



## Legal Analysis on the Rights of the Children In Connection with the Repatriation of Rohingyas into Rakhine State, Burma/Myanmar

Burma/Myanmar has been a state party to the UN Convention on the Rights of the Child (CRC) since 1991. As part of implementation of the CRC, the country produced an act, entitled ‘The Child Law’ in 1993.

In addition to protection under international human rights laws, such as UDHR and ICCPR, Article 7 of the CRC provides the right of a child to acquire a nationality so that the best interests of the child are actualized.

Article 10 of the Burma’s “Child Law” sets out as follows:

“ Every child shall have the right to citizenship  
in accordance with the provisions of the existing law.”

When Article 10 is observed closely, two elements are found: one is that, in line with the CRC, ‘The Child Law’ in Burma/Myanmar appears to have guaranteed the right of a child to acquire a nationality; another is that the said law ignores that right by incorporating the additional phrase, *‘in accordance with the provisions of the existing law’*. No problem would arise if the existing laws were to fulfill the obligations of the government under the CRC. However, this is not the case. Rather, the opposite is taking place.

The existing laws – the 2008 Constitution of the Republic of the Union of Myanmar as well as the 1982 Burma Citizenship Law – have already denied the right to citizenship of all children born by Rohingya people<sup>1</sup> 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:

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<sup>1</sup> The total number of Rohingya people from 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.

(a) person born of parents both of whom are *indigenous races*<sup>2</sup> 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*’<sup>3</sup> who migrated from Bangladesh. However, the term ‘Bengalis’ is used officially by government authorities primarily in domestic, but not in international spheres. The influence of this domestic description promoted by power holders should not be underestimated.

As far as Burma is concerned, society’s influence on law is much greater than its dependence on law. When racism, along with an extreme Buddhist nationalist movement, fuelled 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.

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)<sup>4</sup>, 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 sent 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

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<sup>2</sup> 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.

<sup>3</sup> 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 ကလား. ‘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.

<sup>4</sup> <https://www.everyculture.com/wc/Afghanistan-to-Bosnia-Herzegovina/Bengalis.html>

by the Myanmar Army and government authorities in 2017, many Rohingyas were forcefully driven out to Bangladesh.<sup>5</sup> 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 Bangladesh<sup>6</sup>, 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.

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.

*Human rights are a social practice that aims to realize a particular vision of human dignity and potential by institutionalizing basic rights.* (Donnelly, 1989) The right to acquire a nationality is a basic right for all people. When this basic right is not institutionalized in Burma, human dignity for Rohingya people has already disappeared.

Both the ICCPR and the ICESCR enshrine in their first article a guarantee of the right to self-determination of all people. Unfortunately, this is still a dream for all Rohingya people, who cannot even acquire citizenship status.

The Chairman’s Statement of the 33<sup>rd</sup> ASEAN Summit, issued on Nov 13, 2018, is shameful as it did not raise the issue of seeking accountability for the Myanmar military

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<sup>5</sup> 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>

<sup>66</sup> <https://www.theguardian.com/global/2018/jun/01/myanmar-and-un-announce-deal-for-safe-return-of-rohingya>

perpetrators – including government authorities – who committed and covered up grave crimes against the entire Rohingya community in Rakhine State. Nor did it highlight the citizenship issue, which has caused major concerns for the Rohingyas. As such, it is not only against the norms of international human rights law but also those of the ASEAN Charter. So long as these two underlying issues are ignored, upholding the rule of law will never become a reality; as a result, peace, stability, harmony, and national reconciliation among the various communities may exist only as a sham; and safe and dignified repatriation of Rohingyas can never be actualized; instead, taking advantage of these circumstances, the Myanmar Army will continue committing grave crimes against not only Rohingyas but also other ethnic/ indigenous nationalities in Burma.

**Legal Aid Network**

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