



Legal Recommendations

From Achievement of the Civil Disobedience Movement Towards Unequivocal Elimination of the Military Dictatorship in Burma

Introduction

In Burma/Myanmar, peaceful demonstrations against the military regime conducted by the Civil Disobedience Movement (CDM) are gaining momentum day by day. In a CDM campaign it is considered appropriate to encourage civil servants from various departments to resign from their position in order to stop the functioning of the administrative mechanism of the military regime. The younger generation, also named Generation Z, has displayed energetic activities, boundless creativity and leadership during the public protest. The Legal Aid Network definitely supports the movement.

Notwithstanding its important place in the efforts, CDM is only a tactic that could stop the operation of the administrative mechanism of the regime. The military dictatorship would not be eliminated simply because the government mechanism is no longer operational.

If the banks stop transferring phone bills to the military-controlled company "MyTel", the generals could feel the effect. But at the same time, tens of thousands of textile workers are not receiving paychecks if the banks are closed. And when doctors at Yangon General Hospital strike, they are cutting off the poorest people from medical care. The military has its own banks, schools, and hospitals. It can use this asymmetry to its advantage in the long run.¹

It is highly unlikely to expect that the Military Council (MC), which staged a coup, would transfer power to the election winning party, the National League for Democracy (NLD). Recent history indicates that Aung San Su Kyi would be amenable to a military-designed political framework that would allow her to run for office after the military self-declared state of emergency comes to an end. Hence, the whole scheme is to return to the framework of the 2008 Constitution.

Another possible outcome is for the Military Council to conspire to dismantle the NLD, starting by charging Aung San Su Kyi, the State Counsellor and Win Myint, the President, with crimes including corruption and sentencing them to lengthy imprisonment. While they are in prison, the regime may either declare NLD as an unlawful association or at least diminish the influence of the party in any way they can. After that, the Military Council led by the coup-leader Min Aung Hlaing will seek its legitimacy by organizing a general election. Thereby, in line with the 2008 Constitution, the de facto continuation of the military dictatorship would have been facilitated. If so, how can the CDM campaign move forward?

¹ <https://www.dw.com/en/myanmars-young-generation-z-protesters-take-on-the-military/a-56599995>
Feb. 17, 2021

There has been one remarkable and courageous step taken by the CRPH, which is the declaration against the Military Council as criminals responsible for high treason. It can be speculated that some MPs in the Committee who have the ability to think outside of the box, so to speak, are considering this option. However, they seem to be not well-prepared. Besides, they might be assuming that the Military Council will be defeated by conducting the CDM campaign persistently. On February 14th, one of the members of the Committee even believed that the situation will be shifted significantly over the next few days.² The Committee remains indecisive on whether to proceed with the 2008 Constitution. The Committee has to implement the 2020 election result, yet how is the question.³ If the Committee takes the same old route under the framework of the 2008 Constitution, the military dictatorship embedded in that very Constitution will never be eliminated and the drafting of a brand new Constitution will never become a reality. The Committee seems to lack a clear strategic objective.

Apparently, the implementation of the 2020 election result is no longer the sole duty of the CRPH. It must also shoulder the responsibility of eliminating the military dictatorship demanded by the entire people.

It is becoming clear that the entire movement seems to lack a collective and tangible strategic goal. Unless a concrete strategic objective is set for the long run and implemented accordingly, we are concerned that the CDM campaign might face hardships, albeit not insurmountable, to move forward due to the public suffering from fatigue and the regime creating political turmoil in order to conduct arrests and other forms of repression. Recently, the MC has released over twenty-thousand prisoners since then, the junta is creating a wide-spread terror among the public by conducting midnight raids and threatening people across the country. Therefore, it is time to identify the strategic goals of the mass demonstrations without countering or affecting the course and tactics of the CDM campaign. This paper is presented from the perspective of human rights, constitutional, rule of law, democracy and federalism in support of the fight against the military dictatorship.

While this paper is not a comprehensive blueprint, it offers suggestions to the public, political forces, legal organizations that are relentlessly driving this movement forward, as well as the international community that are willing to support democracy and human rights in Burma in order to achieve a better resolution. We remain vigilant to the emerging challenges and will continue to update this work as this situation evolves. We also welcome the recommendations of key stakeholders in Burma.

=====

Part I

The Interconnection Between Human Rights, Democracy, Self-determination and Rule of Law

Besides the general fundamental right to be treated with dignity, the rights to liberty of movement, equality before the law, fair trial and freedom of association are some of the most basic fundamental human rights. The arbitrary infringement of the aforementioned fundamental rights of Aung San Su Kyi and other democratic leaders, from a rule of law perspective, are absolutely unacceptable. Nevertheless, in the past, the struggle for democracy and the Ethnic Resistance Organizations (EROs) fight for self-determination never went hand in hand, nor were supportive to each other.

² Statement made by Zin Mar Aung, MP, Committee Representing Pyidaungsu Hluttaw (CRPH); <https://www.facebook.com/199678676714208/videos/433469464551017>

³ Statement made by Naing Ko Latt, MP, Committee Representing Pyidaungsu Hluttaw (CRPH); <https://www.facebook.com/199678676714208/videos/3453696014759787>

Most of the so-called democratic leaders, as well as the public now fighting for democracy, have been silent when the rights of the ethnic nationalities were violated by the regime, and as they struggled for self-determination in the ethnic states/provinces. This was particularly obvious after the release of Aung San Su kyi from house arrest in 2020, as she acquiesced to the 2008 Constitution. Democratic activists both in and out of the country seized raising their voice from 1988 to 2010, as they too acquiesced to the mirage of democracy. Many supporters of democracy consistently ignored the struggles of EROs for their right to self-determination and watched as ethnic nationalities suffered under the military regime.

In contrast, the Civil Disobedience Movement which is primarily focused on democratic rights, has joined forces with ethnic nationalities, particularly ethnic youths, *in a collective effort to defeat the junta*. In fact, on February, 6, 2021, two young ethnic women were among the first to start the mass demonstrations. However, some ethnic political forces and ERO's that have historically demanded self-determination, whether they uphold the Panglong Agreement or not, have remained silent in this moment. They have failed to react at this critical moment and have yet to indicate how they intend to effectively support the CDM movement.

The EROs may be confused by the situation. They are concerned that peaceful mass demonstrations will be in some way disturbed if their armed forces enter the towns controlled by the government. Apparently, EROs have shown very little interest in the demonstrations since most of the public demands are focused only on the release of Aung San Su Kyi. During the five-year period of their government, in fact Aung San Su Kyi and Win Myint never spoke out in favour of the EROs but have been publicly supportive of the Myanmar Army. The government even awarded honorary titles and medals to Myanmar Army officers who at various levels fought against the EROs. Therefore, EROs are feeling a great deal of bitterness because the so-called democratic leaders have repeatedly ignored their demands for self-determination. As a result, the pro-democracy movement and the EROs struggling for self-determination cannot form a unified front, strong enough to eradicate the military dictatorship. Unfortunately, the two fronts are ignoring each other.

It is possible that the EROs might presume that the current political situation is simply a power struggle between the Myanmar⁴ political leaders led by Aung San Su Kyi on one side, and the Myanmar Army leaders led by Min Aung Hlaing on the other. This view, that neither Aung San Su Kyi nor the NLD administration would be willing to grant EROs self-determination is based on the party's failure to protect and promote the rights of ethnic nationalities.⁵ Apparently, the ethnic political leaders continue to lose confidence in the NLD administration, especially those who still believe in the Panglong Agreement.⁶ In fact, some ethnic leaders have noted that the coup d'état has saved Aung

⁴ The term Myanmar represents a national that constitutes a majority population in the country.

⁵ Even though NLD is proclaiming federalism, it does not offer any adopted policy on federalism. The NLD administration held the office for five years, from 2015 to 2020, yet failed to protect and promote the rights of ethnic nationalities in respective ethnic states/provinces. It couldn't stop the Myanmar Army and its affiliated cronies from exploiting the land and natural resources owned by the ethnic states/provinces. On the contrary, the NLD excessively commends the Myanmar Army despite its international crimes. Under the leadership of Aung San Su Kyi, the NLD leaders and MPs had treated the Myanmar Army with the utmost deference, while EROs have been portrayed as terrorists and insurgents. On the 21st of April 2020, she praised the Myanmar Army for the launch of military operations against the Arakan Army (ULA/AA) in Rahkine and Chin Sates as follows:

I commend all the military officers and soldiers who have sacrificed their lives to protect the lives and property of the people and appreciate for their services.

Office of the State Counsellor, Release of information (21 April 2020)

<https://drive.google.com/file/d/1sGjkiyccK018ZnsE1_CSKMI_16fj4zFN/view?usp=sharing>

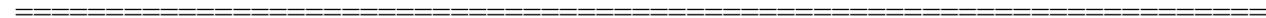
⁶ Interview with Kayan leader Hkun Marko Ban (February 12th 2021). He was an elected MPs in the 1990 election held in May. (Citation Missing?)

San Su Kyi from international condemnation and freed her from the criminal responsibility of the alleged genocide at ICJ.⁷

It is our opinion that self-determination, and a fair and lasting democracy, will only be sustainable in Burma when the rule of law becomes foundational to our nation. Equality before the law is one of the most basic principles of the rule of law. It calls for the right to democracy and self-determination at the centre of the mass demonstrations. Both democracy and self-determination are the centrepiece of human rights, and they can be protected only through the rule of law. All of these principles are obviously intertwined and depend on one another. However, without the rule of law as an indispensable foundation or bedrock for the other principles, neither democracy nor self-determination will thrive in its absence.

The foundation of rule of law should be laid down while the public is fighting against the military dictatorship as well as the MC. Efforts must be exerted to establish independent, impartial, effective, and resource-rich judiciary, as a core feature of the rule of law. In China, the judiciary crumbled between 1966 and 1976 when the Cultural Revolution engulfed the country. In the 1980s, the Chinese Communist Party restructured the integrity of their judiciary in order to open their market to the world that has resulted in bringing development and prosperity to the country. Since then, the Chinese judiciary has been able to deal with the corruption in the state institutions and economic disputes efficiently and impartially to a certain extent.

In general, democracy is focused on individual rights, whereas self-determination gives emphasis to collective rights. The public movement should demand for both democracy and self-determination in connection with the rule of law, which is also the utmost foundation for national equality. The public movement will succeed only when the two values can be enjoyed at the same time and bring justice, liberty, stability, and development, to our society. This paper is compiled on the basis of these ideals and values.



Part II
The situation of the Ethnic Resistance Organizations Which Have Not Yet Signed the Nationwide Ceasefire Agreement

The United Wa State Party (UWSP) has negatively responded to the coup. However, in practice, it has not yet elucidated how it would support and protect the public participating in the CDM campaign. The UWSP may possibly assume that the current struggle does not represent its interest as its goals remain intact. At the writing of this document, the UWSP seems determined to avoid taking a position that would upset the MC. If the UWSP seeks Statehood along with the right to self-determination, which is guaranteed by the constitution, it should take part in the fight against the military dictatorship and exert efforts to build a Federal Union at the same time. In fact, the UWSP should not ignore this window of opportunity to ensure that their goals inform this critical time of transition, failure to do so will only strengthen the administration of the MC and widen the justice gap.

Similarly, the Ta'ang National Liberation Army (TNLA) has failed to express a coherent statement concerning the movement as it appears to be struggling with its own problems. In fact, it is reported that the Restoration Council of Shan State (RCSS) led by, Gen. Ywed Seik, has launched aggressive operations in the territory controlled by the TNLA and the Shan State Progressive Party (SSPP) at the same time when the military regime staged a coup. However, on the flip side, Gen.

⁷ Comment by a Shan national leader on 18 February 2020.

Ywed Seik proclaimed that he rejects the military coup and will protect the demonstrators. This intention behind must be valued.

On the other hand, the Restoration Council of Shan State (RCSS) is fighting against other local EROs instead of centering their efforts developing a mutually flourishing agenda. The RCSS should not focus only on their organizational interest and territory expansion, as it could lead to extreme nationalism. Rather, while maintaining nationalism, it should uphold union national spirit. The problems surrounding territorial control and taxation between EROs should be addressed through peaceful negotiation. If still unsolvable, the belligerent parties should comply with the judgment rendered by a court established jointly by respective EROs. Contrary to this, if any party continue using violent means to occupy any disputed territory, the rule of law would have been jeopardized; and, the dream to build a federal union will never become a reality in the absence of the rule of law.

Similarly, the Arakan Army (ULA/AA), which earned a certain reputation for courageously fighting against the Myanmar Army in Rakhine State, has remained neutral since the cease-fire agreement in between the two belligerent groups in November 2020. Major General Htun Myat Naing, who once proclaimed that he would takedown Nay Pyi Taw if necessary, has remained silent. The Myanmar Army pacified the AA with a ceasefire agreement prior to the coup.

On February 9, 2021, the Kachin Independence Organization (KIO), which is highly respected politically among the four Northern Alliances, urged the Myanmar Army to avoid clamping down on the mass demonstration using force. Their follow-up statement, released on February 17, 2021, is rather ambiguous however, as it welcomes the efforts of the public to eliminate the military dictatorship without offering their contributions to support those efforts.

On February 18, 2021, U La Nan, the general secretary of KIO, expressed their stance more assertively through his interview with BBC. According to U La Nan, Lieutenant General Tayza Kyaw warned the KIO to stay out of the current demonstrations, as they risked severely losing influence and a similar fate to that of the Communist Party of Burma, which faced its mutiny in 1989. Additionally, Lieutenant General Tayza Kyaw added: “The consequences can be even more severe, at its worst, the protesters may be shot with real bullets.” Invoking this statement, the MC chaired by Min Aung Hlaing shall be held accountable for Crimes Against Humanity because it reveals that the regime is committing systematic and widespread crimes against the civilian population.⁸

U La Nan explained that KIO released the statement in light of its concern for the people, with reference to the statement by Tayza Kyaw. U La Nan stated that if the Myanmar Army launches a nationwide brutal crackdown using real bullets, the KIO may take whatever measures necessary, including military operations, in order to protect the unarmed civilians. He also mentioned the continuing peace process, which is to be organized by the Military Council. In this regard, the following political stance of the KIO should be examined.

The peace process should not proceed while the entire country is protesting against the regime as it will distract the EROs. The responsible institutions of the government should resume the stalled peace process only after the demands of the people are settled.

Regarding the aforementioned statement, the first standpoint of the KIO is rational, as it conveys that KIO supports the movement and does not recognize the MC. The second standpoint, however, is rather imprecise. What exactly does the KIO mean by the statement “only after the demand of the people are settled?” This ambiguity could lead to the conclusion that KIO will continue peace talks with any type of government. The intention of the KIO to end the military dictatorship

⁸ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 26 February 2021]

must be valued. However, peaceful demonstrations and the CDM movement alone can hardly defeat the military dictatorship. The eradication of the military dictatorship is elucidated in part 15 of this paper. Only when the EROs and ethnic political forces unitedly join and support the movement, will the eradication of the military dictatorship become a reality.

Part III

The situation of the Nationwide Ceasefire Agreement-signed by the Ethnic Resistance Organizations

Many of them find themselves satisfied within the framework of the 2008 Constitution and are reluctant to recognize that the Nationwide Ceasefire Agreement (NCA) is a failure. Such a political stance will never lead them to achieve the goal of self-determination, one clearly not supported by the 2008 Constitution itself.

As for the NCA-signed EROs, it is unclear how they are going to support the CDM movement. During the 1988 uprising, the Karen National Union (KNU) and the New Mon State Party (NMSP) were fighting against each other while the entire country took over the streets to protest against the ruling junta. The territorial control over 24 villages in Taung Pauk area had led the two belligerent groups to the deadly confrontation. During the clashes against the KNU, the NMSP had to spend a lot of the arms and ammunition reserved to fight the ruling junta.⁹ The winless conflict was ended through a series of negotiations between the two groups. Yet, none of them realized how to approach the analogous problems from the rule of law perspective in the negotiation. The culture of settling disputes before the court was never realized among the EROs. Thus, the KNU and NMSP are still facing confrontations regarding territorial disputes. The foundation of the rule of law was never laid down over the past 32 years.

On February 2021 the Peace Process Steering Team (PPST), which comprises ten NCA-signed EROs including All Burma Students Democratic Front (ABSDF), held a special meeting. The meeting was somewhat unique as it was organized under the name 'Ethnic Revolutionary Organizations.' On top of that, the PPST publicly announced in its meeting minutes that it will side with the CDM campaign and find ways to support the movement.¹⁰

In fact, the EROs are certainly aware that the Myanmar Army has been plotting against the government before and after the election which was held on November 8th 2020. Everybody was aware of the growing tension between the two most powerful groups in the country, NLD and Myanmar Army. In fact, the speculation about the military coup had been spreading months before it occurred. The EROs that signed the NCA should have predicted the political crisis and been well-prepared. Today, it has been over three weeks since the biggest mass demonstrations in history of Burma are happening and yet they are still busy finding ways to get around. The entire public is robustly demanding the authoritarian regime to be abolished; and we eagerly question how could PPST facilitate their demands.

Furthermore, the statement by the PPST includes objection of any use of force against the peaceful protestors, which must be appreciated, but it lacks action. Such a stance is no better than a statement by a NGO without any accurate measures. Gen. Ywed Seik, leader of Revolutionary Council for Shan State (RCSS) and chairperson of PPST, has rhetorically claimed that they are going

⁹ Naing Shwe Kyin, leader of NMSP, Marnarplaw liberated Area (1991).

¹⁰ PPST's statement after a special meeting was held on 20 February 2021.

<https://www.facebook.com/ncasignatoryeaofficial/photos/a.251511012040442/1027848401073362>

to protect the public. The PPST, chaired by Gen. Ywed Seik, is utterly incapable of adopting tangible measures to protect the people participating in the movement.

Moreover, the PPST has decided to suspend political negotiation with the MC. This statement is full of ambiguity and it is obviously sitting on the fence. To put it plainly, the PPST is just waiting to enjoy a share benefit that comes with the victory after the CDM campaign is successful. However, it will continue to go along with the MC and tread back to the same old NCA maneuver if the CDM campaign is defeated. So that the PPST members, signatories to the NCA, do not necessarily disappoint the military regime.

The PPST should stop deferring to the NCA process, which is overshadowed by the 2008 Constitution, if they still consider themselves a member of the Ethnic Revolutionary Organizations. Pursuing the NCA process will never lead to abolition of the 2008 Constitution being demanded by the public. In choosing this position, the PPST may be held to account for how exactly they would eliminate the military dictatorship embedded in the Constitution. Likewise, the entire ethnic nationalities have the duty to question their respective resistance organizations.

Part IV

An Analysis of the Nationwide Ceasefire Agreement (NCA) Through the Lens of International and National Laws

1. Some academics, such as Beatrice Walton, consider that Article 3 of the Vienna Convention on Law of Treaties (VCLT) provides that the Convention does not affect agreements concluded between states and “*other subjects* of international law.”¹¹ This view is partly shared by Laura Betancur Restrepo. She believes that Common Article 3 of the 1949 Geneva Convention shall not have effect on 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.¹² 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.¹³ The Colombia Peace Agreement has been concluded to be a special agreement under Common Article 3, which is part of all four Geneva Conventions.¹⁴

2. 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

¹¹ 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 15 Feb 2021.

¹² Laura Betancur Restrepo, ‘The Legal Status of the Colombian Peace Agreement’ (Symposium on the Colombian Peace Talk and International Law 2016) 110 AJIL Unbound 188. Available at <https://doi.org/10.1017/S2398772300003056> accessed 26 September 2020.

¹³ Christine Bell, ‘Colombia Peace Accord in Comparative Perspective’ (Symposium on the Colombia Peace Talks and International Law 2016) 110 AJIL UNBOUND 165, 169. Available at <https://doi.org/10.1017/S2398772300003019> accessed 26 September 2020.

¹⁴ Silvia Scozia, ‘Colombia 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 11 August 2020.

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.¹⁵

3. 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,¹⁶ but unfortunately, the NCA was not concluded to be a special agreement under Article 3, common to the four Geneva Conventions. Over the past five 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.

4 Although the term “peace agreement” has not yet been defined, Christine Bell qualifies the Lusaka Ceasefire Agreement as a peace agreement.¹⁷ The following basic characteristics for facilitating peace-seeking are found in that agreement: a clearly defined ceasefire with built-in human rights protections; a relatively comprehensive plan for national dialogue and reconciliation; formally adopted and incorporated involvement of a regionally influenced and powerful organization (i.e., the Organisation of African Unity); 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 a calendar for implementing the ceasefire agreement.¹⁸ 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 five years.

Courts and tribunals have the capacity to extend and develop the agreement's meaning where they find it to be part of the legal framework. More negatively, they have the capacity to terminate the operation of an agreement even in the face of political chances to sustain it. The positive law status of peace agreements therefore remains important to their implementation.¹⁹

5. The positive law status of peace agreements may be achieved only when the agreements themselves explicitly refer to the legal process or when the legalization of the stated agreements occurs through government authorities in one way or another after agreements have been signed. For instance, in Mozambique, based on the will of the belligerent parties expressed in their joint declaration,²⁰ a paragraph in the General Peace Agreement stated that the GPA would be transformed into Mozambican law.²¹ The NCA lacks such provisions related to legalizing the agreement.

¹⁵ 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 1 July 2020.

¹⁶ *ibid.*

¹⁷ 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 3 July 2020.

¹⁸ Lusaka ceasefire agreement 10 July 1999: Available at <<https://peacemaker.un.org/drc-lusaka-agreement99>> accessed 26 September 2020.

¹⁹ Christine Bell, ‘Peace agreements: Their nature and legal status’ (2006) 100 *American Journal of International Law* 373, 389

²⁰ Joint Declaration (Mozambique, RENAMO, Zimbabwe, and Botswana), Rome, 7 August 1992. Available at <https://ucdpged.uu.se/peaceagreements/fulltext/Moz%2019920807.pdf> accessed 28 August 2020.

²¹ General Peace Agreement of Mozambique 4 October 1992, Protocol V Guarantees 2(c) p 33. <https://www.peaceagreements.org/masterdocument/392> accessed 26 September 2020.

6. As an implementation of the Northern Ireland Peace Agreement (known as the Good Friday or Belfast Agreement), reached in the multi-party negotiations on April 10, 1998, each government—the British and the Irish—organised referendums on May 22, 1998. In the agreement, a fixed time limitation was mentioned. Accordingly, within 42 days of being signed, the agreement provisions started being implemented, which allowed for convening referendums to facilitate people’s participation in the legal process. The agreement was subsequently approved by the voters.

7. In Colombia, the government led by President Santos and the FARC, the country's largest rebel group led by Londoño, signed a revised peace agreement on September 26, 2016. To endorse or reject the agreement, a popular vote was held on October 2, 2016. The Colombian people ultimately rejected the agreement.²² After then subsequently revising the peace deal, both parties had to find another way to legalize the agreement.

8. In Burma, over the past five years, no referendum was held for the people to approve or reject the NCA since no relevant provision appeared in the agreement itself. Rather than directly securing the legal status of the NCA, another step was created: seeking the legality of the Union Agreement (UA), which would eventually emerge from the NCA processes. Accordingly, after a Union Peace Conference (UPC), the UA would be produced; it would be submitted at the Union Legislative Assembly to seek approval.²³ Currently, because the junta has abolished the Hluttaw, the peace process brought forward according to the NCA has been implicitly dissolved.

9. Because of the provision in the agreement which states: “the agreement of the nationwide ceasefire between the Government of the Union and Ethnic Armed Organizations”, the current military junta does not have the legal right to continue to enforce the agreement. The Myanmar Army/Tatmadaw is a subordinate part of the government also in signing the agreement. There isn’t any provision mentioning that the Tatamdaw is a representative of the Government of the Union that has the right to represent the Government.

10. The National Reconciliation and Peace Centre (NRPC) which initiated and implemented the peace process led by the Aung San Su Kyi was abolished. Instead, a committee comprising six military leaders led by Lieutenant General Ya Pyi was replaced for the continuation of the peace process provided in the NCA²⁴. This committee has been set up by the military junta; therefore, it is illegitimate.

As a conclusion, the Nationwide Ceasefire Agreement is no longer valid in light of the international legal doctrine. This stance is confirmed by the comparative analysis and examples in paragraph 1 to 7. In addition, Legal Aid Network released a statement indicating that the 2008 constitution has been abolished by staging a coup which itself is against the constitution. Therefore, the entire peace process based on NCA and its political road map under the framework of the 2008 constitution can be considered as nullified.

²² BBC, ‘Colombia signs new peace deal with Farc’ (BBC News 24 November 2016)
<<https://www.bbc.com/news/world-latin-america-38096179>> accessed 26 September 2020.

²³NCA (n 4) para 21, 26.

²⁴ The Military Council, ‘Statement on Ceasefire and Permanent Peace’ (1 February 2021)
<https://cincds.gov.mm/node/10447>

Part V

Why The 2008 Constitution Should Not Be Reactivated

The 2008 constitution, in which the military dictatorship is embedded, has been legally and practically nullified by the military coup staged against its provisions, and by the unlawful detention of Aung San Su Kyi and the duly elected President Win Myint. By invoking the Penal Code, the Committee Representing the Union Assembly or *Pyidaungsu Hluttaw* (CRPH) has officially declared the coup-makers led by Min Aung Hlaing as criminals responsible for high treason. Therefore, in accordance with the 2008 Constitution Min Aung Hlaing is no longer qualified to serve as the Commander in Chief.

As such, in line with the Constitution, military officers can no longer be nominated by the Commander in Chief of the Defence Services to serve in various state institutions since the C-in-C position is vacant. As a consequence, there will be a stagnation or inability to act in the proper functions of the three main pillars of government-- the legislative, executive and judiciary branches. Hence, there will be no other way than to terminate the 2008 Constitution. It would be foolish for the NLD to offer again the C-in-C position to Min Aung Hlaing under the superficial rhetoric of national reconciliation. If so, the rule of law will remain unrealized and the endless circle of impunity remain in place.

=====

Part VI

Regarding the Constitution, Can the Indecisive Leadership of the CRPH Potentially Reinforce the Public Movement?

Recently, the CRPH has clearly chosen to tread back into the same old framework of the 2008 Constitution by recognizing Win Myint as the elected president and by approving a law extending the State Counsellor position to Aung San Su Kyi. The CRPH would not be able to provide effective support to the CDM if it continues activating the 2008 Constitution. Rather, it should initiate the emergence of a legitimate National Unity Government during the fight against the MC. Such strategic action will only strengthen the CDM.

The Benefit of Strategic Goals

The idea of strategic goals consists in the creation of an overarching end through consistent and steadfast activities. In order to establish a Democratic Federal Union with the underpinning of the rule of law, the following strategic goals should be implemented:

The Adoption of a Democratic Federal Constitution

For this purpose, in 1990 Ethnic Resistance Organizations (EROs) and many other democratic forces started a Federal Constitution Drafting process. It took 18 years. In its final stage, the Federal Constitution Drafting and Coordinating Committee (FCDCC) finally approved the second draft in 2008.²⁵ This draft can be used for the time being and made publicly available to the people as well as to the international community. Based on this Federal Constitution draft, an interim or provisional constitution should be adopted as soon as possible. Only then the pathway to resolve simultaneously the combined issues of federalism and democracy will emerge.

²⁵ The Federal Constitution Drafting and Coordinating Committee (FCDCC), 'The Constitution of the Federal Republic of the Union of Burma', adopted on 12th February 2008. <<https://www.mmpeacemonitor.org/images/pdf/The-constitution-of-the-federal-republic-of-the-union-of-burma-second-draft.pdf>>

Part VII

An Analysis of the Public Administration Scheme Introduced by the CRPC and Suggestions for the Formation of the National Unity Federal Government (NUFG) for the Interim Period

1. The coup d'état has left a political power vacuum in Burma/Myanmar. To fill the void and protect the public, on February 22, 2021 the Committee Representing the Union Assembly (CRPH) introduced a Public Administration Scheme. Legal Aid Network (LAN) generally welcomes the CRPH and appreciates it for its commitment to the security of the people. However, the Scheme suggests that the CRPH with its people's administration team will replace the junta on the basis of rigid centralization while proclaiming democracy. This is an outright denial of the principles of federalism.
2. According to Chapter 2, article (6), of the Public Administration Scheme, the peoples' administration teams are authorized to protect and prevent any threats to the lives and properties of the people. However, Chapter 5, article (5) of the Scheme reverses the said article because it stipulates that only the police force has the permission to carry weapons. Since all security forces including the police are controlled by the MC or Myanmar Army, the CRPH can't command any police body and the peoples' administration teams don't have any enforcement power to execute their orders and regulations. Even worse is that the CRPH itself is facilitating the military dictatorship by legitimizing the police force which is employed by the MC to suppress protesters. LAN objects the chapter 5 paragraph (5) of the Scheme in the strongest terms and demands the immediate repeal of this article.
3. Apparently, the indecisive path taken by the CRPH is not in any way supportive of the rule of law and it is unclear whether CRPH is acting as a legislative body. If so, the Scheme would have been just a provisional administrative law or rule with no enforcement body. Since CRPH is not a government, it does not have the mandate to exercise administrative power over the people's administration team. The CRPH should establish a government in accordance with a specific interim constitution and designate which organization is in charge of security or how the government will form armed forces to protect the people. The CRPH itself is unclear whether it is taking the position as a legislative body or a government. As such, the CRPH cannot, or should not, exercise the legislative and executive powers simultaneously because its status is questioned.
4. It would be fair to say that the 2008 Constitution and the military dictatorship are like the head and tail of a coin. The CRPH has the responsibility to facilitate the emergence of a federal democratic union, as demanded by almost all ethnic nationalities and their organizations for seven decades, and by the CDM movement calling for an end to the military dictatorship. Hence, the first and foremost task of the CRPH is to abolish the 2008 Constitution but it has not yet done so. Chapter 2 paragraph (6) of the Scheme provides that the peoples' administration team would be in place until a duly elected government emerges. Yet it does not say clearly on which Constitution the new government would be based upon. The CRPH, on the other hand, declared that Win Myint is still the rightful president of the country. Such an arbitrary provision, allowing Win Myint to act as a president even after the term of the Union Assembly, can be found only in the 2008 Constitution.²⁶ Therefore the NLD should not drag the entire country under the 2008 Constitution, but rather should create a whole new pathway towards the elimination of the military dictatorship.
5. The foundation of federalism should be laid down while fighting against the military dictatorship. Even if the ethnic states/provinces cannot enjoy full autonomy as provided in Panglong Agreement, at least most of the executive power should be vested in the states/provinces. Above all, there should be a provisional government that can lead the fight against the military regime in the entire country.

²⁶ Article 61 (b) of the 2008 Constitution

6. In the initial stage, the provisional government shall support the non-violent CDM campaign (but not by giving orders). It should facilitate the horizontal networking in between the political forces and ethnic forces including the Ethnic Resistance Organizations (EROs), seek for international assistance and establish diplomatic relations with other countries. It should also take responsibility for soldiers who at various levels switch sides from the Myanmar Army to the protest movement whether carrying weapons or not. Those members of the army who are still carrying arms should also capture the coup leaders including Min Aung Hlaing and hand them over to the provisional government.

7. Moreover, before the military regime violently suppresses the peaceful CDM movement causing heavy casualties, the provisional government should seek humanitarian intervention by the international community and protection by the UN Security Council. Simultaneously, the government should guarantee and encourage the practice of the right to self-determination by the ethnic states/provinces based on the Panglong Agreement, which is still a legally valid document in light of international law. This would also allow the ethnic nationalities to mobilize their armed forces getting ready for military self-defense operations. Although use of force and war are forbidden by the UN Charter, self-defense is permitted. The best defense is a good offense. Nay Pyi Taw, the capital city and the territorial base of the MC, can be designated as a military target in accordance with international humanitarian law. Finally, the EROs and an international peacekeeping force can take control over the capital after the civilian population is evacuated.

8. The aforementioned agenda is intended to facilitate the CDM based public struggle for the elimination of the military dictatorship. At the same time, efforts should be exerted for the emergence of a new Federal Democratic Constitution, along with the state/province constitutions, so that the establishment of a Democratic Federal Union will become reality.

9. In order to implement the aforementioned agenda, the provisional National Unity Federal Government (NUFG), which primarily comprises leaders of the entities listed below, should be established as soon as possible.

Out of the many EROs active in the country, non-Myanmar²⁷ EROs that meet the following criteria should be eligible and welcomed to participate in the formation of the National Unity Government.

- (a) Independent organizations, which have effective political leadership and objectives and are by no mean under the command of the Myanmar Army;
- (b) Organizations with relatively strong army under their political leadership and command;
- (c) Organizations that have a designated or controlled territory;
- (d) Organizations that stand against the military coup and are willing to protect the people and the peaceful protesters; and,
- (e) Organizations that have fought or have been fighting consistently against the military dictatorship.

The National Unity Government should be formed on the basis of the parliamentary system with the following six delegations:

1. (15) Representatives of all the elected MPs in the 2020 election;
2. (10) Representatives sent by the EROs that are in line with the aforementioned criteria;
3. (10) The political leaders and activists – who are leading or have led the CDM campaign or who led the peoples' struggles against the military dictatorship previously and leaders of

²⁷ Myanmar nationals belonging to the Burmese ethnicity constitute the majority of the population. A sufficient number of their representatives have been elected in the 2020 elections. Thus, in the NUGF provisional government ethnic Burmese should not take any seat reserved for other ethnic nationalities.

various civil society organizations that have participated in the campaign in a leadership role – chosen by the two entities stated above through negotiations among them;

4. (10) Academicians chosen by the three entities stated above through negotiations among them.
5. One Union Attorney General invited by majority consent of all the above-stated representatives.

As such, the NUFG shall be formed with the above-mentioned 46 persons. In addition, the federal government shall appoint the Auditor General of the Union with the approval of the Union Assembly.

Part VIII

The responsibility of the National Unity Federal Government (NUFG)

The National Unity Federal Government shall:

(1) Facilitate efforts for drafting state (provincial) constitutions in accordance with the core principles of the Federal Constitution Second Draft and in return make amendments to the Federal Constitution based on those state constitutions; adopt the Federal Constitution with the approval of two-third of the constituent units of the Union; facilitate a referendum in the respective states to approve their constitutions as to get the consent of indigenous inhabitants and local population; hold union and state/regional elections in accordance with those constitutions. (The NUFG shall implement this agenda within three years from NUFG's establishment.)

(2) Reject rigid centralization and exercise optimum centralization to facilitate stability and tranquility across the Union.

(3) Guarantee the right to self-determination and full autonomy of the constituent units in accordance with the Panglong Agreement until a Federal Democratic Constitution is adopted and protect the interest of every state/province and constituent unit.

(4) Promote the unity of the movements and other entities that are fighting against the military dictatorship and MC or that could be well disposed to oppose them.

(5) Build national unity among the various ethnic nationalities on the basis of human rights, rule of law and federalism while fighting against the military dictatorship and MC.

(6) Repeal the laws undermining individual freedoms, democratic rights and the right to self-determination of the ethnic nationalities; make new laws without prejudice to customary and collective rights on land of the ethnic nationalities, including the ones that guarantee individual land ownership with limitations, and submit relevant land, natural resources and environmental laws to Union Assembly.

(During the interim period the NUFG shall adopt the Provisional Constitution in line with the provisions in the Federal Constitution (2nd draft) and establish the Union Assembly and State/Province Assemblies in accordance with the 2020 election result.)

(7) Divide power on land management between the federal government and state governments: 30% of all lands in the Union shall be managed by the federal government and 70% will go to state governments in each and every respective state/region without prejudice to the rights of indigenous inhabitants stated in paragraph 6.

(8) Adopt plans and policies in order to establish a Federal Union Army. During the interim period, in accordance with the provisional constitution, the NUFG shall form a Military Commission for the

command of the Federal Union Army; the civilian Minister for Defense, appointed by the NUFG, shall oversee the Chief of Staff who is also the chairperson of the Military Commission. The president, elected in accordance with the provisional constitution, shall be the Commander-in-Chief of the Federal Union Army.

(9) Include judicial provisions in the provisional constitution in order to establish an independent, impartial, efficient and resource-rich judiciary apt to guarantee fair trial.

(10) Include provisions in the provisional constitution for the establishment of a Commission for Bribery Eradication composed by qualified and independent persons that have an anti-military dictatorship background.

(11) Adopt a law for the establishment of a Bureau of National Security and Intelligence referring directly to the Prime Minister. Police and security forces shall be under the supervision of the civilian Ministers for Home Affairs or other Ministers who have been active for at least 5 years in the state services as civilians if he/she is transferred from military service.

(12) Support national enterprises and trade with the objective to make them able to compete efficiently in international markets; make laws that authorize the states/provinces and units to give priority to national enterprises operating in the respective ethnic states/provinces for investment licenses on land and natural resources and favor joint venture licenses for national and international corporations.

(13) Take measures to secure the workplace and livelihood for all civil servants participating in the CDM campaign. In addition to this, the government shall take responsibility for the security of the civil servants and military officers who are willing to provide confidential documents of the successive military juntas, including also their families.

(14) When the National Unity Federal Government is constitutionally established on the basis of the aforementioned factors and declared to the international community, it shall seek legitimacy from the United Nations. It will then have an opportunity to ask for UN Peacekeeping Operations.

(15) Implement the right to dual citizenship with the consent of the respective states/provinces in accordance with Article 151 of the Federal Constitution to facilitate eradication of the military dictatorship and economic development and, after the UNFG obtains the recognition of the international community, issue new passports.

(16) Either seek international funding or use reserves from the Union Budget to provide scholarship programs for qualified ethnic youths.

(17) Revoke all laws which infringe freedom of the press, including the 1923 Official Secret Act, and acknowledge that freedom of expression is the fundamental lifeblood of democracy; produce laws that enable the public and the media to investigate activities of the government institutions with the exception of a few national security matters; provide grants from the Union Budget to independent press and media outlets which do not accept funding from cronies; guarantee the right to freedom of expression invoking Article 14(a) of the Federal Constitution and enact a new media law based on it.

(18) Adopt a law regarding the distribution of natural resources revenues and road taxes in the states which own the resources and in which national highways are located. This law enables the state governments to retain 70% of the revenues and share 30% with the Union government.

- (19) Levy taxes on individual income and businesses throughout the Union excluding media industry specified in paragraph 17 and make relevant laws for direct distribution of taxes to the three levels of the governments in the Federal Union which are federal, provincial and local governments;
- (20) Distribute revenues to less developed states/provinces by the federal government in order to reduce the economic gap between the states and regions;
- (21) Implement the eradication of narcotic drugs;
- (22) Provide financial assistance to states/provinces in order to ensure free healthcare and education to the families earning less than the minimum wage and having no other source of income; the minimum wage for every individual shall be regulated by the respective states/regions in conformity with their unique status.
- (23) Enact an electoral law that includes the following:
- i. establish independent and impartial Union and State Election Commissions;
 - ii. introduce an electoral system with the combination of a proportional system, based on province/state wide constituencies, and a first past the post system;
 - iii. grant the Supreme Court of the Union and High Courts of the States/Regions final appellate jurisdiction to adjudicate election disputes.
- (24) International and regional agreements executed by the previous governments of Burma, before the NUFG takes the office, shall be reviewed in accordance with Article 200 of the Federal Constitution.
- (25) Facilitate the formation of new states/provinces if the EROs that participated in the fights against the MC wish so, in line with the Article 202 of the Federal Constitution.
- (26) Encourage the emergence of political parties which primarily focus on diverge political ideologies in support of the multi-party system; party members shall have the right to express their will freely in support of inner party democracy as to prevent the emergence of authoritarian parties; encourage the practice of democracy within parties through the election of party leaders.
- (27) Reward any person who led the CDM movement with the Union Hero title and reasonable emoluments with the endorsement of the ten thousand people involved in CDM; any person belonging to EROs and ethnic organizations who participated in the fight against military dictatorship shall also be rewarded with the National Hero title and reasonable emoluments if they fit with the criteria set by the NUFG.
- (28) Establish a process for disarmament, demobilization, and reintegration for army personnel from the Myanmar Army, also known as the Tatmadaw, and treat them in accordance with international humanitarian law; if they wish to continue fighting against the military dictatorship the NUFG shall assign them relevant duties after going through an accurate scrutiny.
- (29) Establish a Truth and Reconciliation Commission invoking Article 188 of the Federal Constitution in order to address the past abuses of successive authoritarian regimes.
- (30) Produce a new labor law based on the 1926 Trade Union Act and the norms adopted by the International Labor Organization; protect the right of both trade unions and employer's organization in accordance with the law.
-

Part IX

Interference of The International Community and State Sovereignty

After staging the military coup, Min Aung Hlaing delivered a speech in which he spoke of the repatriation of the Rohingya minority that fled to Bangladesh a few years ago. Accordingly, it is evident that the coup-leaders are afraid of possible legal actions by International Courts. Hence, the National Unity Federal Government can lay out all the necessary measures to actually take legal action against the coup-leaders.

Furthermore, invoking the Responsibility to Protect Principle²⁸, the National Unity Federal Government can seek assistance from the UN Security Council (UNSC) to facilitate the proceedings of the international courts (ICC and ICJ)²⁹ which are now trying to take legal action against the military junta led by Min Aung Hlaing for war crimes, genocide and crime against humanity. Additionally, it can ask for military protection of the UNSC in order to prevent heinous crimes against the peaceful demonstrators to be committed by the MC repeatedly, similar to the incidents occurred during the 8-8-88 popular democratic uprisings.

In extreme cases, (...) the unwillingness of a Security Council member to allow for collective measures to protect populations at risk of genocide, war crimes, crimes against humanity and ethnic cleansing may even be found to be a violation of international law.³⁰

Part X

To Put the Top Military Leaders on Trial for Their Crimes

The top military leaders of the Myanmar Army or my father's Army, as repeatedly proclaimed by Aung San Su Kyi, have once again committed international crimes and high treason. Another coup and further grave crimes are very likely if the junta is not held accountable for its criminal activities. The rule of law should be restored by punishing the criminals. All military officers, from low rank to generals, who changed sides and joined the National Unity Federal Government should be granted amnesty and be rewarded. By doing so, the statement of CRPH in which the coup-leaders are indicated as criminals, responsible for high treason, will be put in practice.

Protection of The Public Participating in The CDM Campaign.

For this purpose, all people – particularly the victims and their family members, legal organizations, the CSOs working for documentation, and media – should exert efforts to collect not only reliable information but also evidential materials which might be admitted in national and international courts. The LID 99 and 33 of the Myanmar Army committed war crimes against the civilian population during the battle of Monekoe, northern Shan State in 2016 and genocide against Rohingya in Rakhine State in 2017. According to Radio Free Asia, on 12 February, the same LID 99 abruptly entered the Meikhtila Aviation University compound at around 2:30 in the morning and threatened the residents. LAN requests the entire public to promptly report such violations and other operations of the LID 99 and 33 in every corner of the country, including information about the responsible commanders and officers.

²⁸ International Commission on Intervention and State Sovereignty., Evans, G. J., Sahnoun, M., & International Development Research Centre (Canada). (2001). **The responsibility to protect**: Report of the International Commission on Intervention and State Sovereignty.

²⁹ CITE CASES

³⁰ Andreas S Kolb, *The UN Security Council Members' Responsibility to Protect: A Legal Analysis* (Springer, Berlin 2017) 529.

As for the people residing in close proximity to the territory controlled by EROs and other remote areas, they should also be well-prepared and organize themselves for self-defense and to support the National Unity Federal Government (NUFG).

Part XI

Violations of Human Rights, Vandalism Against Public and Private Property and Gang-Harassment Should be Strictly Prohibited

During the public demonstration against the military dictatorship and the coup-leader no one should be subjected to violations of fundamental human rights committed by authorities, groups or individuals. The MC granted pardon to over twenty-thousand prisoners across the country. This might be a ploy of the MC in order to crack down on the peaceful demonstrations and CDM campaign. Everyone has the right to the presumption of innocence and access to due process of law. The ex-prisoners who have recently been released should not be treated as criminals anymore as to avoid further violations of human rights. No one should be punished without going through a fair trial and gang-harassment should not be allowed. If possible, the community should create appropriate conditions to support this process.

No one should be forced to resign or be employed without his or her free consent. The right to employment is also a human right. The livelihood of people and civil servants belonging to different social-classes and involved in the CDM campaign should be secured so that they are not facing starvation during the fight. The right to livelihood is the most basic human right.

The destruction of state-owned and private property should not be allowed as the right to property is also a fundamental human right. The assets and possessions of Min Aung Hlaing, his family and other coup-leaders can be seized and nationalized by making relevant laws after overthrowing the military dictators from power. The public should be cautious about conspiracy rumors by the military junta that portray the peaceful protesters as rioters. This was one of the reasons the 1988 uprisings ended in blood-shed. During the CDM campaign, awareness raising among the public regarding human rights, rule of law, constitution, fair trial and federalism should also be conducted. The injustice must be defeated by virtue of justice.

Part XII

When Can We Presume That the Military Dictatorship is Completely Eliminated?

There are two different opinions regarding the elimination of the military dictatorship. The first opinion believes that the military dictatorship can be dismissed by conducting non-violent CDM movement. The operation of the administrative mechanism of the junta may be stopped, yet it is not easy to dismiss the MC. The CDM movement alone cannot defeat the military dictatorship. The very first step to eliminate the dictatorship requires the coup-makers led by Min Aung Hlaing be arrested and put on trial in either domestic or international courts.

Hence, now is the time to discard the unrealistic expectation of national reconciliation repeatedly proclaimed by Aung San Suu Kyi and obtaining peace and stability through negotiations with the military leaders, especially those who are indicted as criminals. Whether the CDM movement leaders, NLD or any EROs should refuse dialogue or negotiation with the criminal regime; otherwise, their criminal actions would have been abetted and the rule of law destroyed. Rather, the coup leaders

must be held accountable for their crimes accordingly; thereby the military coup that has long been accustomed to the country would be eradicated.

Then, a whole new Federal Army shall be established with the inclusion of the Ethnic Resistance Armies. Every security force including intelligence must be reformed and placed under the supervision of civilian government. A new federal constitution along with the constitutions of the states/provinces shall come into existence. In accordance with those constitutions, a new federal government and state/province governments must be established through elections. It can be presumed that the military dictatorship is successfully eliminated when the aforementioned conditions are met.

If the public agree to take these suggestions, the followings should be demanded along with the peaceful public movement:

- (1) Elimination of the military dictatorship;
- (2) Abolition of the 2008 Constitution;
- (3) Emergence of the National Unity Federal Government;
- (4) Emergence of the Democratic Federal Constitution;
- (5) Bring Min Aung Hlaing and other coup-leaders into trials;
- (6) Unconditional release of those detained by the MC.

=====

Part XIII

How the EROs Can Provide Military Protection to the Public Participating in Non-violent CDM Movement

What role can the EROs play in the CDM movement? Some people might blame the EROs for not helping the public when the regime shot at the protestors, arrested and conducted midnight raids. Some might be optimistic about the EROs. On the other hand, some speculate that EROs should stay away from the peaceful demonstrations; otherwise, the MC may have a good excuse for brutal suppression of the movement.

As long as the public can proceed with the peaceful demonstrations in every town and in cities across the country, and the MC does not pose any imminent threats to the demonstrators, the EROs should keep its distance.

However, EROs who claim themselves to be fighting for the sake of self-determination, should not sit back and watch the entire country protesting against the junta for their liberty and individual self-determination. It would not be fair. The EROs should at least approach the situation from a humanitarian intervention principle.

Humanitarian Intervention Versus State Sovereignty

The intense situation of Burma suggests that if the military leaders were to launch deadly suppression against the protestors again, as was the case during the 1988 uprising, humanitarian intervention by the international community could be expected for two key reasons. First, in 2018 the UN IFFMM released a comprehensive report on the human rights violations committed by the Myanmar Army for the alleged genocide against the Rohingya to war crimes and crimes against humanity against other ethnic nationalities in Kachin and Northern Shan State.

Second, more than hundreds of unarmed civilians were slaughtered during the 1988 uprising, though there was not a complete record regarding the incident. Aung San Suu Kyi and her NLD party

has committed a tactical error with regard to the aforementioned grave crimes. They whitewashed the international crimes of the ruling military leaders under the rhetoric of national reconciliation and denied the principles of rule of law by providing impunity to the generals. Now is the time to uncover the sufferings of the entire people and let the whole world know how the successive junta blatantly suppressed the demonstrators and committed heinous crimes against the civilians during 1988. Having done so, the public participating in the current CDM movement will be somehow protected from the analogous incidents, the MC will at least hesitate to commit such crimes again as the international community is watching closely.

According to the principles of international law, sovereign equality of the States is enshrined.³¹ Hence, international disputes shall be settled through peaceful means,³² the use of force is forbidden³³ and generally non-interference principle is practiced.³⁴ However, in some instances, the international community's failure to promptly activate the obligation of humanitarian interference had resulted in thousands of civilian casualties under preventable circumstances.³⁵

In some cases, a State intervened in the internal affairs of another State to provide humanitarian support although it was not yet recognized by international law. For example, India had to interfere with the internal affairs of Pakistan in order to protect the people of Bangali in 1971; Tanzania helped dismiss the Idi Amin administration of Uganda in 1979; the Vietnamese army invaded Cambodia to stop the Khmer Rouge massacre of its own population and overthrew the government, as such.³⁶

The stated incidents indicate that the sovereignty of a particular State was intruded under the principle of humanitarian interference because a handful of authoritarian regimes committed grave crimes against its own people. Unlike the stated incidents, the problem of Burma lies in between different entities in the country. Thus, this has brought the Panglong Agreement to the pivotal role in order to activate the humanitarian interference of the international community.

In the case of Burma, the Panglong Agreement³⁷ plays a significant role since it is the founding document of the Union. As the Agreement is still valid in light of national and international law, the ethnic states/provinces have every right to enjoy self-determination and full autonomy. However, the successive military regime destroyed the lawful rights of the ethnic nationalities by staging military coups three times (in 1962, 1988 and 2021) over the past 73 years.³⁸ Therefore, the Union has already been dissolved by unlawful actions of the successive military regimes. None of the EROs attempted to secede from the Union, yet the MC dissolved it by force. By virtue of that, all ethnic states/provinces have returned to the pre-union state and they can be regarded as independent ones

³¹ Article 2 (1) of the UN Charter;

³² Article 2 (3) of the UN Charter;

³³ Article 2 (4) of the UN Charter;

³⁴ Article 2 (7) of the UN Charter;

³⁵ In 1994, the majority of Hutus led by the government committed genocide against the Tutsi minority in Rwanda.

³⁶ Christine Chinkin, 'Appendix 18: Memorandum submitted by Ms Christine Chinkin, University of Michigan Law School' (Select Committee on Foreign Affairs, Appendices to the Minutes of Evidence, UK Parliament, October 1999) <<https://publications.parliament.uk/pa/cm199900/cmselect/cmfa/28/28ap29.htm>> accessed 9 February 2021.

³⁷ The Pang Long Accord – notwithstanding national law – has come into existence arising out of the Aung San-Attlee Agreement, also in relation to the Atlantic Charter; Aung San-Attlee Agreement (n 16) and Atlantic Charter 1941. Available at https://www.nato.int/cps/en/natohq/official_texts_16912.htm accessed 22 July 2020.

³⁸ The case of Burma should not be contrasted with Thailand, in which military coup happened 13 times to date, as the countries do not share the same historical background. Rather, it should be contrasted with India which had undergone British colonial rule as Burma. Since its independence in 1947, India has never experienced a military coup.

with the underpinning of self-determination. Therefore, one can presume that the problems in Burma are no longer a matter of internal affairs.

Legality of the Pang Long Accord

Burma did not come into existence as a totally new nation. She was under the rule of the United Kingdom (U.K). The U.K. and Provisional Government of Burma agreed in a separate treaty³⁹ that the Provisional Government would inherit rights and obligations covered by international agreements to which the U.K. was a party. This continued to bind the “permanent” Government of Burma, after its independence.

Notwithstanding a non-binding declaration, the Atlantic Charter – which led to the emergence of the United Nations – is *politically* binding. In addition to other countries, for Burma, it laid down, inter alia, a valuable principle, namely the right of people to self-determination, which continued to bind Burma.

In connection with this principle, the Aung San-Atlee agreement was made between General Aung San, the Head of the Delegation of the Burma Executive Council, and Mr. Attlee, the then Prime Minister of UK on January 27, 1947 after the Second World War. It was an actual agreement, binding in international law. This was apparently the intention of the parties. In regard to frontier areas, paragraph 8 of the said Agreement provided as follows:

It is an agreed objective of both His Majesty’s Government and the Burmese Delegates to achieve the early unification of the Frontier Areas and Ministerial Burma with the free consent of the inhabitants of those areas.

Accordingly, the incumbent ethnic states – designated in the then frontier areas, mentioned in the agreement– had the right not to join the Ministerial Burma; in which case, they could continue staying under the rule of the British Colonialists, and could struggle for their own independence in later periods. However, in search of unity and of struggling for independence collectively, they sincerely joined the Union together, based on a famous historic agreement – known as the Pang Long Accord. This agreement was concluded by parties within the same state. It therefore falls exclusively within domestic law. In addition, it could in theory implicate international law if it is not applied in accordance with the norms of the latter, e.g., international human rights norms.⁴⁰

The Right to Self-determination of the Ethnic States/Provinces

The ethnic states/provinces, which enjoy the right to self-determination lie in grey areas under international law. They have the right to reorganize the Union or declare as independent States separately. At this point, the ethnic states/provinces can exercise the right of self-defence in accordance with the UN Charter. They can even wage a war under the principle of self-defence.

³⁹ Treaty Series No. 16 (1948)

Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the Recognition of Burmese Independence and Related Matters, London, 17th October, 1947:

Article 2

All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Burma, devolve upon the Provisional Government of Burma. The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the Application of any such international instrument to Burma shall henceforth be enjoyed by the Provisional Government of Burma.

⁴⁰ Commented by David Fisher, Professor of International Law, Faculty of Law, Stockholm University, Sweden.

The EROs may have to provide legal argument within international law that they have the right to mobilize their troops within their respective states/provinces as well as to other states under the principle of humanitarian interference to protect the people. As Sun Tsu, a Chinese military strategist, put it, the best defence is a good offense. Nay Pyi Taw, the capital city and the territorial base of the MC, can be designated as a military target in accordance with international humanitarian law. Finally, the EROs and international peacekeeping forces can launch military offensives against the capital after the civilian population is evacuated.

In order to avoid the aerial attack by the Myanmar Army, EROs' troops should not march into towns and cities, instead they can dispatch commando corps. Moreover, they can cut off all the routes and highways that the Myanmar Army utilizes and ambush its troops and armoured vehicles. Such attacks will not in any way affect the CDM movements in towns but provide protection and encourage the people participating in it. Likewise, the peaceful demonstrators may also raise their voice to support the right to self-determination of the ethnic nationalities invoking the Panglong Agreement.

During the 1988 uprising, the KNU launched offensive operations in Mae-tha-waw in Karen State while the Communist Party of Burma attacked Mongyang in Northern Shan respectively. At that time, Yangon was the capital city and the headquarter of the ruling junta. Thus, if the EROs attack the capital, the civilian population will be severely affected. Now that Nay Pyi Taw has been made the headquarter of the MC, the EROs can designate it as a military target. However, the EROs should be aware of the civilian casualties and most importantly, they must ensure that they respect human rights throughout the war, if they are going to launch offensives against the MC.

PART XIV

Declare the MC as A Terrorist Group

The entire public should raise their voices both in and out of the country in order to declare the MC as a terrorist group. In support of this, there are two concrete reasons. The first reason is that the junta has committed genocide against the Rohingya. Another motive is that the UNFFMM has regarded six generals including Min Aung Hlaing as criminals for their commissions of war crimes and crimes against humanity in Kachin and Northern Shan States. The same six generals have committed unlawful military coups. The CRPH has also proclaimed that the coup-makers are criminals responsible for high treason. Their crimes must be exposed to the international community to attract its attention. On the other hand, the entire public must keep putting pressure on the international community to declare the Myanmar Army a terrorist group.

There can be three potential consequences for pursuing the aforementioned activities. First, crimes against the civilian population might be plummeted as well as blatant abuses might be prevented. Second, internal insurrection can erupt within the Myanmar Army if the entire military institution is at the brink of international condemnation. Some military leaders, who might capture Min Aung Hlaing and his subordinates and switch sides, could emerge. For instance, Gen. Fidel V. Ramos from Philippines; in Indonesia, Gen. Suharto was forced to resign by his fellow military generals because of the public protest against the regime.

Thirdly, international investments and economic assistance given directly to the MC could be ceased if the international community declared the Myanmar Army a terrorist organization. Such economic and humanitarian assistance will be provided through the National Unity Federal Government (provisional); the EROs operating along the borders; cross-border NGOs and through civil society organisations and church-based organisations. Then, the livelihood of the entire public may be provided for some months during the fight against the military dictatorship.

Conclusion

The Civil Disobedience Movement is different in many ways from the 8-8-88 uprising, though, we have been anticipating this moment for 32 years. All hands have to join together to grab this opportunity and to demolish the dictatorship. If the movement is defeated again, many generations will have to kneel down before the dictatorship for 50 to 100 years more. It should not happen. Ba Maw Tin Aung, a late prominent writer in Burma, averred, “the way to judge one’s value is to measure the extent to which people carry the duties of history on their shoulders”. Win Tint Tun, a poet, wrote “everyone has the right to choose how to write his or her own history.” It connotes our individual responsibility for writing our history.

The differences between the CDM and the 8888 uprising are;

- (1) Currently, youth leaders those who are leading the movement know about information technology rather well and their leading style and methods are stronger than the 8888 era.
- (2) Including Facebook, many social media outlets are strongly and energetically working, allowing the international community to see the realities happening on the ground; for instance; Aljazeera, BBC those kinds of global media outlets are launching news in English almost every day.
- (3) At the time of the 8888 uprising, a number of people thought that federalism is a secession. However, now most of the political forces, ethnic as well as democratic, have a common view that Burma should adopt federalism, that it is one of the appropriate models, and that it should be sought and implemented accordingly.
- (4) International courts,⁴¹ particularly the International Criminal Court, have started to hold the military leaders accountable for their crimes, this was not the case before or during the 8888 democratic uprising.
- (5) The UN Security Council in which China is a permanent member has started to put pressure and, possibly, it may make a decision on the use of force, if the junta suppresses the peaceful demonstrators like the experience of the 8888 uprising.

However, there is no need to wait that long. We should not sit and wait for thousands of people in the CDM to lose their lives; for the international community’s effective intervention and assistance to come. In order to overcome this tragedy, establishing the National Unity Federal Government and seeking its legitimacy should be our collective goal. This is at the heart of this proposal.

The CDM strategy is mainly dependent on the 2020 Elected Representative from NLD and others. To this end, the vision must be made clear -- if you succeed to fulfil the 2020 General Election results, the 2008 Constitution should not be reactivated. It is a mistaken path. The mutually flourishing way forward is under the agreement that the 2020 General Election result should be implemented only for demolishing the dictatorship, and for the establishment of the Federal Democratic Union. The approach should be clear; otherwise, we are facing a situation of losing everything. Even to follow the 2008 Constitution, the 2020 General Election results won’t be restored.

To overcome this difficult condition, it’s the right time for the CRPH, currently taking a leading role, the NLD leaders, and the 2002 Elected Representatives to think of having an open

⁴¹ The International Criminal Court and International Court of Justice

discussion. Acknowledgment of personal abilities of Daw Aung San Suu Kyi such as being able to organize the public, capable of being patient, being able to lead the NLD party to be stronger than before, confronting and communicating with the military leaders without fear, being able to speak English and Burmese language fluently, being able to give the answer quickly and reasonably to any public or any person, capable of the sacrifice to her life for only this end. It's true that all of these should be valued.

On the other hand, even completely knowing that it is impossible to amend the core provisions of the constitution, she bowed down to the 2008 Constitution when receiving and enjoying the powers she received. Then, ignoring human rights violations, denying the rule of law, giving inconsequential lip-service about the Federal Union and placing the entire country under the 2008 Constitution, protecting the military leaders, honoring tremendously the fascist Myanmar Army, without regard of the impact in the real lives of ethnic people, without trying to understand deeply self-determination and trivializing and underestimate the Ethnic Resistance Organizations as such, are failures to her leadership and should be avoided. The objective of the CDM movement should not simply be the release of Aung San Suu Kyi and political detainees. Rather, it should strive for overthrowing of the military dictatorship on the one hand and the achievement of self-determination for the ethnic states/provinces on the other.

Self-determination will never be achieved by simply inviting the military junta into a dialogue process. It will be achieved only after the power of the military dictators have been abolished unequivocally. While exerting efforts to overthrow the military dictatorship, the emergence of a new federal democratic constitution along with the constitutions of the ethnic state/provinces needs to be initiated; and, the draft constitutions must be formally approved with the consent of at least the two third majority number of the constituent units of the union.

According to the constitutions stated above, all state security institutions, including the Myanmar Army, police and other intelligent organizations, must be reformed and all of them be placed under civilian supremacy. To uphold the rule of law, an independent, impartial, efficient and resource-rich judiciary needs to come into existence. These tasks must be implemented by the National Unity Federal Government during the limited interim period. With these underpinnings, the new civilian governments – in both federal and provincial levels – would emerge and assume powers. Of course, all of these tasks are quite challenging but not impossible.

Our Legal Aid Network is committed to supporting and facilitating the CDM campaign from the aspect of the rule of law, human rights, democratic rights, justice and federalism. To these ends, we humbly would like to request the assistance and cooperation of the national and international legal and human rights organizations and of the states which are eager to defend, protect and promote the values stated above.

Legal Aid Network

7 March 2021

(The Burmese version of this paper was published on 24 February 2021.)

For more information, please contact:

Mr. Aung Htoo, M.A (Human Rights) R.L., Human Rights Lawyer
 Program on Teaching Human Rights Law, Columbia University, New York, USA.
 Founder of Legal Aid Network (LAN) and Principal of Federal Law Academy
 E.mail: legalaidnetwork@gmail.com
 Tel: (46) 76 1156 215
 Website: legalaidnetwork.org

Mr. Adalgiso Montinari: M.A. Conflict Studies and Human Rights, University of Utrecht,
The Netherlands
Senior Researcher & Program Facilitator - Legal Aid Network (LAN)
E.mail: legallaidnetwork@gmail.com

Ms. Lu Awng (LL.B, B.A Com Arts)
Advocacy Coordinator, Legislative Assemblies
Legal Aid Network (LAN)
Email; lu.awng@legallaidnetwork.org

Ms. Ja Nu Pan (LL.B, LL.M, Ph.D)
Advocacy Coordinator for Legal and Constitutional Campaign
Legal Aid Network (LAN)
E.mail; janupan@legallaidnetwork.org

Ms. Zulma Miranda, Attorney at Law, J.D. (Juris Doctor) United States
Advocacy Attorney for Legal Aid Network to UN, US and International Legal Communities
Email: Zulmiranda@gmail.com | LinkedIn: www.linkedin.com/in/zulmamiranda |
Twitter: [@zulmimiranda](https://twitter.com/zulmimiranda)

Mr. Lahpai Naw San (LL.B, D.L)
Advocacy Coordinator to Ethnic Resistance Organizations
Legal Aid Network (LAN)
E.mail; lahpai.nawsan@legallaidnetwork.org

Ms. Roi San Awng (LL.B, DBL, DML)
Advocacy Coordinator to National Legal Communities
Legal Aid Network (LAN)
E.mail; roisanawng@legallaidnetwork.org