5. Charter inconsistencies

The Charter also contains various inconsistencies. Even though the term "constitutionalism"[53] is reiterated, no provision directly relevant to the limited government concept is found. One paragraph[54]—analogous to the provision in the 2008 Constitution,[55] which might be related to separation of power—is also confusing. Accordingly, by using the term "reciprocal check among the three branches of sovereign powers,"[56] judicial independence is compromised. In

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[44] ibid ch 4. 'Development of Federal Democracy Union Constitution'.

[45] ibid ch 2.

[46] ibid ch 2, para 2..

[47] ibid ch 2, para 3.

[48] The Irrawaddy, 'Chairman of Myanmar Military Govt's Election Body Says NLD's Win Invalid' (26 February 2021). <https://www.irrawaddy.com/news/burma/chairman-myanmar-military-govts-election-body-says-nlds-win-invalid.html> accessed 21 March 2023.

[49] Note: In the English translation, the term 'revolutionary' is omitted. It is unclear why.

[50] Federal Democracy Charter, Part 1, ch 4, pt I, para 3.

[51] Para 22 (a) of the Nationwide Ceasefire Agreement:

> 'Representatives from the government, Hluttaws and the Tatmadaw, representatives from the Ethnic Armed Organizations, representatives from registered political parties, ethnic representatives and other relevant representatives shall participate in political dialogue that is based on an all-inclusive principle.'

[52] Interviews with the CSO leaders – Khun Markoban, Sai Kyaw Nyunt and Naw Hser Hser who participated in the Union Peace Conferences – in October 2018.

[53] Federal Democracy Charter, Part 1, ch III, para 12.

[54] The Federal Democracy Charter Para 5, part 3, Chapter 4, PART I.

[55] Constitution 2008 Art. 11 (a).

[56] Federal Democracy Charter, Part 1, ch 4, Part 3, para 5 'Federal Parliament'.

the provision related to the judiciary,[57] there is not a single sentence guaranteeing its independence.

Other inconsistencies include: in a parliamentary system, the Head of State (i.e., the President) does not constitute a part of the government led by the Prime Minister. Although the Charter affirms the parliamentary system,[58] the President and Vice-President participate in the formation of the government.[59] In addition, the Charter stipulates the right of self-determination in full, guaranteeing the power of the three government branches to be exercised by member states/provinces, separate from the Union.[60] This provision is inconsistent with a genuine federal union in which the state powers can never be practiced separately by the federal and provincial level governmental institutions.

6. Perpetuating the mistaken legacies of the past

A new constitution normally avoids the mistakes of the past, addresses the current underlying issues occurring on the ground, and lays a foundation for a better future society. In Burma, history has described that, under democracy, the majoritarian electoral system – also known as the First Past the Post or winner take all, being practiced since independence – is unfit for the minority ethnic nationalities and their states/provinces.

Since independence in 1948, a First Past The Post electoral system, in terms of majoritarian democracy per se, has been practiced over seven decades now. As such, although elections were held a number of times, the ethnic minorities were marginalized. They neither occupied sufficient seats in the legislative assemblies nor influenced law-making processes at all.[61] Hence, apart from the FPTP, a Proportional Representation (PR) system needs to be practiced in a way that a certain number of seats can be allocated primarily to the ethnic minority political parties. If the PR system is applied, nationwide – or at least state/province or county/district wide –[62] constituencies shall be created.

Under the 2008 Constitution, a FPTP system alone is guaranteed. The practice of a PR system is potentially prohibited as merely "township constituency" is fixed.[63] The Charter displays a similar mistake by repeatedly using the term "township constituency" in connection with the

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[57] ibid, pt 2, Interim Constitutional Arrangement 2021.

[58] ibid, pt 1, ch 4, pt 3, para 8..

[59] ibid, pt 2, ch 6 para 39..

[60] ibid, pt 1, ch 4, pt 3:

> 3.Every member state of the Union shall have separate legislative power, separate executive power and separate judicial power.'
>
> '1. Federal Democracy Union shall be built to meet the characteristics of a federal union exercising full rights of democracy and equal rights and rights to self-determination in full. . . 3.Every member state of the Union shall have separate legislative power, separate executive power and separate judicial power.'

[61] The related issue was raised by the UWSP along with its submission for political dialogue, while demanding permanent reservation of seats for the ethnic minorities.

[62] The composition of a Legislature where members are elected using PR usually better reflects the proportions of votes received by candidates on a State or Territory-wide basis than houses where members are elected to single seat electorates. Proportional Representation Voting Systems of Australia's Parliament. <https://www.ecanz.gov.au/electoral-systems/proportional> accessed 21 March 2023.

[63] *Constitution 2008* Art. 109 (a).

population provided for in the 2008 Constitution,[64] thereby blocking the PR electoral system that would enhance ethnic minority representation in Parliament.

In addition, the Charter makes a similar mistake by establishing the position of State Counsellor.[65] Under the Charter, the State Counsellor ranks above the Prime Minister, who is the Chief Executive.[66] This hierarchy contradicts the practice of any democratic country that practices a parliamentary system. Further, the Charter does not prescribe how the President and Deputy President are elected by setting out a presidential election system. Their positions appear to be carried over from the 2008 Constitution.[67] Given the above, the Charter incorporates the mistaken legacies of the past.

7. Major concerns in upholding the rule of law

Under the 2008 Constitution, the President, as Chief Executive, is entrusted with the power to nominate persons to be appointed as Chief Justices.[68] As a result, the judiciary lacks independence. Under the 1947 Constitution, a similar practice was conducted, but an independent judiciary still largely emerged because the President, who appointed the Chief Justices, was not the Chief Executive but the Prime Minister.[69] The President at the time served only as the ceremonial Head of State.[70] Importantly, in accordance with the 1947 Constitution, for the Supreme Court Justices, judicial tenure was guaranteed,[71] something omitted in the 2008 Constitution. The Charter prescribes an analogous provision[72] provided for in the 2008 Constitution.[73] The Charter is unclear whether the President is the ceremonial Head of State or the Chief Executive as he ranks at the top of the entire government even during the prescribed interim period.[74]

8. Major concerns to terminate the civil war

Some provisions relevant to fiscal federalism, land, and natural resources contained in the Charter[75] are vague, albeit valuable. Although the other provisions[76] are relatively more specific, the entire Charter fails to establish, on the one hand, the nexus between the appropriate representation of ethnic nationalities in the legislatures and, on the other hand, ethnic nationalities' right to fiscal federalism and to the ownership, management, and preservation of land, natural resources, and environment. This failure thus connotes that ethnic minorities, due to the lack of the former, would not enjoy the latter even if the Charter is later

[64] Federal Democracy Charter, Part 1, ch 4, pt 3, para 7.
[65] ibid, Part 2, ch 6 para 39 (b)..
[66] ibid.
[67] Note: There is no country – in which a military official chosen and sent by the Commander-in-Chief of the Armed Forces can become the President or even the Deputy President –in accordance with the Constitution. Nor is the practice of the presidential electoral system under the 2008 Constitution in line with other countries applying a presidential system.
[68] Constitution 2008 Art. 299 (c) (1).
[69] *Constitution 1947* (n 12) Art. 114.
[70] *Constitution 1947* (n 12) Chapter 5.
[71] *Constitution 1947* (n 12) Chapter 8, Article 143.
[72] Federal Democracy Charter, Part 1, ch 3, para 9.
[73] Constitution 2008, Art. 299 (c) (1).
[74] Federal Democracy Charter, Part 1, ch 3 para 8.
[75] ibid ch 4, pt 3 para 18-19..
[76] ibid ch 4, pt 3 para 20-23..

transformed into a constitution. If the above situation persists, ethnic nationalities will continue to suffer hardships. As a result, civil war - with its risk of continued turmoil and even atrocities - might not end even if military rule is abolished.

Conclusion

Regarding Burma, the situations occurring on the ground vividly indicate that the old system must be eliminated so that a new system can emerge. The legal system must be replaced with a new one based on the rule of law principles that reflect international legal norms and bolster a genuine federal union. In support of this, the following characteristics of a federalism suited to Burma may be worth observing:

1. To facilitate the emergence of a successful federal union, promotion and protection of human rights must be a top priority and human rights must be protected by the rule of law
2. The power of judicial review must be practiced by the independent, impartial, efficient and resource-rich judiciaries on federal and states/provinces levels of governments, as an implementation of constitutionalism that accentuates limited government
3. The independent formation and operation of political parties and Civil Society Organizations (CSOs) need to be guaranteed
4. The formation of transparent and accountable democratic governments, primarily representing the diverse ethnic minorities and indigenous peoples, is required in all three levels of the Federal Union, and
5. Having met the above situations, with the participation of the Ethnic States/Provinces – as the constituent units, including Myanmar state/province, which exercises provincial sovereignty –a new federal union may be formed.

Recommendations

1. The emergence of the provisional/interim constitutions

With reference to the operational flaws that took place over the past two years, it is evident that the Federal Democracy Charter, which is not legally binding, no longer suffices as it is unable to seek and establish trust among various ethnic nationalities and their own States/Provinces.

To facilitate the emergence of a federal union suited to Burma, the production of, and compliance with, the provisional/interim constitutions in both federal and provincial levels is a sine qua non even during the struggle against the military dictatorship. It will undoubtedly be a daunting task given the lack of constitutional culture in Burma, but not impossible. The stated provisional/interim constitutions are required to reflect core values contained in some priceless parts of the Federal Democracy Charter, the Federal Constitution (First Draft), the FCDCC Constitution (Second Draft), and the provisions legitimizing the combinations of de jure and de facto standards and the others dealing with, or resolving, the current underlying issues taking place on the ground.

2. Obligation of states for seeking accountability and ending impunity in Burma

A comprehensive strategic program must be undertaken by both the national and international communities, or the struggle for freedom in Burma may take many more years. Regardless of how long it takes, however, unethical, unjust, and unlawful oppressions must be countered with ethical, just, and lawful actions. Chaotic, disarrayed, and random responses

must be replaced with systematic, orderly, and planned measures. A combination of nationwide measures and worldwide legal, political, and constitutional campaigns must also be conducted. To this end, with the emergence of provisional/interim federal democratic constitutions in Ethnic States/Provinces and a provisional/interim federal democracy constitution at the central level, a foundational rule of law must be established as soon as possible. In connection with global constitutionalism, the international rule of law should be activated in support of seeking global peace to promote and protect human rights.

Finally, but not least, the international community of states has a collective obligation to deal with the serious human rights issues in Burma. That obligation requires, at the very least, seeking accountability to end impunity in a way that *jus cogens* norms are effectively observed and enforced.

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Terminology: Burma and Myanmar

Regarding the name of the country, complications had started since the time of the 1947 Constitution. The name of the country "Burma" was in the English language. Nevertheless, it was translated into "Myanmar" in the Myanmar language. Following the 1962 military coup up to the emergence of the 1974 Constitution, both languages adopted by the 1947 Constitution were used. After changing "Burma" into "Myanmar" in 1989, the name of the country has become "Myanmar" in both English and Myanmar language. Subsequently, the 2008 Constitution simply adopted both languages. The complication of the name of the country has negatively influenced the peace-seeking process.

Non-Myanmar ethnic nationalities, by and large, adopt "Burma" and "Myanmar" interchangeably, without providing sufficient attention in distinction. Verbally, a large majority of both Myanmar or Non-Myanmar people use another term, that is, "Bamar". Some democratic countries denied the legitimacy of the then ruling military regime, which changed the name of the Nation from "Burma" to "Myanmar". Hence, they still use the term "Burma".

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