New Approaches to the Peace-seeking Process in Burma/Myanmar

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COMPILED BY
FEDERAL LAW ACADEMY

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Illustrator/Designer: **Ying Tzarm**

Contact: Mr. Aung Htoo,
Principal of the Federal Law Academy
legalaidnetwork@gmail.com;
www.legalaidnetwork.org

SOME EXTRACTIONS FROM THIS PAPER

"In addition to several other countries, such as Mozambique and Columbia, Burma's contemporary history has illustrated that, if the dialogue between the belligerent parties, albeit necessary, is the sole emphasis, then genuine peace will never be achieved and the resumption of fighting will constantly occur."

"Ethnic and democratic leaders alike commonly articulate that the "political problems" would be resolved by political means. While this premise is correct and appreciable, it is neither complete nor workable. The term "political means" is, per se, vague and inaccurate; like a boat without a rudder, it would go nowhere on its own. During the previous decade, the political problems have primarily turned into issues surrounding the Rule of Law, as the five following reasons show in this paper."

"In the context of Burma, unless a genuine Federal Union can be established, opportunity is quite slim to achieve a genuine peace. Simultaneously, only when "federalism" is rhetorically claimed, rather than peace, war and other rights violations would continue unabated. The stated term "a genuine Federal Union" is rather controversial. To facilitate resolving this, federalism dynamics and dynamic federalism may be realized, and possibly practiced to a noteworthy extent."

"In the event the ethnic nationalities and their states/provinces broadly participate in a new constitution making process reflecting ethnic-based cooperative federalism, the doctrine of unity in diversities, required in a genuine Federal Union, would become a reality."

"The most crucial efforts should focus on seeking criminal accountability for the grave crimes allegedly committed by the ruling military leaders led by C-in-C Min Aung Hlaing and his inferior accomplices. Without such accountability, the legitimacy of future meetings will remain under threat as the perpetrators are formally regarded as criminals from a legal perspective, both nationally and internationally."

"It is therefore now time for all EROs, ethnic CSOs, religious institutions, human rights organizations, women's organizations, lawyers' associations, legal and paralegal organizations, and national and international funding agencies to facilitate, and join hands with, the international legal and human rights organizations to avoid these outcomes. Only then can a true peace-seeking process unfold in Burma."

CONTENT

TERMINATION OF THE NATIONWIDE CEASEFIRE AGREEMENT: NEW APPROACHES TO THE PEACE-SEEKING PROCESS IN BURMA/MYANMAR

EXECUTIVE SUMMARY

Unless the underlying issues surrounding the ethnic nationalities can be resolved properly and effectively, a genuine peace might not be achieved. Highlighting ethnicity—or accentuating ethnic grievances and demanding the equal right to self-determination—is not toxic. Rather, it offers a way to move toward the emergence of a genuine federal democratic union in Burma. In this regard, the misconception of a part of the international community must be addressed.

Why does it matter? The results of putting ethnicity at the centre of public life are toxic. Inter-ethnic relations have become dominated by zero-sum thinking that hardens ethnic divides and drives the proliferation of armed groups, with deadly consequences. In many ways, violent conflict in Myanmar can be seen as the militarisation of ethnicity.[1]

The major crisis regarding ethnicity is not the result of putting ethnicity at the centre of public life. The stated crisis has primarily arisen due to ignoring the 1947 Pang Long Accord, which has, since its inception, remained legal based on both domestic and international law. The underlying problem lies not with the ethnicity but with the military dictatorship that activates Myanmar chauvinism, fueling the emergence of extreme nationalism. The 2008 Constitution by no means creates a new political system, but the portrayal of this legal framework tries to repackage the existing military dictatorship under the façade of a new, more democratic regime.

1 See International Crisis Group, 'Identity Crisis: Ethnicity and Conflict in Myanmar,' (28 August 2020) <https://www.crisisgroup.org/asia/south-east-asia/myanmar/312-identity-crisis-ethnicity-and-conflict-myanmar> accessed 1 September 2020.

Under the 2008 Constitution, the country and its top military leaders are not only prolonging non-international armed conflicts but also ending the process of seeking accountability through international justice mechanisms—the International Court of Justice (ICJ) and the International Criminal Court (ICC).

The crucial issues surrounding citizenship, human rights, democracy, politics, and armed conflicts are primarily attributed to the military dictatorship, even if some conflicts over territorial control or other objectives exist among the ethnic forces. Indeed, the military regime led by Ne Win used the 1974 Constitution—in which citizenship was not a serious issue—to enact the 1982 Citizenship Law, which incorporates racist concepts. Since then, the citizenship problem has become increasingly prevalent. The content of the 1982 Citizenship Law was also reflected in Article 345 of the 2008 Constitution by the military. Hence, it is virtually impossible to cancel or amend the 1982 Citizenship Law as long as the 2008 Constitution continues to exist. The citizenship issue thus arose not from ethnicity but from a fabrication by the military dictatorship.

Historically, the term "Myanmar" indicates a majority nationality, whereas "Burma" embodies the entire country. Similar to other ethnic nationalities—such as Shan, Kachin, Karenni, Karen, Rakhine, Mon, Chin, and so on—Myanmar constitutes one ethnic nationality. In recent seminars, including the fourth session of the Union Peace Conference, Min Aung Hlaing repeatedly urged other nationalities to adopt the "We all are Myanmar" concept, which ultimately represents an unethical motivation for practicing Myanmar chauvinism. It is time now for all Myanmar ethnic nationals to practice equality among all ethnic nationalities, primarily based on collective rights—starting with the way a Myanmar province is formed.

Ethnicity has been manipulated by the successive military regimes—who have used it as a weapon—to incite racial hatred or to implement "divide and rule" policy, which is detrimental to peace. The successive Myanmar military rulers define peace by focusing merely on the absence of fighting by pressuring the Ethnic Resistance Organizations (EROs)[2] to completely surrender. In this paper, a reasonable definition of "peace" is explored.

The ruling regime has produced, and adhered to, the Nationwide Ceasefire Agreement (NCA) as the overarching document that might create a pathway to peace. However, more unfavorable circumstances that impede peace have been occurring for at least five years since the signing of the NCA.

2 In this paper, we refuse to use the term 'Ethnic Armed Organizations (EAOs)', which is being used forcibly by Myanmar military leaders. The term EAOs by no means relevant to their political ambitions and it can also denote that the armed groups have similar status to thuggish groups. The situation on the ground is quite different. Such armed groups are fighting for what they believe, for their political goals. They are battling against oppressions of the Myanmar army in their respective states/provinces. Therefore, in this paper, they are referred to as the Ethnic Resistance Organizations (EROs).

In this paper, a detailed analysis examines the NCA and the Union Agreement (UA) with respect to the minimum standards of the "Rule of Law," international humanitarian law, human rights laws, and domestic laws. For instance, the "forcible confiscation of land" prohibited in the NCA does not deter government authorities and the Myanmar Army from confiscating lands by invoking the existing laws. Ambiguities in the NCA and the negative results are explicated vis-a-vis the lack of an independent supervision or enforcement mechanism. The legal status of the NCA is therefore also analyzed in this paper. Eventually, we recommend terminating the NCA and all related measures to clear the path forward and to search for a new, comprehensive, and reliable process.

In connection with seeking peace, the interpretation of "federalism" made by C-in-C Min Aung Hlaing is examined. Invoking the provincial sovereignty emanating from, and legitimized by, the Pang Long Accord, we elaborate on why Burma should adopt an ethnic-based federalism. To this end, the experiences of other countries involved in non-international armed conflicts—such as Indonesia, Nepal, Ethiopia, Mozambique, South Africa, the Philippines, Sierra Leone, Columbia, and so on—are presented. Then, we submit our recommendation: rather than ethnic federalism that guarantees the unrestricted right to self-determination up to secession, ethnic-based federalism should be practiced—through which ethnic peoples and their ethnic states/provinces can enjoy "full autonomy."

Finally, having observed the multifaceted factors that influence, or are connected to, peace by any means, we present new approaches to the peace-seeking process, for the following reasons. To start, in addition to several other countries, such as Mozambique and Columbia, Burma's contemporary history has illustrated that, if the dialogue between the belligerent parties, albeit necessary, is the sole emphasis, then genuine peace will never be achieved and the resumption of fighting will constantly occur. In other words, if the current process surrounding the NCA proceeds, it would not lead to peace, even if it continues unabated for another decade. During such a period, the desperate depletion of natural resources—negatively affecting both the human and the natural environment—could not be deterred.

In addition, more positive laws that are detrimental to a genuine federal union would have come into existence. The rule of the military dictatorship operating under the 2008 Constitution would have been embedded, thereby resulting in catastrophic circumstances for the entire union.

Ethnic and democratic leaders alike commonly articulate that the "political problems" would be resolved by political means. While this premise is correct and appreciable, it is neither complete nor workable. The term "political means" is, *per se*, vague and inaccurate; like a boat without a rudder, it would go nowhere on its own. During the previous decade, the political problems have primarily turned into issues surrounding the Rule of Law, as the five following reasons show.

First, the so-called entire peace-seeking process would merely end in the framework of the 2008 Constitution in which blanket impunity is applied for any heinous crimes. Second, some unjust laws that infringe upon individual rights and freedoms have prevailed. Hence, rather than laying a democratic foundation, the rule of the military dictatorship has been embedded. Third, the existing laws, particularly those related to the exploitation and management of land and natural resources, impede the right of self-determination, in terms of the collective rights of the ethnic nationalities and their own states/provinces.

Fourth, the EROs, the ethnic political forces, and the ethnic civil society organizations (CSOs) are unable to express their will, collectively or individually, regarding the emergence of a genuine federal union in legal form. Fifth, regarding the international grave crimes allegedly committed by the Myanmar Army leaders, particularly against the Rohingya and other ethnic nationalities, a challenging question has arisen for all ethnic and democratic leaders: would they facilitate the efforts of the international legal communities toward ending impunity in Burma, or would they remain silent, thereby consciously or unconsciously abetting the commission of more heinous crimes by the stated perpetrators?

The two government soldiers who participated in the massacre of Rohingya were transported to the office of the Prosecutor in The Hague in the Netherlands, where the ICC is located, in August 2020.[3] As perpetrators, they confessed to obeying orders provided primarily by Col. Than Htike and Lt. Col. Myo Myint Aung and committing grave crimes to exterminate the Rohingya.[4] Under the international legal doctrine of superior/command responsibility, the aforementioned army officials, are responsible for testifying that who provided the order for the soldiers to commit such grave crimes. The presence of the perpetrator soldiers in The Hague might be the beginning step to ultimately ending impunity. It is time now for all stakeholders participating in the peace-seeking process to facilitate and work with the international legal communities that are striving to seek criminal accountability in Burma.

3 New York Times: Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter (8 September 2020): <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html?smid=tw-share> accessed 9 September 2020.

4 AFP, 'Myanmar army deserters say officers ordered Rohingya massacres, rapes.' (8 September 2020) <https://www.france24.com/en/20200908-myanmar-army-deserters-say-officers-ordered-rohingya-massacres-rapes> accessed 10 September 2020.

CHAPTER: I

SEEKING DEFINITION OF "PEACE"

"Peace" has become one of the most popular political vocabularies in Burma today. In the Nationwide Ceasefire Agreement,[5] albeit not a peace accord, the term "peace" is repeatedly used therein.[6] The same is for the government authorities led by Aung San Suu Kyi as well as all top Myanmar military officials including C-in-C Min Aung Hlaing. Whenever meetings, ceremonies and public gatherings take place, they all commonly refer to the term "peace" superficially, without seeking any definition of peace.

> *The nationalities of the country know that the current anniversary is more significant than the anniversaries of the previous two years both in character and essence. I have noticed greater aspirations and interest for peace of the national people. At this moment, we are gathering here, serving the historic duty to fulfil the wish of the peace-loving people. We of the Tatmadaw are exerting utmost physical and intellectual efforts to shoulder the historic duty well and restore eternal peace and strengthen democracy.*[7]

5 The NCA was signed by the government on one side and the 8 EROs on the other on 18 October 2015; see The Nationwide Ceasefire Agreement Between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations 2015 (NCA). Available at https://peacemaker.un.org/sites/peacemaker.un.org/files/MM_151510_NCAAgreement.pdf accessed 22 July 2020.

6 ibid Preamble: 'In order to achieve lasting and sustainable peace in this country, we, this signatories to this Nationwide Ceasefire Agreement, pledge to each other to diligently work together to implement all provision contained in this agreement completely, successfully and without fail in an accountable, responsible and transparent manner.'

7 Min Aung Hlaing's Speech delivered at the third anniversary of the Nationwide Ceasefire Agreement-NCA signing, Nay Pyi Taw (15 October 2018). Available at https://www.seniorgeneralminaunghlaing.com.mm/en/9638/opening-speech-delivered-commander-chief-defence-services accessed 24 June 2020.

Unfortunately, in regard to the term "peace," there has not been any common agreement during, at least, about the three-decade long peace seeking process. It is realized by all stake holders from different perspectives, and accordingly, they attempt to implement their understandings differently. This is one of the major factors which negatively impact the operation of the peace seeking process.

For instance, Min Aung Hlaing reveals that peace will be achieved if the EROs[8] give up their armed struggle policy, leading to a total surrender. Conversely, a large majority of ERO leaders intend to establish a genuine Federal Union, along with the existence of a Federal Army[9] in which armed wings of the EROs constitute a part, rather than surrender. Unfortunately, the civilian part of the government led by Aung San Suu Kyi doesn't have any clear policy or working agenda for peace, except pursuing the pathway already laid down by the Myanmar military ruler centering on the NCA.

What is peace? The term "peace" is controversial. There is no accurate interpretation across the world. In seeking peace, the existence of civilization is inevitable, but the question that remains is how to minimize the negative aspects of society while the positive entities are promoted enough to allow progress in the development of civilization. As claimed by Thomas Hobbes, in his eminent theory on the state of nature, it was the war of every man against every man in primitive society that resulted in human beings feeling insecure and vulnerable at every moment. Today it is unimaginable to continue living in the state of nature, or uncivilized world, as described by Hobbes. An uncivilized world should no longer exist. To this end, the negative characteristics of human beings such as cruel behavior arising out of greed and anger must be minimized, and the development of a people-centered civilization may be sought. They may be a reality, at minimum, only when truth is uncovered and miseries are eradicated.[10]

In seeking truth to eradicate the miseries, an inward-oriented approach is invaluable. This means at a minimum, every individual should seek to attain purity of mind so that the mind is tamed. This results in a state where the conversion of misery to happiness, bondage to liberation and cruelty to compassion might take place, as indicated by Mr. S. N. Goenka. He continued to elaborate that "There cannot be peace in the world when people have anger and hatred in their hearts. Only with love and compassion in the heart is world peace attainable." Undoubtedly, in order to facilitate achieving world peace, an inward-oriented approach must be appreciated, encouraged and expanded to the extent that every individual obtains the opportunity to have access to the process of purification. However, it remains to be seen if by merely relying on meditation or other religious practices–be they organized, non-organized or sectarian–whether or not the inward-oriented

8 In the NCA, the term 'EAOs' is used.

9 Ei Ei Toe Lwin, 'UNFC, Daw Suu agree on federal army plan' Myanmar Times (online edn 1 December 2013) <http://www.mmtimes.com/index.php/national-news/8918-unfc-daw-suu-agree-on-federal-army-plan.html>
accessed 22 June 2020.

10 Aung Htoo, A Forgotten Hero of Asia: Tin Maung Oo (Salai Tin Maung Oo family, ISBN- 978-0-9869240-0-2, Canada, 2011) 93-98.

approach alone may be sufficient to achieve world peace.[11]

Peace must be realized from two aspects: firstly, it is an intangible substance, which might be attainable in the mind of an individual, let's say, inner peace. Secondly, it refers to a peaceful situation taking place within the society or state or in the whole world and this can be regarded as outer peace because the peaceful situation exists outside the mind of an individual. One presumption is that if the inner peace exists, then outer peace would become a reality. Recommendations based on this presumption is that human beings must pursue inner peace as a priority. Conversely, another presumption is that only when outer peace exists, can inner peace be attained. This is because if outer peace is ruined, individuals might not have the opportunity to pursue inner peace. The recommendation based on the second presumption is that human beings should pursue outer peace and work to create a peaceful society in which all individuals enjoy the opportunity to seek inner peace. It is worthwhile to observe the relationship between inner peace and outer peace in-depth.[12]

According to a UN document submitted at the 2000 Millennium World Peace Summit, it was highlighted that the worst forms of human brutality are war and poverty. It also stated that if poverty, as one of the root causes of war, could be eradicated, then peace could be attained. Accordingly, eradication of poverty is essential; and to this end, basic needs of people must be guaranteed. Many times, although poverty exists, peace can be attained if social justice is in place.[13]

It is time now for all stakeholders who get involved in the peace-seeking process in one way or another, to consider that the absence of fighting alone does not constitute peace. In the context of Burma or anywhere else, the characteristics of peace worth pursuing, at a minimum, are as follows:

- Lack of unjust and unfair violence;
- Guarantee of individual and collective rights by a constitution and other organic laws;
- Guarantee of meeting the basic needs of people and of their right to development by the state;
- Existence of state organs and state institutions, particularly the independent judiciary, that can effectively adjudicate the underlying legal, political and societal issues with the underpinning of the Rule of Law; and
- Creation of a society in which political, religious and racial extremism are prohibited; love, humanity and ethics are preserved; and social justice is in place.

As far as Burma is concerned, will the peace-seeking process be feasible, only when historical legacy is heeded, codified and activated emanating from the historic Pang Long Accord.

11 ibid.
12 ibid.
13 ibid.

Franklin D. Roosevelt and Winston Churchill meet off the coast of Newfoundland, Canada, in 1941. ullstein bild/Getty

CHAPTER: II

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 treaty[14] 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:

14 Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the Recognition of Burmese Independence and Related Matters (conclusion, London 17 October 1947, ratification 4 January 1948 by exchange of the instruments of ratification, art 15 of the Treaty) 70 UNTS 183, '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 by enjoyed by the Provisional Government of Burma.'

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 to not 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.[15]

Given the above, the ethnic States have their rights to manage their land within their own state/province, with the underpinning of the right of self-determination, arisen out of Panglong Accord; and, this right should not be ignored and abrogated simply invoking the 2008 Constitution and organic laws – including 2012 Farmland Act, 2012 Vacant, Fallow and Virgin Land law, 2018 Amendment of the said Act, 2014 Special Economic Zone Law, 2019 Land Acquisition, Resettlement and Rehabilitation Law, etc.

In regard to the Pang Long Accord, the underlying question now to be dealt with is whether Aung San Suu Kyi and her NLD government formally and legally recognize the Pang Long Accord, as the overarching agreement, or not. If not, this denotes vividly that no other Accord arising out of any political negotiation in the future can be legalized, given that the legality of the Pang Long Accord, whose legal status is the most valid, has even been denied. She and her NLD government then need to justify their reasons why they have not recognized it as an 'Accord.' In addition, they must also declare the official cancellation of the Pang Long Accord. In that case, all the ethnic states would return to the former situation before the Pang Long Accord was executed. They might then establish their own independent ethnic states as they wish, as per Paragraph 8 of the Aung San-Atlee Agreement[16] which is legally binding to date.

15 Commented by David Fisher, Prof. of International Law, Faculty of Law, Stockholm University, Sweden.

16 Aung San-Attlee Agreement (27 January 1947) para 8 (b): 'The leaders and representatives of the peoples of the Frontier Areas shall be asked, either at the Panglong Conference to be held at the beginning of next month or at a special Conference to be convened for the purpose, to express their views upon the form of association with the Government of Burma which they consider acceptable during the transition period: whether -'. Available at https://burmastar1010.files.wordpress.com/2011/06/44172419-aungsan-atlee-agreement.pdf accessed 22 July 2020.

If the Pang Long Accord is recognized formally, officially and legally, Aung San Suu Kyi should observe every word and paragraph therein, ensuring the actual implementation of that agreement on the ground, particularly the two paragraphs which guarantee full autonomy for internal affairs of the frontier areas, in terms of ethnic states, and which also enshrine democratic rights – already recognized in democratic countries – of the ethnic nationalities inhabiting in those frontier areas.

Should the underlying legal issue, which has ensued from the Pang Long Accord, is dealt with properly and effectively, it will not be necessary to continue convening the 21st Century Pang Long Conference. Instead, as an effort to implement the Pang Long Accord, the Constitution of the new democratic federal Union shall have to be drawn up, approved and practiced along with the Constitutions of the ethnic states/provinces. As a consequence, a foundation for 'the Rule of Law' would have been laid.

CHAPTER: III

ANALYSIS OF THE NATIONWIDE CEASEFIRE AGREEMENT (NCA)

To date, the NCA[17] is the only document being referred to, and applied by, both civilian and military parts of the government in Burma whenever the so-called peace seeking processes are activated. The intention of the government, which appears in their activities, is that the NCA is to encompass all issues related to peace as well as ceasefires.

> *The NCA is not only for ceasefire alone. It is not only an agreement indicating clearly on how to implement the peace process. It is a political accord on what path to take towards establishing a democracy federal union. Throughout our country's history this is the only agreement that was aimed toward the establishment of a federal union. It is an important agreement for national reconciliation, equality and establishment of a federal union. The difficulties we are facing today are not because of the NCA but due to the weakness in implementing the NCA, requirements to abide by it and misunderstandings.*[18]

Until and unless a new peace accord – in which the ceasefire arrangements are included – emerge, the NCA may play an overarching role that would dominate the entire peace seeking process. It has been the case although the validity of the NCA is increasingly challenged particularly after 2018.[19] Anyway, an analysis will be made addressing both peace and ceasefire related issues from normative as well as empirical aspects, based on the Rule of Law.

17 NCA (n 5).

18 Speech delivered by State Counsellor at 4th Anniversary of NCA https://www.statecounsellor.gov.mm/en/node/2576

19 Ywad Serk, Chairperson of the RCSS/SSA

The preamble of the NCA[20] constructs the validity of the previous agreements and reaffirm all promises and previous agreements.[21] Such a legal stand is unable to uphold the Rule of Law. If a previous agreement – in whole or in part – is contrary to this agreement, the former should be null and void. The individual pre-existing ceasefires, in terms of preliminary or bilateral, divided the EAOs, whereas this single agreement would unite them. Keeping the existing agreements alive may lead to actualization of a 'divide and rule' strategy.

Even though the NCA somewhat appears as an agreement that outlines political roadmap for peace, the entire process has already been framed and controlled firstly by 'exception clauses'[22] provided for in almost all crucial agreements, secondly by the conditions set up under the framework for political dialogue[23], thirdly by the Union Peace Dialogue Joint Committee (UPDJC), fourthly by the decision making procedure prescribed under the Para 6.2 of the framework for political dialogue,[24] and fifthly by the orientation of the NCA which will end up within the framework of the 2008 Constitution.[25]

A. "Federalism" and "self-determination" in the NCA: positive expectation towards future

The Nationwide Ceasefire Agreement
Chapter 1: Basic Principles

1. In order to achieve lasting and sustainable peace, we agree to implement this Nationwide Ceasefire Agreement in accordance with the following basic principles;
a. Establish a union based on democracy and federalism that fully guarantees democratic rights, national equality and the rights to self-determination in the spirit of Panglong, on the basis of liberty, equality and justice in accordance with the outcomes of political dialogue aiming to non-disintegration of the union, non-disintegration of national solidarity and perpetuation of national sovereignty.

20 *NCA* (n 5) Preamble: 'This Nationwide Ceasefire Agreement, between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations, recognizes, reinforces, and reaffirms all previous agreements between the Government of the republic of the Union of Myanmar and the Ethnic Armed Organizations.'
21 ibid ch 2 para 2(c).
22 ibid ch 1 para 1(a).
23 ibid ch 2 para 2(a), ch 5 para 20(b), para 21(a)(2), (b), (c).
24 Framework for Political Dialogue 2015, 6.1.2. Available at https://www.peaceagreements.org/masterdocument/1519 accessed 10 June 2020.
25 *NCA* (n 5) ch 5 para 20(f): 'Submitting the Pyidaungsu Accord to the Pyidaungsu Hluttaw for ratification.'

Out of all agreements reached in the NCA, the aforementioned paragraph is the most significant one for all EROs as well as a large number of non-Myanmar ethnic nationalities. Over the past five decades, the terms "federalism" and "the right to self-determination" disappeared from a list of political vocabularies in Burma as they were criminalized by the successive ruling military regimes commencing from the time of General Ne Win, who ruled the country after staging a military coup in March 1962. Now, let's say, it has been reversed to a noticeable extent. Min Aung Hlaing himself expressed that the Myanmar Army has been in the process of observing "federalism" largely, and that the military leaders even visited some federal countries.[26]

When the two terms, stated above, appear in the NCA – even if legal status of the document is still controversial – it was somewhat astounded by the general public. It connotes that the ruling military regime has, officially but superficially, recognized "federalism" in written as a pivotal political objective of the country.[27]

Whether the military regime would sincerely actualize "federalism" needs to be scrutinized. It is because, during their ruling period 1962 to 1988, the Myanmar Army leaders adopted the doctrine of "Myanmar way to Socialism" as a political rhetoric, but socialism was never practiced empirically. In the aftermath of the 1988 popular democratic uprising, they have no longer revealed any term related to socialism to date. Federalism may face similar destiny in future. In essence, federalism is inextricably related to the protection of minority rights, including the right to self-determination of the ethnic nationalities. Under the right to self-determination in the context of Burma, full autonomy of the ethnic nationalities over their ethnic states/provinces, in terms of the constituent units of the Union, needs to be guaranteed.

B. Exception Clauses in the NCA

Of the agreement, mentioned in the Chapter 1, Para 1 (a) of the NCA, the exception clause – in accordance with the outcomes of the political dialogue – governs the entire paragraph. Accordingly, the political dialogue – to be held in the aftermath of signing of the NCA – is of paramount importance given that the new agreements to be arisen out of the forthcoming political dialogues will supersede the incumbent ones, guaranteed in the NCA. From this aspect, the validity of the NCA is explicitly challenged.

26 Global New Light of Myanmar, 'Speech delivered by C-in-C of Defence Services at 4th anniversary of NCA' Global New Light of Myanmar (online edn 29 October 2019) <https://www.globalnewlightofmyanmar.com/speech-delivered-by-c-in-c-of-defence-services-at-4th-anniversary-of-nca/> accessed 24 June 2019.

27 Note: Chapter I para 1 (a) was copied to Union Accord Part III (1), Union Accord Part III Addendum (a) agreement 1(1) and Addendum (c) (1).

Another exception clause, "aiming to non-disintegration of the union, non-disintegration of national solidarity and perpetuation of sovereignty," is also known as "Our Three Tasks."[28] It is contrary to the establishment of a Federal Union as it leads to the practice of rigid centralization. Conversely, federalism is suited to seek and practice optimum centralization to the greatest degree despite that oscillation may take place depending on changing times and circumstances. Only then, an appropriate division of power can be conducted between the central level governmental institutions and those of the constituent units of the Union, in terms of ethnic states/provinces, in the context of Burma.

Similarly, another exception clause – "in accordance with the progress of the peace process"[29] – is totally vague, and uncertainties, that are against the Rule of Law, are in place.

In a nutshell, there are some factors that constraint not only the development of "federalism" but also the incumbent peace seeking process: (1) the NCA lacks core outlines as far as "federalism" is concerned. (2) the ruling party NLD has not yet had any clear policy or principles on federalism, adopted by its party conference or, at least, by its central committee. (3) although a large majority of the Ethnic Resistance Organizations (EROs), the democratic forces and the CSOs – that jointly participated in, and produced a Federal Constitution (draft) – no longer formally adhere to it; (4) the six points peace policy adopted by the Myanmar Army obstruct federalism; and (5) Min Aung Hlaing, C-in-C of the Armed Forces, repeatedly promotes the existing laws and the 2008 Constitution which are detrimental to federalism.

The Myanmar Army's policy for peace,[30] can also be regarded as "exception clauses" given that the so-called peace seeking process cannot proceed without passing through it. Of the six points therein, the two are overarching: to comply with "existing laws", enacted by the State; and, to participate in the process for democracy in accordance with the 2008 Constitution having adopted "Our Three Tasks."

One problem with the reference to "existing laws" is uncertainty as to which laws are being referred to: Would it be the national laws only or also laws existing in the areas controlled by the Ethnic Resistance Organisations? Nor is it clear what the temporal scope is of the "existing

28 Min Aung Hlaing refers to the same term as 'Our Three Main National Causes' in English.

29 *NCA (n 5) ch 3 para 5(e).*

30 Six points policy of the Myanmar Army for peace is not a law or an agreement. In fact, there is no indicator at all that that policy was laid down after consultation with all military officials, serving in various levels of the Armed Forces. As such, it is realized that that controversial policy was drawn up and adopted by Min Aung Hlaing and some of his leading officials *per se*. However, the stated policy is much more influential even than the NCA empirically on the ground.

laws": Is reference being made only to laws in existence at the time of signing of the ceasefire agreement or also to laws which might come into existence after conclusion of the agreement? It seems obvious that laws enacted after the agreement is signed could affect implementation of the ceasefire agreement in ways that not all the parties could foresee at the time of signing.[31]

Empirically, the term "existing laws" at a minimum refers to the 2008 Constitution and all other national laws that have already existed at the time of signing. However, this term may also be applied, if any existing law, enacted after the agreement is signed, is beneficial to the ruling Myanmar military leaders. Uncertainties deny the Rule of Law and obstruct trust building between the belligerent parties.

C. Land Issue in the NCA

In regard to land issue, the NCA provides: do not commit any forcible confiscation or transfer of land from local populations.[32] The term 'forcible confiscation' is highly controversial. It connotes that the confiscations by the government authorities and the Myanmar Army in conformity with the Vacant, Fallow and Virgin Land of 2012 and its Amendment Law (2018)[33] do not constitute an action of 'forcible confiscation.' Nevertheless, if any EROs confiscate a plot of vacant, fallow and virgin land in designated territories, located in their respective ethnic states/provinces, it would be regarded as a forcible confiscation.

A prohibition of the NCA against the land confiscation may be a powerful restriction imposed only on the EROs but not on the Myanmar Army and the government authorities. In fact, the NCA may be regarded just as a 'soft' law mostly. As such, no dispute arising out of the NCA is judiciable. Differently, all laws passed by the legislative chambers stand 'hard' laws, and are judiciable. Simply by invoking the agreements reached in the NCA, land confiscations – being done by the government authorities and the Myanmar Army in accordance with the existing laws – cannot be deterred. The NCA is explicitly subordinate to the existing laws.

The ultimate objective of the NCA is to produce the Union Accord, which might be portrayed as supreme political agreement in the entire

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

32 *NCA* (n 5) ch 3 para 9(c).

33 All ten signatory EROs recommend to amend two laws, stated above, on vacant, fallow and virgin land which predominantly lie in the ethnic states/provinces; see Peace Process Steering Committee (PPST), 'Special Meeting Statement' (7 March 2019) para 6. Available at https://lioh.org/?p=678 accessed 23 July 2020.

country. In connection with land, the supremacy of the existing law is also applied in part 1 of the Union Agreement:[34] every citizen has the right to own and manage land in accordance with the land law.[35] The term "land law" explicitly refers to the "existing land law." Furthermore, as pinpointed by Prof. David Fisher, the laws enacted after the agreement has been signed will continue to be relevant. For instance, the first part of the Union Accord (UA), in which land related agreements are included, was signed on 29 May 2017; but the Amendment of the Vacant, Fallow and Virgin Lands Management Law was enacted on 13 September 2018. Hence, it is construed that the signatories to the UA will have to persist in complying with any land law, albeit abusive, which will emerge in future.

The said UA, emerged based on the NCA, is the end of the beginning. For some decades, the ethnic leaders, by taking the ways of armed struggle or non-violence or others – have been primarily exerting efforts for achievement of their right to self-determination, including their historic right to land. Land is directly related to all other natural resources such as water, metals, minerals, timber, energy etc., all of which influence the status of the national and global environment.

Gan Taw Army Land Signboard | Photo – HURFOM

34 As an implementation of the NCA, three Union Peace Conferences have been held, and a Union Agreement, in which altogether 51 points are included, have been produced to date.

35 Union Peace Conference 2nd session, Land and Environment Sector Principle Agreement (29 May 2017) para 7: 'Every citizen has the right to own and manage land in accordance with land law.' Available at https://www.statecounsellor.gov.mm/en/node/904 accessed 23 July 2020.

The mountainous regions in Burma, especially Shan State, were rich with the natural resources. Under the rule of the British government before independence, the value of Silver, Lead, Zinc and Ah-Phyte-Than extracted from these areas was over 4.3 million pounds sterling yearly. However, in accordance with the Third Schedule of the 1947 constitution, the power to extract these natural resources did not lie with the States concerned but with the Central Government.[36]

The ERO leaders – may not be all, who are sincerely struggling for their right to self-determination – expected, or are still expecting, that if a genuine federal Union can be established,[37] their ethnic states/provinces would achieve at least autonomy in connection with their right to self-determination, and accordingly they would enjoy their historic land right. In regard to "autonomy", Commander-in-Chief Min Aung Hlaing stated below citing fifth paragraph of the Pang Long Accord:

> *The paragraph which is mostly criticized and referred to is the last sentence of fifth paragraph. The sentence is "Full autonomy in internal administration for the Frontier Area is accepted in principle. Everybody may notice the phrase "internal administration". On the other hand, it means the Self Governing. We all agreed the Self Determination in the NCA. So I said NCA is wider than the ceasefire --------.38*

Min Aung Hlaing's speech, stated above, is particular in three aspects: one is that he has recognized the validity of the Pang Long Accord by implication; another is that he does not deny that the ethnic states/provinces shall enjoy "full autonomy" according to Pang Long Accord; and, the last is that he just try to convince the ethnic leaders that "self-determination" agreed upon in the NCA is wider than "full autonomy" granted under the Pang Long Accord. Anyway, this is somewhat an encouraging speech. However, when he continues elaborating about what "self-determination" means one year later, he uses the other way around to refer to the opposite of what he had expressed. Accordingly, vicious circle takes place repeatedly as he just quotes the framework of the 2008 Constitution as follows:

36 U Tun Myint (Taunggyi), The Grievances of Shan State (1957); U Tun Myint was a famous Shan ethnic leader, who signed the Pang Long Accord in 1947, on behalf of Shan State together with his Shan leader colleagues; in regard to grievances and relevant claims see Shan, 'The Meaning of "Bamar one Kyat, Shan one Kyat"' (Shan News 17 May 2016) <https://english.shannews.org/archives/14101> accessed 25 June 2020.

37 United Nationalities Federal Council, 'Position Statement on Signing NCA' (UNFC 24 January 2018). Available at https://progressivevoicemyanmar.org/wp-content/uploads/2018/01/UNFC-Stmt-on-NCA-signing-Eng-24Jan2018_2.pdf accessed 23 July 2020.

38 Min Aung Hlaing (n 7).

In so doing, instead of the focus on a single desire that is incompatible with the country's situation, paying attention to the possibilities suitable for our country will facilitate and speed up our peace process. For example, rather than demand for self-determination,39 ways to ensure perfection by amending or supplementing Tables 2, 3 and 540 is more natural, I suppose.[41]

With regard to this point, we need to consider the rights of self-determination. We need to widely consider and to seek the best way for such issue. It needs to review that what laws region and state Hluttaws (legislative assemblies) have passed in connection with Schedules 1, 2, 3 and 5 of the Union Legislative List mentioned in the constitution of our country and to what degree the development undertakings for the regions and states have been carried out based on the said laws.[42]

Under the 2008 Constitution, the self-administered areas, referred to by Min Aung Hlaing, can be regarded as autonomous regions. Nonetheless, the stated areas enjoy minimal power. They are: to maintain pasture[43] and conserve and preserve forest.[44] The ethnic nationalities inhabiting therein are allowed to cultivate[45] but not to exercise their historic land right, which is collective ownership and land use right for indigenous peoples. The ethnic nationalities can govern themselves but they are not allowed to use their own natural resources even for their survival let alone development. This is the type of autonomy granted by the ruling military regime. This transpires not only for autonomous regions but also for all ethnic states/provinces under the 2008 Constitution.

In regard to land, the following agreements reached in the NCA do not lay any foundation for land rights which should be enjoyed by the ethnic nationalities: avoid forcible confiscation and transfer of land from local populations;[46] and, avoid the destruction of public property, looting, theft, or the taking of property without permission.[47] Even if the stated agreements

39 In the English translation, the term "self-administration" is used. It is incorrect. According to Min Aung Hlaing's original speech delivered in Myanmar language, he explicitly expresses 'self-determination'.

40 Tables 2, 3 and 5, stated above, are Schedule 2, 3, and 5 in the 2008 Constitution: the title of sch 2 is 'Region or State Legislative List'; that of sch 3 is 'List of Legislation of the Leading Body of Self-Administered Division or Self-Administered Area' and; that of sch 5 is 'Taxes Collected by Region or States'.

41 Min Aung Hlaing (n 26)

42 Min Aung Hlaing (n 7).

43 Constitution of The Republic of the Union of Myanmar 2008 Sch 3 (6).

44 Constitution of The Republic of the Union of Myanmar 2008 Sch 3 (7).

45 The Farm Land Law 2012. Available at https://www.mlis.gov.mm/mLsView.do;jsessionid=F90878E6E5E9B105DAE13F78D586FB1E?lawordSn=183 accessed 24 July 2020.

46 *NCA* (n 5) ch 3 para 9(f).

47 ibid ch 3 para 9(g).

can be regarded as disciplines imposed upon the parties to the NCA, violations committed by the Myanmar Army cannot be deterred nor can they be taken into legal actions.

> *Since the start of 2020, the Burma Army has deployed over 2,000 troops, and fired hundreds of mortar shells to try and push through a strategic road into the northern Karen District of Mutraw, despite its existing ceasefire with the Karen National Union. Hundreds of villagers have fled to hide in the jungle, and thousands more are preparing to flee. Villagers have been tortured, shot at indiscriminately and killed.*[48]

D. Ambiguities in the NCA and Their Negative Results

In the NCA, there are many vague terms which cannot be interpreted accurately nor can they be activated in practice on the ground. They are: the spirit of Pang Long;[49] a new political culture of resolving political conflicts;[50] matters concerning the Union Army (Pyidaungsu Tatmadaw);[51] an inclusive political dialogue process;[52] any direct or indirect action that may be regarded as hostile or contemptuous;[53] and, recognizing the political aspirations based on revolution of the Ethnic Armed Organizations.[54]

Under the NCA, whether the EROs are formally recognized to administer their designated territories is unclear. There are some agreements that confer semi-administrative power, not similar to the tasks of the NGOs/CSOs, on the EROs: administer rule of law in ceasefire areas and take action against perpetrators in accordance with the law in consultation with each other;[55] undertake the administration of military matters in ceasefire areas in consultation with each other;[56] and, provide necessary supports in coordination with each other to improve livelihoods, health, education, and regional development for the people.[57] Nonetheless, these agreements could never be implemented over the past five years given that the independent supervision or enforcement mechanism lacks in the NCA.

48 Karen Peace Support Network, 'Karen Heartlands Under Attack' (Karen Environmental and Social Action Network KESAN April, 2020) <https://kesan.asia/resource/karen-heartlands-under-attack-english-and-burmese-languages/> accessed 25 June 2020.
49 *NCA* (n 5) ch 1 para 1(a).
50 ibid ch 1 para 1(b).
51 ibid ch 1 para 1(c).
52 ibid ch 2 para 2(a).
53 ibid ch 3 para 5(b).
54 ibid ch 2 para 2(d).
55 ibid ch 3 para 5(h).
56 ibid ch 3 para 5(i).
57 ibid ch 3 para 9(a).

More importantly, even if an independent mechanism exists, let's say, the intention of the belligerent parties – in a nutshell, to take responsibility for administrative affairs in consultation with each other – may not be beneficial to local ethnic nationalities as well as to EROs themselves. Apart from others, the terms "in consultation with each other" and "existing laws" would create serious problems. The reasons below are found.

(1) Land, natural resources and natural environment are treasures of the ethnic states/provinces. Under the existing laws, the right to own and manage land thoroughly lies with the central government, in terms of state, but not ethnic provinces or local governments. Hence, pressures would be imposed upon the EROs to comply with the existing laws in administration. The EROs are helpless from the aspect of statute laws while customary land ownership right is not recognized by the ruling regime. During the previous five years period after the NCA has been signed, the EROs and the ethnic states/provinces have continuously suffered from the enforcement of the abusive existing laws. The NCA is virtually useless as it has been unable to deter the atrocities arising out of the stated draconian laws.

(2) In public administration, civilian supremacy is commonly practiced in democratic countries. Conversely, under the 2008 Constitution, military supremacy is exercised. To this end, if administrative affairs are done in consultation with each other, the pressure might be imposed upon the EROs to practice military supremacy. As a result, the conflicts between the civilian and military leaders within the EROs may arise.

(3) The term, in consultation with each other, is totally vague. The problem might not occur so long as the ERO leaders yield to the wishes of the Myanmar military leaders in administration.[58] Nevertheless, who will decide if the ERO leaders' perspectives are different from the Myanmar military leaders and problems arise? As stated above, the independent supervision or management mechanism, in the ceasefire agreement, lacks. The Myanmar military leaders are not accustomed to submit legal and underlying political issues at the courts, and ask for adjudication, even if the courts are to be established jointly. The ERO leaders may also hesitate to rely on judicial adjudication given that a large majority of them lack both experience and political will.[59] Importantly, the agreement discussed above was never carried out during the previous five years period. It is useless.

58 Interview with the leaders of the KIO, who dealt with the Myanmar military leaders during 17 years long ceasefire period, at the Headquarters of the KIO, Laiza, in 2012 one year after fighting broke out between the Myanmar Army and the KIO.

59 Interview with the leaders of the United Nationalities Federal Council (UNFC) in Chiang Mai, 2017.

(4) The practice of Myanmar chauvinism – in terms of racial, religious, cultural and linguistic influence over the non-Myanmar ethnic nationalities – has exacerbated the already desperate situation in the territories designated by the EROs.

(5) Who will interpret the term "the people"? Semi-administration power might be exercised for the people only in the EROs' designated areas "in consultation with each other" but not in other territories controlled by the ruling Myanmar military regime. If so, it would be a one-sided agreement. The vague terms in the NCA have led to create opportunity for the ruling Myanmar military leaders to intervene in EROs' administration in their designated areas. The UWSP which has the strongest military power among all EROs might have concerns about this, in addition to others, and it has not yet signed the NCA.

The other ambiguities are also explored. They are: avoid forcibly taking money, property, food, labor or services from civilians;[60] the proportion of representatives participating in political dialogue shall be negotiated during discussion on the Framework of Political Dialogue;[61] and, we shall include a reasonable number/ratio of women representatives in the political dialogue process.[62]

Since 2000, when the United Nations Security Council unanimously adopted Resolution 1325 on Women, Peace and Security. An international consensus has developed around the need to involve women in peace processes in order for peace building to be sustainable and to have a meaningful and proactive role in peace seeking and making processes. One third of a total number of participants in all peace seeking processes should be women, who represent women victims of heinous crimes and those, who defend the rights of the oppressed ethnic nationalities in their ethnic states/provinces.

One of the agreements – de-mining activities to clear mines laid by troops from all sides – [63] is valuable but still vague. If a genuine peace seeking process can be implemented, de-mining is required under the agreement with the exchange of information about the location of mines. Cooperation in this area, should be expressly illustrated. De-mining of agricultural lands and civilian areas shall be listed as a priority. Verification of de-mining matters with a certain role for independent actors must be created. Unfortunately, it lacks in the NCA. As such, the stated agreement could not be carried out during the previous five years period. It is also useless.

60 *NCA* (n 5) ch 3 para 9(d).
61 ibid ch 5 para 22(c).
62 ibid ch 5 para 23.
63 ibid ch 3 para 5(e).

The term "recognizing the political aspirations based on revolution of the Ethnic Armed Organizations" is more controversial. On 23 March 2020, the regime declared the Arakan Army (AA) a terrorist organization.[64] This is on the one hand. On the other hand, it also invites the AA, as one of the northern alliance groups, for dialogue. If the dialogue is successful and if the AA agrees to sign the NCA finally, the AA may no longer be a terrorist organization. Afterwards, it may turn to one of the revolutionary EAOs. It is evident that the legal status of an organization depends on the political whim of the ruling authorities, both civilian and military.

The Contract Act, an effective law in Burma, provides that agreements the meaning of which is not certain, or capable of being made certain, are void,[65] and that agreements in restraint of legal proceedings are also void.[66] Upholding the Rule of Law may never be feasible even if the agreements in the NCA are honored.

E. The most controversial term in the NCA

It is the term "ceasefire area" which can be found in many agreements of the NCA. What does it mean? A number of armed conflicts already occurred between the Myanmar Army and the EROs who are the NCA signatories, particularly the Karen National Union and the Revolutionary Council for Shan State (RCSS). Despite the existence of the NCA, armed conflicts occurred out of controversies primarily given the vagueness of the stated terms. The situation has been exacerbated by lack of independent mechanism for enforcement of the NCA.

Given that the term 'Nationwide Ceasefire' is used as the heading of the agreement, it must encompass all territories in the country. Only when fighting ceases in all territories in the entire Union, such a situation may uphold the Rule of Law. If only some territories are specified as "ceasefire areas," the other territories will be "non-ceasefire areas." If so, the NCA is meaningless and unfruitful. Such a situation has been taking place for five years now. Neither any organization nor government authorities can point out on the map which are ceasefire areas while the others are non-ceasefire areas.

Even if it is the case, and if non-ceasefire areas continue to exist, the agreement should not be entitled as the "Nationwide Ceasefire Agreement".

64 Nyein Nyein, 'Myanmar Govt Declares Arakan Army a Terrorist Group' (The Irrawaddy 24 March 2020) <https://www.irrawaddy.com/news/burma/myanmar-govt-declares-arakan-army-terrorist-group.html> accessed 24 July 2020; Thet Naing and Rikar Hussein, 'More Violence Feared as Myanmar Names Arakan Army a Terrorist Organization' (Voice of America VOA 24 March 2020) <https://www.voanews.com/extremism-watch/more-violence-feared-myanmar-names-arakan-army-terrorist-organization> accessed 24 July 2020.

65 The Contract Act (1872), Art 29.

66 Ibid, Art 28.

It is because any party to the NCA would have the right to activate military maneuvers – such as recruiting new soldiers, expanding military deployments, reinforcing weapons and ammunitions, embedding the military camps, etc., and if necessary, conducting defense war – in non-ceasefire areas. Unfortunately, for five years now, this right is being enjoyed merely by the ruling Myanmar Army, while denying the signatory EROs. Unfortunately, such situations have been taking place in the entire country, thereby leading to never-ending conflicts.

Given the above, it is evident that all belligerent parties have made widely differing interpretations of the NCA, and practiced accordingly. Thus, such practices, which are contrary to the Rule of Law, have caused controversies and disputes in the peace seeking process. During the 9th meeting of the JICM, Deputy Senior General Soe Win publicly admitted the existence of interpretation issues arising out of the NCA.[67]

--- the workgroups met four times before the 9th edition of JICM; although some terms have been incorporated in the NCA, they were incorrectly interpreted; as such, the stated terms were discussed again not to deviate from their senses, delaying for attending to new facts, to be discussed;

Restoration Council of Shan State troops on parade on Shan State National Day in Loi Tai Leng, Shan State on Feb. 7. 2014. / Kyaw Kha / The Irrawaddy

67 9th meeting of joint coordination body for implementing NCA. https://www.facebook.com/watch/?v=299549424715068

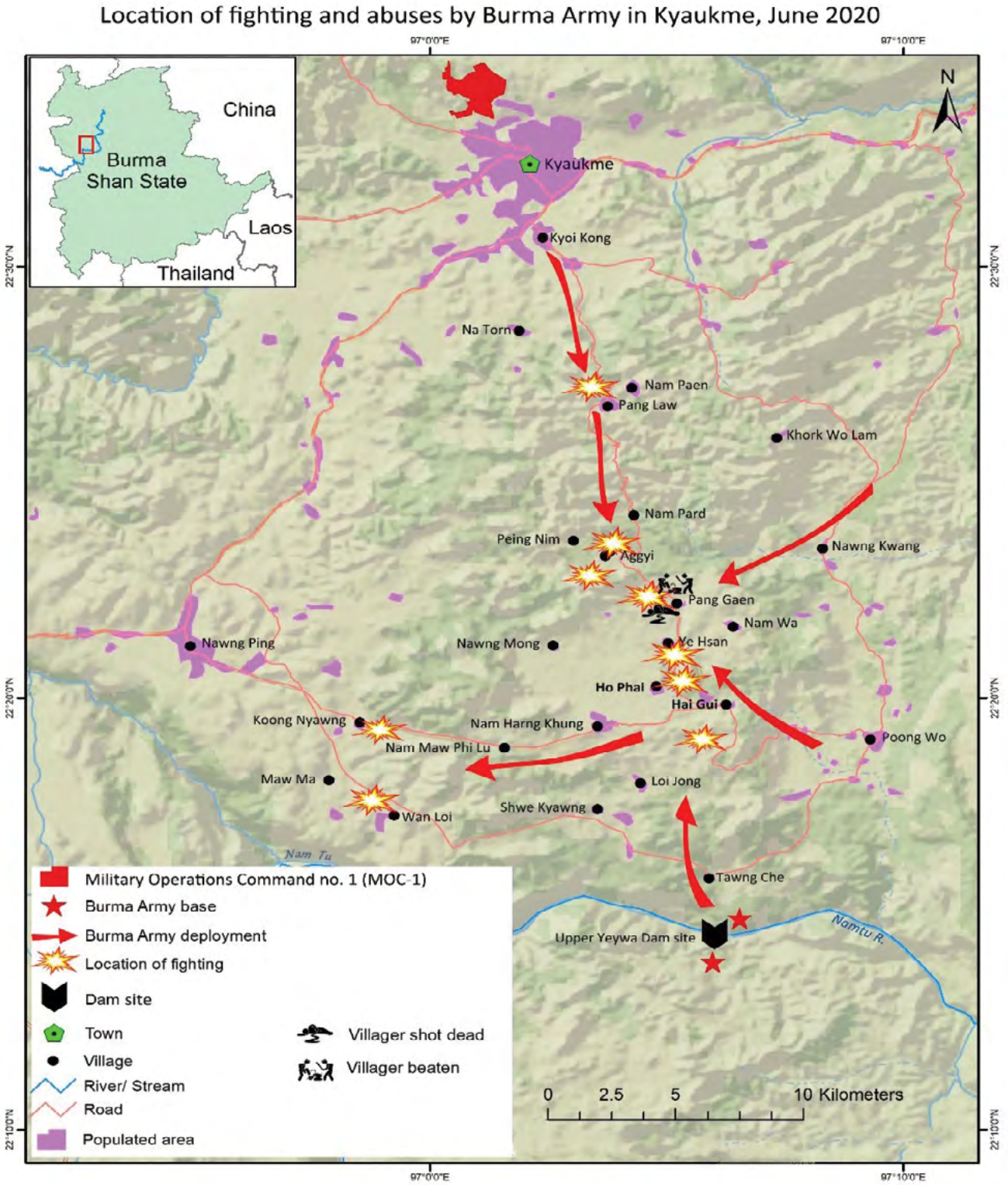
F. Requirement to Comply with International Humanitarian Law and Human Rights laws

There are some valuable agreements in the NCA possibly aiming to prevent, or lower, atrocities of war victims, during national armed conflicts. They are: avoid restrictions on the right to education in accordance with the law; destruction of schools and educational buildings, including educational tools; and the disturbance and hindrance of students and teachers;[68] avoid impeding an individual's right to health or access to healthcare; or restricting public health resources and the legal transportation of medicines for public use;[69] avoid impeding the small-scale storage, transport, sale and trade of food and supplies;[70] avoid the destruction or actions that would lead to the destruction of schools, hospitals, clinics, religious buildings and their premises and the use of such places as military bases or outposts;[71] avoid either directly or indirectly interfering, humiliating or damaging the reputation of public activities to preserve religion, literature, and cultural and traditional practices;[72] avoid any form of sexual attack on women, including sexual molestation, sexual assault or violence, rape and sex slavery;[73] avoid killing and maiming, forced conscription, rape or other forms of sexual assault or violence, or abduction of children;[74] and avoid enslavement or forced labor of civilians.[75]

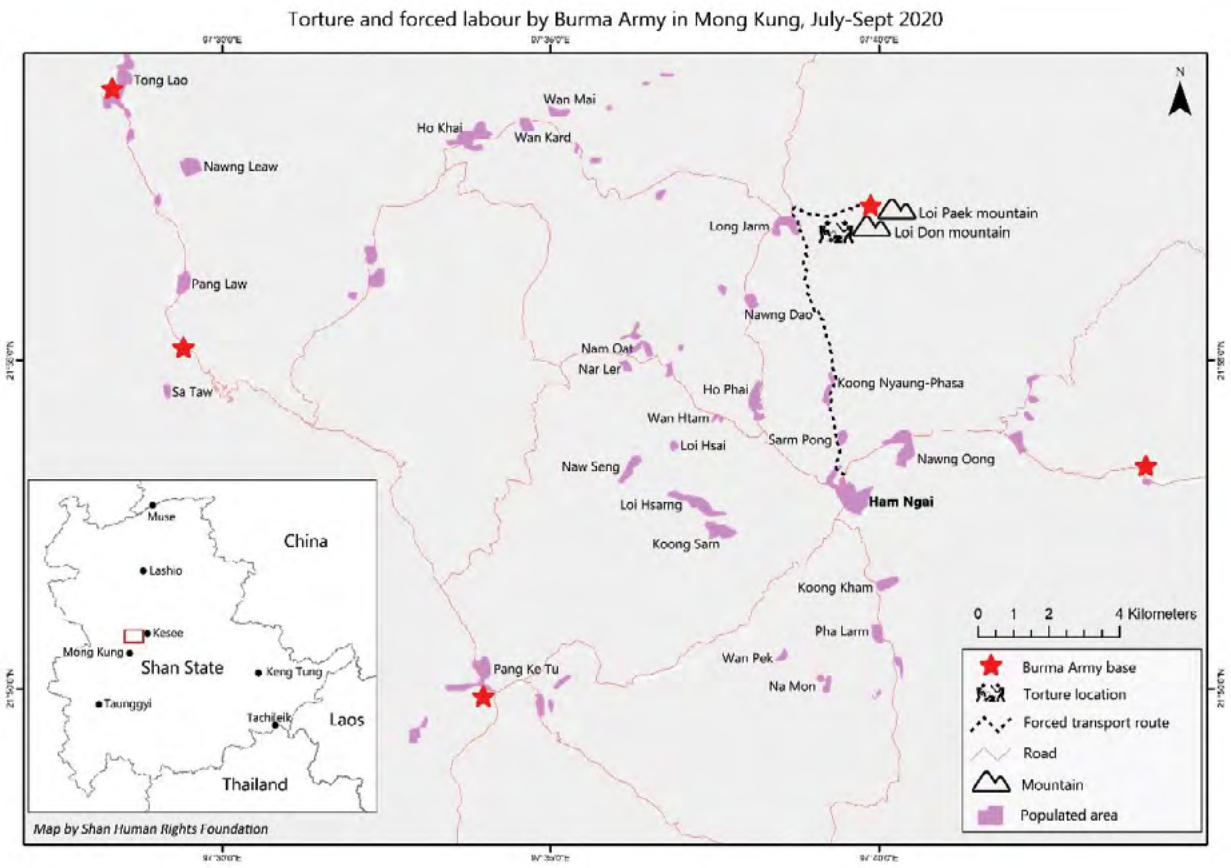
Burma has been a party to international humanitarian law, also known as law of war, that is, the Geneva Conventions. In compliance with the stated international law, the country must produce a domestic law, as have been the cases in many democratic countries across the world.[76] That law should be a total distinction from the existing military law, the Defence Services Act of 1959. The latter regulates behavior of the military personnel, who provide full time military service, in the Armed Forces. The former is to incorporate the essence of the Geneva Conventions into the domestic law, possibly entitled Burma Military Act, in ways, *inter alia*, that the atrocities of war victims can be reduced or prevented during non-international armed conflicts. If so, the aforementioned agreements in the NCA will no longer be necessary. Even if there is no NCA or similar agreement, will civilians obtain legal and judicial protection as the said law will be enforceable in the domestic civilian courts. In fact, peace seeking should go hand in hand with nation building,

68 *NCA* (n 5) ch 3 para 9(h).
69 ibid ch 3 para 9(i).
70 ibid ch 3 para 9(j).
71 ibid ch 3 para 9(k).
72 ibid ch 3 para 9(l).
73 ibid ch 3 para 9(m).
74 ibid ch 3 para 9(n).
75 ibid ch 3 para 9(o).
76 For Example, Geneva Conventions Act 1985, Canada; Geneva Convention Act 1936 amended in 1960, India; Geneva Conventions Act 1957 amended in 1995, UK; see International Committee of the Red Cross, 'National Implementation of IHL' (ICRC database) <https://ihl-databases.icrc.org/ihl-nat> accessed 24 July 2020.

including legal and judicial reform. Unfortunately, it has not been the case. On the other hand, given the lack of independent enforcement mechanisms in the NCA, the intended protection for people, stated above, has never become a reality for five years now.



Extrajudicial killing, torture by Burma Army during operation against RCSS/SSA near Upper Yeywa dam site in Kyaukme
Source: Shan Human Rights Foundation



Torture and force labour by Burma Army in Mng Kung, July-Sept 2020
Source: Shan Human Rights Foundation

Humanitarian Assistance

In the NCA, para 10[77] addresses humanitarian assistance for refugees and Internally Displaced Persons (IDPs). The present need for such assistance in areas affected by conflict is beyond dispute. However, another exception clause, "with the approval of the government" is also found here. It seems that the government will not allow humanitarian agencies access to the non-signatory EROs' areas and it has the monopoly over humanitarian assistance. The same problem lies with the signatory organizations. Only when they can appease the government authorities and the Myanmar military leaders, access of the NGOs and INGOs, which bring humanitarian assistance, may be attainable.

77 *NCA* (n 5) ch 3 para 10:

a. Relevant Government ministries, the Ethnic Armed Organizations and local organizations shall coordinate with each other when implementing the delivery of humanitarian assistance by NGOs and INGOs to assist Internally Displaced Persons (IDPs) and conflict victims with the approval of the Government of the Republic of the Union of Myanmar.
b. Ensure the safety and dignity of the IDPs when undertaking a prioritized voluntary return of IDPs to their places of origin or resettlement of IDPs into new villages in suitable areas.'
c. Collaborate on the resettlement process including verification of IDPs and refugees.

Para 10 seems more geared to hampering than to facilitating such efforts: that para seeks to oblige the EAOs to "work hand in hand" with the government. These two promises to help IDPs appear vague and lack specifics. They are inadequate for dealing with displaced persons. There needs to be a specific provision about the government's duties in relation to their humanitarian needs, pending a final political settlement. To engender confidence and commitment, more detailed provisions on both the nature of the cooperation and the assistance should be specified while a definition of "IDPs" be made.

Resettlement of IDPs and return of refugees are directly related to their security, in terms of human security, based on the Rule of Law. In addition, their economic security must be ensured in a way, *inter alia*, that their right to self-determination on natural resources, based on their historic land right, must be guaranteed. Importantly, not only the refugees and IDPs but also ordinary people should be protected from both the government and the EAOs in this regard. A ceasefire provides the space and opportunity for careful and considered economic development whilst protecting the peoples' rights to their natural resources, but that depends on responsible governance in the EAOs as well as the ruling regime, as government.

The return of IDPs and refugees to their areas where they resided previously is different as the definition of IDPs and refugees are also different. Even though the KNU and the regime has been implementing a resettlement program for both IDPs and refugees over the past five years under this NCA, it is virtually a total failure. Almost all refugees have remains on the Thai Burma border in the territory of Thailand. The IDPs in Karen State have been facing life threatening situations[78] let alone economic development. In order to build a free and united society, the people who return must have the right to reclaim their former lands and engage in occupations they were forced to give up during the fighting.

A comprehensive bill of rights is hardly appropriate. However, the obligations of the parties at this critical juncture which is neither an 'emergency' nor 'peacetime', need to be clearly laid out as do the entitlements of civilians, especially the victims of the armed conflict and those particularly vulnerable groups such as children, women and the elderly. The well-being of civilians should be at the centre of this.

78 Karen Human Rights Group, "If I had known, I wouldn't have returned to Myanmar': Shortcomings in Refugee Repatriation and Reintegration' (KHRG, News Bulletin 20 June 2019) <https://khrg.org/2019/06/19-1-nb1/%E2%80%98if-i-had-known-i-wouldn%E2%80%99t-have-returned-myanmar%E2%80%99-shortcomings-refugee-repatriation> accessed 25 July 2020; Thomas Wilkie-Black 'Myanmar's Karen displaced in a quagmire' (Asia Times 27 April 2019) <https://asiatimes.com/2019/04/myanmars-karen-displaced-in-a-quagmire/> accessed 25 July 2020.

Both parties may commit to creating conditions, which would guarantee security for all people particularly in the war-torn areas negatively affected by the armed conflicts, in a way that measures for the Rule of Law are implemented. Only then, it will facilitate the return of refugees and resettlement of displaced persons effectively.

However, so long as the Myanmar army claims and uses the lands for their own benefits, and the draconian laws, which deprive the historic land rights of the ethnic nationalities, in terms of indigenous peoples, a civil, law-abiding society cannot be established and thrive. Such unethical actions, which are detrimental to society, shall be terminated.

Human Rights

It is shameful that single vocabulary on human rights lacks in this NCA. Protection and promotion of all internationally recognized human rights should be placed at the centre of all operations to seek and build peace. The agreement should contain a cohesive provision embracing rights with the statement that the government has the duty not only to not commit to, but also to prevent violations and to safeguard human rights. Monitoring missions to be set up under this agreement should also monitor the human rights situation.[79]

G. The Enforcement Issue in the NCA

From both normative and empirical aspects, to enforce a significant, but controversial, agreement is highly unlikely merely under the NCA: avoid hostile propaganda, defamatory, untruthful or derogatory statements, both within and outside the country.[80] This agreement predominantly relates to freedom of expression. This is not just the issue which may arise out of the violation of the NCA but the one that involves the entire society. If freedom of expression on the one hand and hate speech on the other hand can be dealt with appropriately, formally and legally, this agreement is unnecessary.

Even if such a pivotal issue is set out in the agreement, controversies would arise if the entire society lacks the stated legal protection and enforcement. To this end, legal reform for the entire country shall be made while the peace seeking process is underway. Unfortunately, it still lacks.

79 Legal Aid Network, 'Potential for Peace in Burma or Regional Stability' (LAN 15 May 2014) 24. Available at https://kaladanpress.com/2014/05/17/potential-for-peace-in-burma-or-regional-instability/ and https://drive.google.com/file/d/0BzC8VZhwp11AX1JTeHdtTUFDVnc/view accessed 25 July 2020.

80 *NCA* (n 5) ch 3 para 5(f).

In one of the agreements, among others, the dignity issue is found: avoid acts violating a person's dignity, violence, extrajudicial detention, kidnapping, torture, inhumane treatment, imprisonment, killing or otherwise causing the disappearance of the individual.[81] The dignity issue, which is also related to freedom of expression. It has been involved with the invalidity of Section 66 (d) of the Telecommunication Act.

Except for the dignity issue, the perpetrators of the remaining crimes stated in the said agreement, regardless of whether the belligerent parties to the NCA or ordinary citizens, shall have legal actions taken against them. It is unnecessary to address them under the NCA. Nevertheless, what is a sine qua non is that the parties to this agreement shall express their commitment to minimum standards of the Rule of Law, including one is that no one is above the law and perpetrator of any crime shall be held accountable. Unfortunately, it is lacking.

In the entire NCA, there is only one agreement that indicates the term "Rule of Law": administer rule of law in ceasefire areas in negotiation with each other and take action against perpetrators in accordance with the law in the same manner.[82] The rule of law must be upheld, not only in the ceasefire areas, but in the entire country. From the aspect of the Rule of Law, using the term "negotiation with each other" is unreasonable and such agreement can never be enforced. After negotiating with each other, the perpetrator or suspect can be released or the case may be covered up.

No perpetrator has been taken into any legal action by invoking this agreement in the NCA for five years now. To resolve this, independent actors, from national, regional and international communities, should be invited to form a certain type of independent mechanism. Then, that mechanism should be authorized to become a temporary institution which will supervise implementation of the agreements, and facilitate law enforcement authorities. When it lacks, the stated agreement is virtually useless.

In the NCA, the following agreement needs to be scrutinized: the removal of all the Ethnic Armed Organizations that are signatories to this Nationwide Ceasefire Agreement from the list of unlawful associations shall be undertaken.[83] Unfortunately, the stated agreement does not elaborate anything about how to create the legal status of the signatory EROs. Simply because they are cancelled from the list of unlawful associations, they cannot achieve any legal status. In conformity with the domestic laws, the signatory EROs have two ways for registration. They can register under the Political Parties' Registration Law of 2010. If so, they have to place themselves under

81 ibid ch 3 para 9(b).
82 ibid ch 3 para 5(h).
83 ibid ch 6 para 24(b).

the 2008 Constitution.[84] It is highly unlikely for a large majority of the EROs to adopt the 2008 Constitution right away as they have a fundamental objective at a minimum to amend the 2008 Constitution to be in line with federalism principles or to draw up a new federal democratic Constitution. Hence, no signatory ERO has been registered under the said law to date.

Another potential is to register under the Law Relating to Forming of Organizations (1988).[85] In that law, there is no similar provision, relevant to the 2008 Constitution. This was the most appropriate way to turn the EROs into legally registered organizations. Unfortunately, the ruling regime had repealed the Law Relating to Forming of Organizations before the NCA was signed. Such unethical behavior, *inter alia*, indicates that the ruling military regime has been manipulating the laws to push the EROs into a legal corner so that all of them will be trapped within the framework of the 2008 Constitution.

As such, although the signatory EROs have been cancelled from a list of the unlawful associations, they have not yet become the legally registered organizations. As such, they are unable to deal with domestic enterprises, foreign investment companies, foreign governments and international institutions officially and legally nor can they execute any contract. Rather, unofficial dealings with the authorities and other companies have been taking place thereby exacerbating the corrupt practices. Such behaviors are against the Rule of Law. Furthermore, to conduct enterprises by themselves, some signatory EROs have already established companies with different names by seeking unofficial understanding from the ruling military regime, particularly from the Ministry of Home Affairs, whose Ministers are top military Generals.[86] Such unlawful practices have increased blatant corruption, by which the Rule of Law languishes.

H. Lack of a Role for Independent Actors in the NCA

Chapter 4 of the NCA seeks to establish a Joint Ceasefire Monitoring Committee composed of representatives of the parties as well as "trusted and well-respected individuals". The Committee shall "coordinate and ensure" adherence to the agreement.[87] There is no specification of the number of

84 Political Parties' Registration Law 2010 s 6(c): 'safeguarding the Constitution of the Republic of the Union of Myanmar;'. Available at https://www.mlis.gov.mm/mLsView.do;jsessionid=64D9E18FBAACB36EC61C3EB93D9820E4?lawordSn=1408 accessed 25 July 2020.

85 Law Relating to Forming of Organizations 1988 (State Law and Order Restoration Council Law No 6/88). Available at http://www.asianlii.org/mm/legis/laws/lrtfoolaorcln688830/ accessed 25 July 2020.

86 This powerful position is currently assumed by Lt. General Soe Htut. His predecessor was Lt. General Ko Ko.

87 *NCA* (n 5) ch 4 para 12.

Committee members, the apportionment of seats among the parties and the "respected persons" nor any provision regarding quorum or whether decisions are to be taken by vote, acclamation or consensus. Unless such decision-making modalities are specified, the Committee cannot be expected to carry out the central role contemplated for it in implementing the ceasefire. Needless to say, in the absence of a body capable of exercising that role, there is a risk that one or more of the parties will endeavour to fill the decisional vacuum by unilaterally acting in ways that could undermine the ceasefire.

Crimes and injustices against individuals and groups have remained unabated even after the emergence of the Military Code of Conduct in 2015[88] in light of the NCA.[89] Accordingly, the objectives of the document are seemingly to avoid burdening the public and to protect civilians, and these provisions are legally binding.[90] Unfortunately, this so-called legally binding document never enables people to seek protection against crimes.

1363. In Kachin and Shan States, the Mission established that the Tatmadaw intentionally, frequently and systematically directed attacks against the civilian population or individual civilians. It has also systematically engaged in attacks that were indiscriminate, either because they were not directed against a specific military objective, or because they employed a method or means of combat that cannot be directed at a specific military objective. Underlying these tactics is the assumption that everyone belonging to a specific ethnic group necessarily supports or sympathises with the insurgent EAO from that ethnic group, and therefore a deliberate assimilation between the civilian population and the EAO. Attacks frequently occur in civilian-populated residential areas and in flagrant disregard of life, property and the well-being of civilians. This modus operandi has been a catalyst for the range of serious human rights violations outlined in this report, including extrajudicial killings, torture and ill-treatment, rape and other forms of sexual violence, arbitrary arrest and detention, and the large-scale destruction of villages and civilian property. Witnesses gave consistent accounts of the Tatmadaw randomly shelling villages, dropping bombs into civilian-populated areas, shooting at fleeing civilians, executing civilians in their custody and burning villages.[91]

The enforcement issue has negatively influenced the entire peace-seeking process since the outset. This reality is attributed to the insufficient legal knowledge among leaders of the ethnic resistance organizations

88 Military Code of Conduct, Joint Agreement between the Myanmar Government, including the Myanmar Army, and the Ethnic Resistance Organizations (EROs) which signed the Nationwide Ceasefire Agreement 18 November 2015. Available at https://www.peaceagreements.org/masterdocument/1544 accessed 25 July 2020.

89 *NCA* (n 5) ch 4 para 11.

90 ibid.

91 UNHRC, 'Detailed findings of the Independent International Fact-Finding Mission on Myanmar' (42nd Session 9-27 September 2019) UN Doc A/HRC/42/CRP.5

(EROs), which make up one side of the dialogue partners. On another side, whenever important meetings—for instance, a series of meetings attempting to produce a Nationwide Ceasefire Agreement—take place between the ruling military regime and the EROs, the former—albeit having impoverished legal knowledge—normally approached Tun Tun Oo, the then Deputy Attorney General but now Attorney General, to obtain legal suggestions from him. Unfortunately, the EROs lacked such legal assistance.

Furthermore, the military regime was able to persuade the EROs to sign all ceasefire-related documents, which might lead to seeking peace, without incorporating any effective enforcement mechanisms. Indeed, the military regime appeared to have done so intentionally. In every ceasefire related agreement – preliminary, bilateral or nationwide – the body merely constituted by the representatives of the belligerent parties, as members, are normally formed.[92] It is also known as Joint Monitoring Commission (JMC) in later processes. Hence, out of the two counterparts, if one side—particularly the side of government forces, the Myanmar Army—violates the agreement, enforcement is impossible despite having JMC.[93] The agreement is nothing but indefinite, endless discussions, wasting time and resources.

In regard to establishing an effective enforcement mechanism, which should be formed merely by the Third Parties, there was no progress up to the stage of signing of the Nationwide Ceasefire Agreement (NCA) on 15 October 2015. Afterward, based on the NCA, the military Code of Conduct appeared as an only formal document controlling military maneuvers while protecting civilians. Unfortunately, it is also useless as it still lacks an enforcement mechanism.

In the Military Code of Conduct, although the term "legally binding" is mentioned,94 the document only constitutes "soft law," which can be used in the processes between dialogue partners, as stated above. Unfortunately, it is not "hard law," which can be invoked by the aggrieved military parties or civilian victims for law-suits in the Court, regardless of whether the agreements reached in the document are just or unjust. No process exists in the NCA to transform "soft law" into "hard law." Empirically, the NCA is virtually useless for civilians inhabiting the ceasefire territories.

92 A similar problem-solving mechanism was first mentioned in the agreement made between the SLORC and the Kachin Independence Organization (KIO) in 1994. All other EAOs, which entered ceasefires with the regime, got analogous experiences. Only in a separate agreement made with the KNU on 4 September 2012, the regime agreed to proceed with the process of drafting a Code of Conduct to fortify the ceasefire.

93 *Military Code of Conduct (n 88)* para 1: 'The military personnel of the Government of Burma and EAOs agreed to uphold and precisely implement the terms of the NCA. In the event when terms of the agreement are violated or when disputes arise, both parties agreed to abide by the ruling of the Joint Monitoring Committee.'

94 ibid; LAN (n 79).

Cooperation to assist in the livelihood, health, education, and regional development of the people is one of the measures to be undertaken by the armed parties, as agreed upon in the Military Code of Conduct.[95] On the ground, however, the opposite is occurring. The Myanmar Army maintains a strong presence all across Southeast Myanmar while supplying troops, weapons and ammunition to its army camps, which negatively impacts the livelihoods of the communities living in the surrounding areas. For example, cold dust from a Tatmadaw-run cement factory contaminated nearby waterways during the rainy season, resulting in at least 15 villages facing water shortages, and gold mining activities damaged forests and polluted water and soil in several village tracts.[96] These economic projects are being undertaken without securing the free, prior, and informed consent (FPIC) of the local ethnic Karen groups,[97] in violation of the UN Declaration on the Rights of Indigenous Peoples.

Protection against violence, arbitrary arrest, kidnapping, torture, killing, inhuman treatment, and so on is another provision for the protection of civilians during national armed conflicts, particularly during ceasefire periods.[98] Unfortunately, with the presence of Tatmadaw forces, although several cases of sexual violence against children, rape in the context of forced marriage, and pressure to remain silent occur, the abusers often go unpunished or underpunished, creating greater insecurity and trauma for the victims; the judicial system and the system of mental health services are still unable to meet the necessary standards to adequately address the sufferings of victims.[99]

The Military Code of Conduct is not a legally qualified judiciable document. Hence, by simply invoking that document, people cannot sue military perpetrators for the suffering they caused in the civilian Courts. In regard to sexual and gender-based violence, limited legal protections are found in domestic law: the constitution guarantees equality before the law,[100] freedom from discrimination on grounds of gender,[101] and a prohibition of trafficking and enslavement;[102] in addition, rape[103] and other sexual related assaults[104] are serious crimes under the Penal Code. However, these protections are insufficient.

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95 *Military Code of Conduct* (n 88) ch 2 para 7(a).

96 Karen Human Rights Group, 'Southeast Myanmar Field Report: Militarisation, Environmental Pollution and Sexual Violence against Children, July to December 2019' (KHRG 24 February 2020) 1. https://khrg.org/2020/02/19-2-f1/southeast-myanmar-field-report-militarisation-environmental-pollution-and-sexual accessed 25 July 2020.

97 ibid.

98 *Military Code of Conduct (n 88)* ch 2 para 7(b).

99 ibid; *KHRG* (n 78).

100 Constitution of The Republic of the Union of Myanmar 2008 Art 347.

101 Constitution of The Republic of the Union of Myanmar 2008 Art 348.

102 Constitution of The Republic of the Union of Myanmar 2008 Art 358.

103 Burma Penal Code 1861 Sec 375, 376. Available at https://www.mlis.gov.mm/lsScPop.do?lawordSn=9506%20 accessed 25 July 2020.

104 ibid Sec 359-374.

Legal deficiency is not a primary reason for the lack of legal action taken by the local ethnic individuals and groups. Apart from fear of potential reprisal from the Myanmar Army, the lack of a legal aid system in remote mountainous areas, of sufficient resources for litigations, of trust in the Courts, and of efficient CSOs and social organizations are also major catalysts. In addition, denial of access of media is also another important factor.

Many times, even if laws are just, injustices commonly arise due to lack of enforcement.

> *193. In addition to its obligations under international law, Myanmar's Penal Code and the Ward or Village Tract Administration Act adopted in 2012 punish forced labour as a criminal offence. However, authorities have not adequately enforced the law. Adding to impunity, Article 359 of the Constitution, which exempts from the prohibition of forced labour "duties assigned by the Union in accordance with the law in the interest of the public" could be interpreted to exempt the military from the forced labour prohibition. According to the International Labour Organization's Committee on the Application of Standards, Tatmadaw soldiers involved in forced labour have only faced internal disciplinary action, with the exception of one person who the Committee reported was punished under section 374 of the Penal Code.*[105]

Actually, the parties should consider establishing a monitoring body wholly independent of the parties themselves. The use of independent monitors of ceasefires appears to be the most common model applied today and is of particular utility in cases where the parties are not on an equal footing and where their relationship is characterized by mistrust. An independent monitoring body is also best suited to deal objectively with complaints of ceasefire breaches.

A monitoring mission requires clear rules to govern decision-making, the risk otherwise being that one or more of the parties will act on their own in ways that could jeopardize the ceasefire. An independent monitoring mission offers clear advantages over one composed of the parties themselves and the parties should therefore explore what possibilities exist for the United Nations, individual states or other appropriate entities to monitor the ceasefire.[106]

105 IIFFM Report (n 91) para 193.
106 ibid.

I. The Political Roadmap

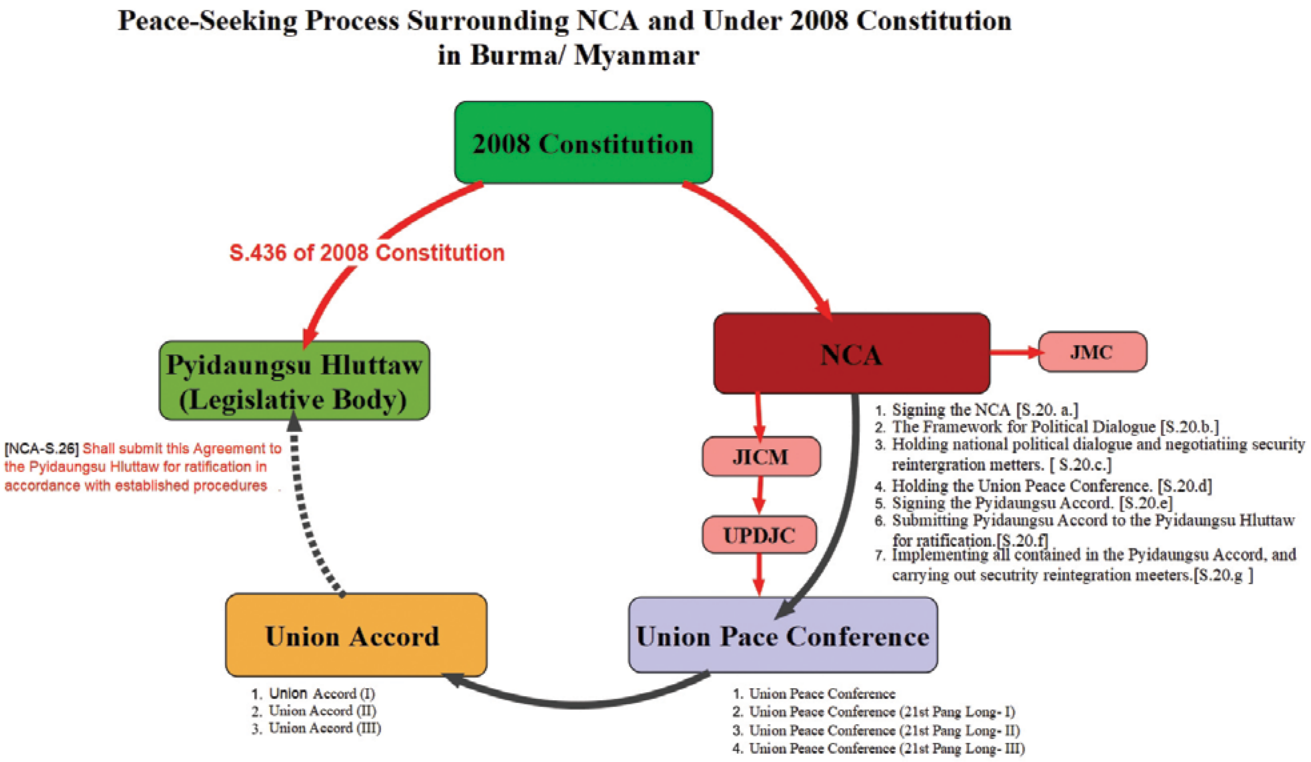
The political roadmap, laid down by the ruling military regime, started from the signing of the NCA. In fact, the signing of the NCA should not be a prior condition that must be fully complied with in establishing a political dialogue. Many EROs have already signed the ceasefire agreements at both provincial as well as union levels. At that time, the country was under the rule of the President Thein Sein, a former military General. Simultaneously the regime had already reached an agreement with the Kachin Independence Organization (KIO) to reduce the momentum of war.[107] If the then regime sincerely wishes to establish a genuine political dialogue, it can be done without signing of the NCA by all EROs.

Only 8 EROs signed the NCA on 15 October 2015. Later in 2018, the New Mon State Party (NMSP) and the Lahu Democratic Union (LDU) signed it. Many powerful EROs have not yet done so. It has been five years now. The term "nationwide" has not yet been a reality. Currently, passing through the middle of Burma, civil war has spread to the Rakhine State.

Even if the NCA process, firstly step one,[108] is pursued, a sequence of steps becomes a serious issue as to whether the process would be implemented one step after another serially as set out in para 20 (a)(b)(c)(d)(e)(f)(g). It is quite ambiguous. Taking advantage of this ambiguity, the ruling regime held the Union Peace Conference only with 8 EROs which signed the NCA, out of 21 altogether in the entire country. Of the 8 EROs, there are the three Karen groups. The two defected from the KNU and formed their own organizations.[109] Hence, these 8 EROs may somewhat represent merely two ethnic provinces – the Karen State and the Chin State – out of 8 ethnic provinces. The New Mon State Party, in Mon State and some powerful EROs in Shan State have not yet signed the NCA. In Rakhine State, the same is for the Arakan Army which appears to have received about 80% support of the Rakhine nationals.

With this undemocratic underpinning, the 'Framework for Political Dialogue' (FPD), which would generate the entire process was drawn up and approved.[110] This is step two.[111] The process for the drafting of the FPD, controlled by the Myanmar military leaders, had already been done. Hence, the new signatories – the New Mon State Party (NMSP) and the Lahu Democratic Union (LDU) – did not have any opportunity to amend or revise

107 Agreement between Union Peace Working Committee and Kachin Independence Organization Delegates, October 10, 2013.
108 *NCA (N 5)* ch 5 para 20(a).
109 The Democratic Karen Buddhist Army (DKBA) and the KNU/KNLA (Peace Council).
110 Composition ratio and decision-making procedure of the Union Peace Conference already elaborated in para 6.3.4.
111 *NCA (n 5)* ch 5 para 20(b).



the FPD. Thus, the process is underway under such an undemocratic control, which does not embody fair representation of the ethnic provinces.

Step three relates to holding national-level political dialogues.[112] The term 'national-level' should cover at least all eight ethnic provinces. When an accurate interpretation lacks, the so-called political dialogues were held only in a few States and Divisions, but not in all. The will of the ethnic nationalities inhabiting respective ethnic states/provinces could not be reflected adequately. The national-level political dialogues were undertaken just as a sham. In regard to security integration matters, the EROs have declared that they intend to participate in the formation of the Union Army, as a single army. Conversely, Min Aung Hlaing stated that the Myanmar Army has already been a single army, and as such all other fighters in the EROs can apply for members of the MA. This is one of the most crucial issues to be dealt with. Unfortunately, such a pivotal issue has not yet even been discussed although altogether four Union Conferences had already been convened.[113]

In the third conference, a draft agreement on the "non-secession" clause submitted by the Myanmar Army was not approved. Anyway, the fourth step is underway.[114] To date, any single substantial agreement on federalism has not yet been reached. Hence, the question has arisen for the

112 ibid ch 5 para 20(c): 'Holding national-level political dialogue based on the adopted Framework for Political Dialogue, and negotiating security reintegration matters and undertaking other necessary tasks that both parties agree can be carried out in advance.'

113 The Union Peace Conferences or the 21st Century Pang Long Conferences were held in 2016, 2017, 2018 and 2020.

114 *NCA (n 5)* ch 5 para 20(d): 'Holding the Union Peace Conference.'

fifth step,[115] on how the Union Accord would be completed. Another substantial flaw of the NCA is that time limitation, as a sunset clause, is not set out therein.

The process was firstly initiated by the President Thein Sein regime in 2011. He was able to somewhat convince the people and the international community that a democratic transition along with a peace seeking process had been underway.[116] The current process should be contrasted with the previous one by which the 2008 Constitution was drafted after convening a National Convention (NC), taking time for almost 15 years, emanating from 1993.

Lengthening time is one of the major strategies, conducted by the Myanmar military regimes. After the NLD had won the May 1990 general elections, the military junta did not simply transfer power to the NLD, having provided a reason that it would do so only after drawing up a new constitution. To this end, the regime prepared to convene the NC. Prior to the NC, the 104 basic constitutional principles were produced by the regime. Therein, the outlines that would entrench the military dictatorship, including "Our Three Tasks," had been incorporated. To steer the NC, a technical team led by Chief Justice Aung Toe was formed. Aung Toe and his team served the Myanmar military leaders well. Thus, a new Constitution (draft) was drawn up merely based on the stated 104 basic constitutional principles.

Afterwards, that new Constitution (draft) was forcefully approved by a constitutional referendum in 2008, notwithstanding the Cyclone Nargis strike with an official death toll of 84,537 and 53,836 more missing.[117] Then, it became the 2008 Constitution. During an unprecedentedly long period of constitution making, the overt rule of the military dictatorship persisted. Even if the Constitution emerged, the transfer of power to the NLD was never done. Rather, a new election was held in 2010, ignoring the result of the 1990 general elections. Based on the 2008 Constitution, a former military General Thein Sein became the President.

The KIO entered the ceasefire with the military regime in 1994. When asked about a political dialogue, the Myanmar military leaders responded by urging the KIO to join the NC. Similarity went to all other EROs which entered ceasefire one group after another at that time. The then NC was a tremendous political as well as legal trap. Analogous strategy is being applied

115 ibid ch 5 para 20(e): 'Signing the Pyidaungsu (Union) Accord.'

116 At that time, there arose some recommendations that Thein Sein be awarded the Nobel price as he was behaving as De Clerk in South Africa. What is different in between De Clerk and Thein Sein is that De Clerk agreed to repeal the South Africa's Constitution of 1983 in which apartheid was systemically incorporated. Differently, Thein Sein defended the 2008 Constitution wherein the military dictatorship is desperately embedded.

117 Michael F Martin and Rhoda Margesson, 'Cyclone Nargis and Burma's Constitutional Referendum' (Congressional Research Service, Report for Congress RL34481, 30 June 2008). Available at https://www.everycrsreport.com/reports/RL34481.html accessed 25 July 2020.

by the incumbent military regime in the Union Peace Conference, being held based on the NCA.

The current situation is more devastated and complicated than the period that the NC was held to produce a Constitution. In the NC, there was no military in uniform; some educated civilian proxies, including Chief Justice Aung Toe, were manipulated, to steer every constitution making process. Now, the incumbent and former army officials, as a block, replaced Aung Toe and his technical team to control the entire peace seeking process. In cooperation with some academic proxies, the Myanmar military leaders primarily led all processes of the JICM, UPDJC and JMC, the semi-institutions formed under the NCA. In addition, they generate the Union Peace Conferences too. Importantly, the overarching theme of the entire peace seeking process is the 2008 Constitution. Min Aung Hlaing reiterated that the 2008 Constitution and "existing laws" must be complied with as the core of the peace policy.

With these underpinnings, the sixth step process[118] needs to be examined. Accordingly, the Union Accord would be binding only after it was ratified by the Union Assembly. The stated Union Assembly is not a new constituent assembly, composed by the elected representatives, as was the case when the 1947 Constitution was approved. It is just an existing assembly in which one fourth of a total number of representatives are army personnel chosen and sent by C-in-C Min Aung Hlaing. If they are not happy with any agreement – for instance, something like, "The seats of all legislative assemblies in the entire Union will be occupied merely by the elected representatives" – the entire Union Accord might be turned down.

The NCA keeps silent as to how many percent of all the representatives of the Union Assembly, the Union Accord would be ratified. It totally blurs. This is on the one hand. On the other hand, procedural issues are also found: What does the phrase "in accordance with the procedures" mean? The ambiguities, which are detrimental to the accuracy of law, exist in the NCA fully. Further, the document lacks an agreement illustrating that if there are disputes in interpretation, they will be submitted at the Supreme Court for adjudication. Hence, the term "in accordance with the procedures" may be one-sidedly interpreted by the military regime, that is, just to comply with Article 436 of the 2008 Constitution.[119] If so, the entire Union Accord would

118 *NCA (n 5)* ch 6 para 26: 'We shall submit this Agreement to the Pyidaungsu Hluttaw (the Union Assembly) for ratification in accordance with procedures.'

119 Constitution of the Republic of the Union of Myanmar 2008 Art 436 (a): 'If it is necessary to amend the provisions of section 1 to 48 in Chapter I, Section 49 to 56 in Chapter II, Section 59 and 60 in Chapter III, Section 74, 109, 141 and 161 in Chapter IV, Section 200, 201, 248 and 276 in Chapter V, Section 293, 294, 305, 314 and 320 in Chapter VI, Section 410 to 432 in Chapter XI and Section 436 in Chapter XII of this Constitution, it shall be amended with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote.'

become meaningless: only when every single agreement is satisfied by the Myanmar military leaders, the Union Accord might be ratified. Hence, the entire process would end there and a vicious circle would start again.

J. Other Incompetence in the NCA

The Troop Recruitment

The "troop recruitment"[120] agreement restricts troop recruitment by the EROs while it keeps silent for the MA. Allowing one side to arm itself during a ceasefire, whilst preventing the other side from doing the same thing may not be fair. It is against the principle of the Rule of Law, which emphasizes equality.

Time Frame

The NCA is a vague and open-ended agreement, without a precise and realistic timeline as well as a timeframe for implementation. Five years period, after signing of the NCA, should be sufficient and the effect of the NCA be terminated. If not, similar to the case of the National Convention which produced the 2008 Constitution, the NCA may lapse only after about 15 years or more. During that time, the 2008 Constitution would be operating well, and the rule of the military dictatorship would have been embedded. In addition, more organic laws which would be detrimental to the federalism foundation would have come into existence.

K. The Legal Status of the NCA

The legal status of the NCA must be examined. If peace-related agreements with a powerful enforcement mechanism have legal status, breaches of those agreements can be reduced, thereby effectively facilitating the peace-seeking process. In fact, the emergence of an overarching agreement, which would buttress the pursuit of a negotiated exit from war and toward peace,121 is a sine qua non in any countries with internal armed conflicts stemming from the underlying political, racial, and societal issues. Such agreements also focus on addressing violations of individual and collective rights.

120 *NCA* (n 5) ch 3 para 6.

121 Bard Drange, The potential and limits of peace agreements – ACCORD, (April 2018) <https://www.accord.org.za/conflict-trends/the-potential-and-limits-of-peace-agreements/> accessed 31 July 2018.

To this end, the legal status of the peace-related agreements and their content should be examined to assess whether armed conflicts would re-occur amid insufficient agreements that could fuel incompetence or intensify other societal issues. Immanuel Kant stated that "no treaty of peace shall be held valid in which there is tacitly reserved matter for future war."[122] To avoid the creation of such peace-related agreements, some influential factors must be identified while still accounting for the particular situations of the respective countries.

Since the end of the Second World War, the UN has focused on preventing interstate conflicts; later, following the Cold War, the international community has also become increasingly involved in addressing internal conflicts.[123] Ceasefire agreements are envisioned by academics as the first link in a chain between war and peace, creating the space for negotiations to lead to long-lasting agreements.[124] Notably, though, ceasefire agreements or peace accords executed between state and non-state parties are not normally considered international agreements. The Vienna Convention on the Law of Treaties (VCLT) excluded agreements concluded with or between non-state actors, but this exclusion applies only to agreements made between states.[125]

However, some academicians, such as Beatrice Walton, envision that Article 3 of the VCLT provides that the Convention does not affect agreements concluded between states and "other subjects of international law."[126] This view is partly shared by Laura Betancur Restrepo. She believes that Common Article 3 of the 1949 Geneva Convention shall not effect 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.[127] Christine Bell also invoked Common Article 3 and argued that an agreement in Aceh was similarly stated as a special agreement

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

123 International Alert Women Waging Peace: Conflict prevention, resolution and reconstruction, institutional security and sustainable peace, advocacy toolkit: <https://peacemaker.un.org/sites/peacemaker.un.org/files/ToolkitWomenandConflictPreventionandResolution_InternationalAlert2004.pdf> accessed 31 July 2020.

124 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 26 June 2020.

125 Alina Kaczorowska-Ireland, Public International Law, ISBN 0-203-84847-0 Master e-book ISBN (2010) 81

126 Beatrice Walton, (n 124).

127 Laura Betancur Restrepo, 'The Legal Status of the Columbian Peace Agreement,' Symposium on the Columbian Peace Talk and International Law, (3 November 2016) 1: available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E83C790A2F8E63912454AAA7D90647CF/S2398772300003056a.pdf/legal_status_of_the_colombian_peace_agreement.pdf> accessed 11 August 2020.

for the purposes of humanitarian law.[128] The Columbia Peace Agreement has been concluded to be a special agreement under Common Article 3, which is part of all four Geneva Conventions.[129]

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

> *(i) special agreements cannot be considered international treaties because AGs do not have the capacity to conclude treaties and the contrary would inevitably modify their legal status; or (ii) AGs have a limited international legal personality which allows them, at least a priori, to conclude only the agreements referred to in CA3 and only to the extent that they refer to and concern IHL.130*

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,[131] 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, contrary to the case of Colombia.

Although the term "peace agreement" has not yet been defined or explored, Christine Bell qualifies the Lusaka Ceasefire Agreement as a peace

128 Christine Bell, 'Columbia Peace Accord in Comparative Perspective,' Symposium on the Columbia Peace Talks and International Law, (3 November 2016) 169: Available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/14D6D1986F104F243B1FFFE1AE92A5CA/S2398772300003019a.pdf/lex_pacificatoria_colombiana_colombias_peace_accord_in_comparative_perspective.pdf> accessed 11 August 2020.

129 Silvia Scozia, 'Columbia Peace Agreement', How does law protect in War (24 November 2016) 1: <https://casebook.icrc.org/case-study/colombia-peace-agreement> accessed 11 August 2020

130 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' 96 (895/896) International Review of the Red Cross (2014) 1196-1197. Available at https://international-review.icrc.org/articles/special-agreements-means-enhancing-compliance-ihl-non-international-armed-conflicts accessed 1 July 2020.

131 Ibid, Ezequiel Heffes, 1217.

agreement.[132] 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.[133] 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.[134]

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,[135] a paragraph in the General Peace Agreement stated that the GPA would be transformed into Mozambican law.[136] The NCA lacks such provisions related to legalizing the agreement.

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—accurately organised referendums on May 22, 1998. In the agreement, an accurate time limitation was mentioned. Accordingly, within 42 days of

132 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' 40 New York University Journal of International Law and Politics 107 (2008) 114-115. Available at https://nyujilp.org/wp-content/uploads/2013/02/40.S-Lang.pdf accessed 3 July 2020

133 Lusaka ceasefire agreement: Available at <https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/Lusaka%20Cease-Fire%20Agreement%20(1999).pdf> accessed 15 August 2020

134 Christine Bell, 'Peace agreements: Their nature and legal status' 100 American Journal of International Law 373 (2006) 389

135 Joint Declaration: <https://ucdpged.uu.se/peaceagreements/fulltext/Moz%2019920807.pdf> accessed 28 August 2020.

136 General Peace Agreement of Mozambique, Protocol V 2(c), (4 Obtober1992) https://www.peaceagreements.org/masterdocument/392

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.

In Columbia, the government led by President Santos and the FARC, the country's largest rebel group led by Londono, 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.[137] After then subsequently revising the peace deal, both parties had to find another way to legally approve the agreement.

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 Accord (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.[138] Such a procedure directly opposes the common practice of the many countries that have encountered non-international armed conflicts. This divergence from common practice could be problematic; if the NCA were to meet the basic characteristics of a peace agreement, as was the case for the Lusaka peace agreement, the original NCA text might be impeded when the second agreement, the UA, is later produced. Such conditions are possible because parties to the agreements and their political will might change once the UA is produced.

Even if the NCA is adopted, another contentious issue has arisen that relates to the lack of independent third-party actors. The NCA lacks a clear provision on whether the UPC would be convened only once or multiple times. While this should occur only once, the UPC has, to date, already convened four times, and no one knows how many additional times it will do so.

All peace-related agreements should have targets and benchmarks for measuring the progress toward a comprehensive solution to long-running disputes. At the very least, a clear timetable is required. Given the lack of both this requirement and independent third-party actors, the peace seeking process stalled from the end of 2018 to August 2020.[139] Then, the fourth

137 BBC, Colombia signs new peace deal with Farc, (24 November 2016) https://www.bbc.com/news/world-latin-america-38096179

138 The NCA (n 5), para 21, 26.

139 Speech delivered by Ywad Serk, Chairperson of the RCSS/SSA at the opening ceremony of the fourth secession of the Union Peace Conference, 19 August 2020. <http://www.nrpc.gov.mm/content/683/nca-lkmttrethiuthaaseaa-ttiungrngsaalknkkiungaphai

conference was convened on August 19–21, 2020. The ruling regime could also now endlessly continue convening the UPC or other similar meetings by using different names. However, all forthcoming meetings surrounding the NCA would also end within the framework of the 2008 Constitution—wasting time, energy, and resources. This situation highlights the absurdity of such a process.

acnnymaakiuycaa-rmpnny> accessed 1 September 2020

CHAPTER: IV

INTERPRETATION OF FEDERALISM

In interpreting a political term 'federalism,' many differences are found. However, certain characteristics and principles are common to all truly federal systems.[140] Federalism unites separate states or other polities within an overarching political system in a way that each constituent units are allowed to maintain their own integrity by addressing the required factors such as a written constitution, non-centralization and the accommodation of very diverse groups whose differences are fundamental while preserving democratic government.[141] Furthermore, federalism establishes direct lines of communications by elected representatives who occupy all government positions; to fulfil the geographic necessity, a common defense against common enemies is undertaken; fair equality and fair sharing of wealth are practiced; eventually, the existence of a non-centralized party system is facilitated.[142]

In addition, a few valuable academic definitions are also worth observing:

Daniel Elazar (1987) defines Federalism simply as self-rule plus shared rule, operating contractually on a noncentralized basis through a matrix of governments, with fluid power loadings.[143]

140 The Editors of Encyclopaedia Britannica, 'Federalism' (Encyclopædia Britannica 30 April 2020) <https://www.britannica.com/topic/federalism> accessed 22 August 2020.
141 ibid.
142 ibid.
143 Daniel J Elazar, *Exploring Federalism* (University of Alabama Press, Tuscaloosa 1987).

The Federalism idea involves both structure and processes of governance that seek to establish unity on the basis of consent while preserving diversity by constitutionally uniting separate political communities into an encompassing polity.[144]

Powers are divided and shared between constituent governments and a federal government, where the constituent governments have broad responsibilities and the autonomy to carry out responsibilities and the federal government undertakes broader countrywide responsibilities.[145]

--- Federalism refers to a political system designed to attain 'both union and non-centralization at the same time.' In the process, the federal union and its component units are supposed to enjoy considerable degree of shared rule and self rule within its constitutionally defined powers and responsibilities.[146]

Based on the historic Pang Long Accord, Burma was established as a Union with the ethnic states/provinces commencing from 12 February 1947. Unfortunately, the ethnic equality and minority issues have not yet been resolved, and the civil war has prolonged for seven decades. Hence, it is required for the country to exercise "ethnic based cooperative federalism" – even if it is not "ethnic federalism" according to which the right of secession is granted vis-à-vis the right to self-determination.[147]

All in all, article 39, which is within our federal system framework, is a guarantee of our unity and not a threat of our disintegration. The reason why African countries that don't have this article are embroiled in chaos and riot is because they are not able to bring unity that's based on consent.[148]

Since the 1962 military coup, the ruling Myanmar military leaders have never attempted to sign and ratify any international bilateral and multilateral agreements which include obligations towards minorities.

144 Robert Agranoff, Federalism' in George Thomas Kurian (ed), The encyclopedia of political science (CQ Press, Washington 2011) 571. Mohammad Habib (Asst.Prof), 'Ethiopian Federal System: Formative Stage' Friedrich-Ebert-Stiftung, Addis Ababa Office (2010) 5: <http://library.fes.de/pdf-files/bueros/aethiopien/07945.pdf> accessed 28 August 2020.

145 Ibid.

146 Ibid, Daniel J Elazar, Exploring Federalism (University of Alabama Press, Tuscaloosa 1987).

147 Article 39 of the Ethiopia Constitution (1994), Rights of Nations, Nationalities, and Peoples: 'Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.'

148 Taye Kebede, 'the Unique Features of our Federalism,' Walta Media and Communication Corporate S.C. (7 October 2016): <http://www.waltainfo.com/FeaturedArticles/detail?cid=24912&locale=en> accessed 28 August 2020.

Throughout the long era ruled by the Myanmar military, minority affairs have never been an important concern nor did the military regime exert any effort bringing a more extended inclusion of minority rights into national legal system. The UN Seminars on human rights in multinational communities and on the protection of rights of national, ethnic and other minorities have been irrelevant to Burma as of now.

The major underlying issue, which has prolonged the civil war in Burma, is primarily related to the rights of the ethnic nationalities, in terms of the promotion and protection of the minority right. In essence, federalism is inextricably related to the protection of minority rights, including the right to self-determination of the ethnic nationalities. Under the right to self-determination in the context of Burma, full autonomy of the ethnic nationalities over their ethnic states/provinces, in terms of the constituent units of the Union, needs to be guaranteed.

When an agreement for a reasonable definition of 'federalism', based on the protection of minority rights as stated above, could not be reached nor could it be incorporated in the NCA, another undue action has arisen: C-in-C Min Aung Hlaing has misled the understanding of 'federalism' by using vague and complicated terms in his opening speech made in the 4th secession of the Union Peace Conference (UPC) also known as the 21st Century Pang Long Conference held on 19 August 2020 the following: 'Federalism is a concept of sharing mandates in cooperation among different regions, states, national races, and ethnic groups. In essence, it is a concept of unity and sharing.'[149] MAL's articulation on 'federalism' does not match with any academic norms.

Whenever "federalism" is applied, in addition to others, "the division of powers" or "power sharing" is commonly practiced. It describes how the power of the State/Union would be divided vertically between the organs of the Union or Federal level government and those of the state governments. C-in-C Min Aung Hlaing (MAL) has replaced "the division of powers," with a new term, "mandate."

The word "mandate"[150] is not only confusing but also revealing of the actual vision of federalism by the military. MAL appears to have avoided the term "power" intentionally. 'Mandate' does not embody the intrinsic power of an entity but the one that derives from higher authorities.[151] Such entities

149 English translation of Min Aung Hlaing's speech is available at http://www.nrpc.gov.mm/en/node/453

150 The term လုပ်ဆောင်ပိုင်ခွင့် in Myanmar language is translated to mandate.

151 Note: In the US, jurisprudence of a federal mandate is 'any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.' Federal mandates are very controversial in US politics because the states often are obliged to implement federal policies. https://www.law.cornell.edu/uscode/text/2/1555

would be the ethnic states/provinces, which constitute a Federal Union. Rather than power, the ethnic states/provinces would merely exercise a mandate, endowed by the central government, in which the military rule has been embedded, according to MAL.

Conversely, in her speech, Aung San Suu Kyi referred to "power sharing" in attempting to make an interpretation of "federalism" as follows:

> *------ we have to establish a genuine Democratic Federal Union; in accordance with a federal system we needed to have power–sharing, resource sharing, sharing of tax revenues, all federal units should have equal status, states should have their own state constitutions capable of guaranteeing the right to self-determination. I also spoke about the basic principles which would ensure that in the exercise of powers shared to the states, it should be based on the people.*[152]

Unfortunately, her power sharing concept would embed the existence and operation of the 2008 Constitution which exercise all sovereign powers by the central authorities. She didn't mention anything about, at least, sharing of sovereign powers between the federal/central authorities and the constituent units of the Union. In fact, the system of the delegation of sovereign powers from the constituent units, in terms of ethnic states/provinces, to the federal/central authorities must be exercised, based on the historic 1947 Pang Long Accord. The Union Peace Conference totally ignored the following recommendation made by Sai Nyunt Lwin, Vice-Chairperson (1) of the Shan Nationalities League for Democracy (SNLD), made at its opening ceremony of the fourth secession:

> *I want us to view this peace conference as a means to fully implement the details of the Panglong Agreement signed in 1947. I do not wish it to be a conference that aims to overshadow and nullify the Panglong Agreement, as some people fear. I sincerely urge everyone to not allow that to happen.*[153]

Nor was "full autonomy" for frontier areas – in terms of ethnic states/provinces, enshrined in the Pang Long Accord – embodied in any agreement reached in the Union Accord. By examining the following speech delivered by Aung San Suu Kyi, it is clear that she has been articulating about federalism

152 Aung San Suu Kyi, State Counsellor and Chairperson of National Reconciliation and Peace Centre, delivered speech at Union Peace Conference—21st Century Panglong (19 August 2020): <https://www.statecounsellor.gov.mm/en/node/2960> accessed 1 September 2020.

153 Speech delivered by Sai Nyunt Lwin , Vice-Chairperson (1) of Shan Nationalities League for Democracy, at 4th Session of Union Peace Conference- 21st Century Panglong, (19 August 2020): <http://www.nrpc.gov.mm/en/node/457> accessed 19 August 2020.

merely within the framework of the 2008 Constitution.

> *We will need to continue our dialogue on the division of power, allocation of resources and revenue between the Union, States and Regions, and the powers as described in the additional tables to the Constitution.*[154]

Additional tables to the Constitution squarely refer to Schedules I to V in the 2008 Constitution. Schedules I and II are Union Legislative List and Region/State Legislative List. In Burma, there is no doubt that natural resources are rich in the ethnic states/provinces. However, management power for energy, electricity, mining and forest sectors are almost fully apportioned to the Union list. For instance, petroleum, natural resources, production and distribution of electricity of the Union, minerals, mines, gems, pearls, forests, and environmental protection and conservation including wildlife, natural plants and natural areas are in the Union list, except for small-scale mines.[155]

Medium and small-scale electric power and production, salt and salt products, cutting and polishing gemstones with the Region or States, village firewood plantation, recreation centers, zoological garden and botanical garden are in the State list. The difference is huge. In these regards, a single word of the core provisions in the text could not be amended to promote the rights of the ethnic states/provinces and their respective ethnic nationalities, in terms of the right to self-determination, during the previous one-decade period.

After completion of the 4th secession of the UPC, the status of "federalism" rhetorically articulated by the ruling regimes – both the military and civilian parts of the government – has become more obvious than before. Accordingly, "federalism" would superficially exist, but not become a reality empirically.

154 Opening Speech by State Counsellor Daw Aung San Suu Kyi at the ceremony to mark the 2nd Anniversary of the Signing of the Nationwide Ceasefire Agreement: <http://www.nrpc.gov.mm/en/node/203> accessed 2 September 2020.

155 Schedule II of the 2008 Constitution was amended on 25 July 2015 in accordance with the Union Assembly Law No. 45.

CHAPTER: V

THE UNION ACCORD (UA)

PRODUCED BY THE UNION PEACE CONFERENCES OR THE 21ST CENTURY PANG LONG CONFERENCES

The 21st Century Pang Long Conference: Against the Rule of Law Foundation

Aung San Suu Kyi added another title, the 21st Century Pang Long Conference, to the Union Peace Conference, already specified in the NCA. Her performance triggered a complicated political and legal issue. The civilian part of the government led by her never stated publicly that the core agreements reached in the previous Pang Long Accord would be adopted by this new Pang Long Conference. Rather, she rhetorically and repeatedly claimed that Pang Long "spirit" will be activated. The term "spirit" may be attractive to wider public, but it is quite vague from legal aspect. Either Aung San Suu Kyi herself or her NLD party never explicated the interpretation of "Pang Long spirit."

What does "Pang Long spirit" mean? Does it formally recognize the independent existence of non-Myanmar ethnic nationalities in history? Does it focus only on unity but not diversities? Does it also acknowledge that, only with the support and cooperation of the non-Myanmar ethnic nationalities, Burma gained independence? Under that term, does she perceive that Pang Long is the beginning of Pyidaungsu, or the Union, but not an end itself, and that, without Pang Long Accord, any Union would not arise, leading to the emergence of the Union of Burma? The vagueness of the term as well as implementation of it have caused the uncertainties, which stand against the minimum standards of the Rule of Law.

According to the NCA,[156] after convening the Union Peace Conference, a Pyidaungsu Agreement, or a Union Accord, will be signed. However, the following procedural flaws within the current process negate the legality of

156 *NCA ch 5* para 20 (e).

any document which may emerge from the Union Peace Conference, also known as the 21st Century Pang Long Conference, now and in future:[157]

Lack of nexus between the previous Pang Long Accord and the new one

Before the independence of the country, the U.K., which colonized Burma, on the one hand and the provisional Government of Burma on the other hand agreed in a separate treaty[158] that the Provisional Government would inherit rights and obligations covered by international agreements[159] to which the U.K. was a party. This continued to bind the "permanent" Government of Burma, after its independence in accordance with international law. As such, the responsibility to implement the agreements made in the sole and legitimate Pang Long Accord, executed on February 12, 1947, has already been devolved primarily on the NLD government which attempts to produce a new Pang Long agreement.

Unfortunately, the NLD government has not yet attempted to bear this historic responsibility as well as legal obligation, nor has it established a nexus between the two agreements in order that the legitimacy of the former one can be inherited by the new one.

Of the 37 points under Part I of the UA, there are five principles to be based in federalism. Nevertheless, there is no agreement which states that a certain type of federalism would be exercised: for instance, dual federalism, or cooperative federalism, or confederated federalism, or symmetric federalism, or asymmetric federalism, or ethnic federalism, or ethnic based federalism etc. A certain type of federalism suited to Burma cannot be chosen randomly. Nor can it be done merely by applying someone's wonderful wisdom or knowledge on federalism. The fundamentals of federalism which should be applied in Burma must be taken into account by invoking recent history of the country and addressing the underlying issues currently taking place on the ground.

157 Legal Aid Network, 'Peace Statement 5: Statement on Legal Issues Arising out of the 21 Century Pang Long Conference' (LAN 27 May 2017). Available at https://progressivevoicemyanmar.org/wp-content/uploads/2017/05/Peace-Statement-5-on-Legal-Issues-of-UPC-English.pdf accessed 22 July 2020.

158 *Treaty (n 14)* art 2.

159 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.

A BRIEF ANALYSIS OF THE UNION ACCORD (UA)

Federalism Principle 1: Sovereignty Issue

Of the five federalism principles stated in the Union Accord (UA), the principle 1 indicates sovereign power.[160] However, this principle is not a new agreement, arising out of the countless numbers of the dialogues or negotiations, for the establishment of a Federal Union. Article 4 of the 2008 Constitution was squarely transformed into the federalism principle 1. The stated Article 4 has two parts: (1) the sovereign power of the Union derives from the People; (2) and, it is in force in the entire country.

It is required to make a contrast between Article 4 of the 2008 Constitution and Article 3 of the 1947 Constitution which stipulates, 'the sovereignty of the Union resides in the people.' According to the latter, it connotes that the sovereign power of the Union derives from the people, resides in the people, and exercised by the people. Conversely, under the 2008 Constitution, the second part of Article 4 has hugely created a serious issue. Accordingly, the sovereign power of the Union derives from the people, is in force in the entire Union, and the Union exercises sovereignty.

Article 47 of the 2008 Constitution provides, '---the term "Union" means person or body exercising the legislative or executive authority of the Union under this Constitution according as the context may require.' According to Article 47, the term "Union" encompass the military personnel, not elected but sent by the C-in-C of the Armed Forces, constitute one fourth of a total number of all members in all legislative assemblies while the high-ranking military leaders assume about 2/3 of the executive authority. Under the 2008 Constitution, even the Sovereign power, which derives from the citizens, is primarily assumed by the military, but not by the citizens, as the military has already occupied the instrumental positions in both legislative and executive bodies by invoking the term "Union."

The stated action is a tremendous constitutional trick by which the role of the people is suppressed while the venue for the military leaders are created by making the nexus between the Sovereignty and the Union. Furthermore, although Article 4 of the 2008 Constitution[161] somewhat mentions popular sovereignty, it explicitly omits provincial sovereignty.

In accordance with the Pang Long Accord, the ethnic states/provinces,

160 Union Accord, Agreement of Principle on Political Sector, Principles to be based in Federalism, Principle (1) (29 May 2017): The Sovereign Power— The Sovereign Power of the Union is derived from the citizens and is in force in the entire country.

161 Constitution of the Republic of the Union of Myanmar 2008 Art 4 The Sovereign power of the Union is derived from the citizens and is enforced in the entire country.

including Myanmar province, deserve to enjoy provincial sovereignty. By invoking the term "people" a thousand times, Aung San Suu Kyi normally refers to popular sovereignty, which is correct. However, she never refers to provincial sovereignty, which is required in establishing a federal Union. The popular sovereignty reflects the individual rights while the provincial sovereignty embodies the collective rights. Indeed, the combination of both would be beneficial rather than adopting merely one while, consciously or unconsciously, neglecting another. The US Constitution was ratified, not by the will of individual citizens, but by the consent of at least nine states/ provinces out of 13. It is a basis for provincial sovereignty.

In fact, in today Burma, sovereign power is not primarily assumed by the citizens or constituent units, but by the C-in-C of the Armed Forces. Ten years' experiences have illustrated that, without his consent, no article in the Constitution can be amended, and no pivotal decision of the government be made. Currently, there is no state institution which is powerful to take action against the C-in-C for his alleged criminal actions, including violations of international humanitarian law and human rights laws, and civil wrongdoing. Hence, the C-in-C of the Armed Forces is sovereign for two reasons: (1) he is the law as whenever he wants to make law, his will has become law; and, the Rule of Law is irrelevant to him.

Federalism Principle 2 and 4 (g): Separation of Powers and the Constitutional Tribunal

The principle 2[162] somewhat reflects the doctrine of separation of powers. Nevertheless, it is also not a new agreement for the establishment of a Federal Union. Article 11(a) of the 2008 Constitution was transformed into the federalism principle 2, and the military regime plays another trick. Principle 2 should be read with principle 4 (g) which states: 'separate and independent tribunal on State Constitution must be set up for dealing with disputes on Constitution among Union and Regions and States or among Regions and States.' Principle 4 (g) is also not a new one. The relevant provisions on formation and operation of the Constitution Tribunal have been provided for in Article 320 to 336 of the 2008 Constitution.

The doctrine of separation of powers normally depends on the government system, adopted and exercised by any country. In a parliamentary system, separation of powers between the Legislature and the Executive cannot be exercised as the entire government constitutes a part of the legislative body. Between the Legislature and the Executive, separation can happen only when a presidential system is activated, and the President shall

162 ibid Art 11(a); Union Accord, Agreement of Principle on Political Sector, Principles to be based in Federalism Principle (2): Exercise of Sovereignty– The 3 branches of the sovereign power of the State, namely legislative power, executive power and judicial power are separated to the extent possible, and exert reciprocal control, check and balance among themselves.

be directly elected by the people in most of the countries which exercise the presidential system.

It is not clear whether Burma exercises the presidential system for three reasons: (1) the military leader sent by the C-in-C can become the President or, at least, the Vice-President without passing through any elections;[163] the President is not the Commander in Chief of the Armed Forces; and, the President does not assume the exclusive power to appoint or dismiss his ministers contrary to the Presidents in other countries which practice a presidential system. In addition, the power of the presidents was never checked by the legislative assembly. Conversely, the President influences the legislative assembly: for instance, the incumbent President Win Myint publicly delivered a speech to all law-makers in the Union Assembly instructing how laws shall be made.

Under any circumstance, from normative aspect, the doctrine of separation of powers shall be practiced between the Judiciary and other two branches of the government. Conversely, Article 11 (a) of the 2008 Constitution, which is the federalism principle (2) of the UA now, mistakenly conveys that reciprocal control, check and balance can be exerted upon the Judiciary by other two branches of the government. With this underpinning, an infamous action was done by the legislative branch resulting in impeding the independence of the Constitutional Tribunal tremendously. The case study is below.

In 2012, while Aung San Suu Kyi was in the People's Assembly (Pyithu Hluttaw) as a member, the Union Assembly – constituted by the People's Assembly and the National Assembly – extensively imposed pressures on the Constitutional Tribunal. It occurred when a majority of the MPs were not happy with the decision rendered by the said Tribunal over a constitutional issue submitted by the former President Thein Sein. At that time, Shwe Mahn – a former military General who was the speaker of the People's Assembly – and Aung San Suu Kyi were the close friends. The rhetoric claims – the legislative assembly, known as the Hluttaw, exercises the supreme power, and there exists merely sky over the Hluttaw echoed in the entire country.

Article 324 of the 2008 Constitution provides, 'the resolution of the Constitutional Tribunal of the Union shall be final and conclusive.' Unfortunately, a majority member in the legislative branch did not comply with the said constitutional provision. Rather, they extensively imposed pressure on the Constitutional Tribunal. Eventually, all nine top judges, chaired by Thein Soe, were forced to resign. Burma needs to circumvent similar unethical or unlawful action of the legislative branch against the Judiciary in future.

163 Constitution of the Republic of the Union of Myanmar 2008 Art 60.

Federalism principle 2 mentions only the Constitutional Tribunal. It is by no means sufficient. In fact, it needs to encompass all types of judiciaries – such as the Constitutional Tribunal, the Supreme Court, the Administrative Court etc. In regard to the judiciary, federalism principle 4 (g) states vaguely by merely mentioning 'separate and independent tribunal.' It is totally useless as, under the 2008 Constitution, both the Constitutional Tribunal and the Supreme Court have already existed separately and also independently, in terms of form, without meeting any judicial value provided for in the international judicial principles below.

In today's world, despite that justice is still being pursued by violent means in retaliation for supposedly wrong actions done by someone – or a group, state actors, or non-state actors – countless people, as well as a large number of sovereign states, prefer peaceful means. Of the various ways of seeking justice, the judiciary stands at the top: it has become, more or less, a symbol of justice, a mirror of truth, and an emblem of peace. Rightful adjudication granted by a dignified judiciary is, to its utmost, able to protect and promote human dignity, humanity, and human rights for both victims and the alleged perpetrators.

The judiciary can also facilitate the ending of vicious circles of vengeance that tarnish human characteristics for respective persons or other entities. This is on one hand. On the other, only when the terminology –the "Judiciary" or any type of tribunal – is indicated, anticipation of rightful adjudication from that institution is neither sensible nor meaningful. As such, key judicial values require exploration.

Being independent,[164] impartial, efficient and resource-rich is recognized as the minimum values of a judiciary. Independence can become a reality with the underpinning of 'separation of powers'; that is, the judiciary, at least, stands separately from the legislative and the executive branches in terms of institutional or structural independence.[165] If so, interference from any other branches of government can be deterred and the rights of people can be protected boldly. Another instrumental requirement is that the judges are to be provided certain protections for their security in accordance with respective laws and practice, as well as financial safeguards.[166]

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164 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1997 para 4: The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law. Available at https://www.ru.nl/publish/pages/688605/beijing-eng.pdf accessed 19 May 2020.

165 The Bangalore Principles of Judicial Conduct 2002 vol I: 'INDEPENDENCE: Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.' Available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf accessed 18 May 2020.

166 Once appointed, judges are paid high remuneration so that they are not tempted to accept bribes or other inducement. The salaries of judges cannot be lowered at any time, and those salaries are

To these ends, proper efforts must be exerted for the emergence of the Judiciary with the stated qualification. Even if the said efforts could not be done during the previous five-year election term, such efforts should have been done during the second term – in which the NLD, led by Aung San Suu Kyi, won a landslide victory – 2015 to 2020. Now, the time has passed. Unfortunately, no foundation for the emergence of the stated Judiciary has been laid at all.

Federalism Principle 3: Equality

It sounds good as the federalism principle 3 indicates equality as follows: 'each ethnic national race must have equality in politics and race, and simultaneously must have the right to keep, protect and upgrade their languages, literatures, traditions and cultures.' However, the said agreement is quite vague. In fact, equality issues shall be dealt with from some aspects. From the normative aspect, absolute equality must be discarded; socio-economic inequality be reduced; unfair income distribution among individuals be downgraded. From the Rule of Law aspect, the following minimum standards must be upheld: 'no one is above the law'; 'equality before and in the law'; 'equal situations shall be treated equally'; and 'non-discrimination is in place.' From the rights aspect, equal rights among individual citizens are guaranteed while equal opportunities are created. From the federalism aspect, in the context of Burma, equality issue must be addressed based on the doctrine of Provincial sovereignty, which is elaborated under federalism principle 4 below.

The first part of the federalism principle 3 – 'each ethnic national race must have equality in politics and race' – sounds good, but no concrete fact is achieved. "equality in politics and race" can be defined from various aspects. For instance, C-in-C Min Aung Hlaing (Hereinafter MAL) elaborated the equality issue by providing an example of the two former Presidents, who were the ethnic nationals, in Burma.[167] In fact, it is an incorrect example. At that time, under the 1947 Constitution, all Presidents, who were non-Myanmar ethnic nationals, did not have any power to rule the country, and they were just ceremonial. Conversely, U Nu and other Prime Ministers – all of them were Myanmar nationals – assumed authentic power to rule the country.

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paid directly from a fund called the Consolidated Fund, which is not subject to parliamentary approval. This means that the government cannot plead poverty or national austerity to reduce the emoluments of a judge. Where increases are to be made to judicial salaries, they are decided by an independent body and not by politicians.

167 C-in-C Min Aung Hlaing delivered a speech at the fourth secession of the 21st Century Pang Long Conference, held on 19-21 August 2020: 'We need to raise the issues of "ethnic rights: and "minority rights" only in the absence of equality and the presence of discrimination. But there is no discrimination between the majority and the minority in any matters including the legislation, administration, judiciary and social development. The first President or the Head of State of the country after the independence was restored was Sao Shwe Thaik, the Shan national, and his successor was Mahn Win Maung, the Kayin national.'

In addition, MAL approached "equality in politics and race" from another aspect by saying below:

> *We must consider assigning duties to regions or state governors, separated from the Prime Minister and Ministers who achieve their positions politically. Such a system is successfully being practiced by our neighbouring India.*[168]

Accordingly, MAL explicitly referred to the practice of India in which Governors in States/Provinces are appointed by the President of the Union. Given that the elected members of the Legislative Assemblies of the States[169] also constitute a part of the presidential electoral college, it is not totally unreasonable when the President is entrusted with power to appoint the governors in States/Provinces. If MAL likes the system of India in the appointment of governors in States by the President, the presidential electoral system – being practiced under the 2008 Constitution – must be repealed first.

Anyway, Dr. Venkat Iyer – an Indian national, but the British citizenship holder, who is a constitution and media law expert – has a view quite different from Min Aung Hlaing, particularly regarding the stated appointment system. He explicates the flaws of federalism in India by highlighting some points below:

- Because the power of appointment of Governors in States is held by the Centre (the President), and because that power is usually used to appoint people who are beholden to the Centre, most of the Governors do not act in a neutral and independent way. This disadvantages States that are politically of a different complexion from the Centre.
- The Central Government has the power to dismiss State Governments and impose Central rule (called 'President's Rule'. This power has been misused or abused many times, which is not healthy for genuine federalism and for a liberal democracy.
- The Central Parliament has the power to redraw the boundaries of States, to divide existing States, and to create new States. Even though this power can only be exercised by a special majority, it is capable of misuse.
- The issue of official language has also been the cause of friction between the Centre and some States. For example, the Central

168 C-in-C Min Aung Hlaing delivered a speech at third anniversary of signing the Nationwide Ceasefire Agreement (NCA).

169 The Constitution of India (2007) Article 54: The President shall be elected by the members of an electoral college consisting of— (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the States.

Government frequently tries to impose Hindi as the national language, ignoring the constitutional status of English as the associate national language (which is to be given equal status), and this has led to complaints from the States of southern India whose people do not, by and large, speak or know Hindi.

- Immediately after independence from British rule, the Indian Government adopted a policy of strong central economic and industrial planning. Under this policy, control over industrial policy and financial institutions, and the All-India Services, went largely to the Centre, and the states were reduced to a subordinate position.
- Unlike in countries like the USA, there is no equal representation of States in the upper house of the Indian Parliament. And because some States are very large (bigger than many European countries put together), they wield more power than the smaller states.
- Regionalism has sometimes threatened Centre-State balance in India, with some secessionist movements threatening the unity of the country. Regionalism means pressures exerted by people living within a region, usually within a State but sometimes within more than one State, for example an area of the country where there is a common language or religion or caste/tribe. Crudely, it can be seen as close to chauvinism or local nationalism.
- But many of the centralising features of Indian democracy have, in the past 30 years, been loosening slightly in favour of the States, mainly as a result of economic liberalisation and an increase in overall prosperity.

Advantages of federalism in India, contrasting with Burma, are also worth observing. In Burma, under the 2008 Constitution, the military leader, without necessity to be elected, can become the President. Conversely, in India, it can never happen.[170] In India, the civilian President is the Supreme Commander of the Defense Forces of the Union.[171] If it is applied in Burma, MAL's position would have been reduced extensively. In India, civilian supremacy is practiced: Chief of Defense Staff – currently General Bipin Rawat with a four-star rank, the most senior officer in the Indian Armed Forces – is not the commander of the armed forces, but serves as adviser to the Indian government, formed by all civilian elected ministers. India gained independence from the British, one year earlier than Burma, and the military coup never occurred. In Burma, the military coup had happened for the three times unlike India.

The Supreme Court of India is independent, impartial and efficient contrary to Burma. By applying the writ of habeas corpus, the Court protected

170 The Constitution of India (2007) Article 52.
171 The Constitution of India (2007) Article 53(2).

fundamental rights and freedoms of Indian citizens during the reign of Prime Minister Indra Gandhi, who ruled the country, during the emergency period from 1975 to 1977. In Burma, the Supreme Court, which is subservient to the military regime, rejected the writ of habeas corpus applications, submitted by family members of Sumlut Roija, a young Kachin lady, who was kidnapped by Myanmar military personnel and disappeared.

MAL doesn't learn the advantages of India federalism. Rather, he selects the most disadvantageous factor, the appointment of Governors in States by the Centre (the President), and attempts to copy it. Similar system exercised in Burma under the 1947 Constitution failed: the Heads of the States were appointed by the President on the nomination of the Prime Minister.[172] It was regarded by the ethnic leaders, as one of the major grievances that impede their right to self-determination, resulting in the prolonging of the civil war. Currently, MAL would like to revive it.

Under the 2008 Constitution, the Rakhine and Karenni (Kayah) ethnic States are facing similar constitutional issues. In the first State, although the respective ethnic political party won in the elections, they did not obtain an opportunity to form a government given that the power is entrusted with the President for formation of the state/region governments.[173]

In Karenni State, invoking Article 263 (e) (2) of the 2008 Constitution, L Phaung Sho, the Chief Minister of the Karenni State, was dismissed by President Win Myint on 3 September 2020. If there is prima facie evidence involving corruption or any other crimes, the Chief Minister must be formally investigated, and indicted in the court as was the case for Najib Razak, former Prime Minister of Malaysia. Unfortunately, such action was not taken. As such, for the allegations on corruption, he is innocent as there lacks any court verdict.

The incumbent President is a member of the ruling party NLD. Regarding this controversial case, the NLD highlighted the improper procedure undertaken by the speaker of the Karenni State Legislative Assembly, who took charge of the process for dismissal of the Chief Minister.[174] The NLD top leaders publicly claimed that the said speaker, who is also a NLD member, attempted to discredit the political image of their party as he was not included in the candidate list for the forthcoming 2020 elections, to be held in November.[175] Accordingly, it appears that the former Chief Minister has become the victim of a political scandal. However, he has already been removed from his political position, while impeding his personal dignity.

172 Constitution of the Union of Burma 1947 Art 160.
173 Constitution of the Republic of the Union of Myanmar 2008 Art 248 (c).
174 Statement issued by the Central Executive Committee of the NLD on 3 September 2020.
175 Ibid.

In fact, the Chief Ministers of any Ethnic States should not simply be removed by the Central authorities. Nor should this practice be a tradition, particularly for the ethic politics. If such malpractices continue, it would somewhat trigger racial hatred as the three Presidents, who ruled the country 2011 to 2020, are Myanmar nationals while almost all leaders of the states/provinces are non-Myanmar ethnic nationals. Nevertheless, under the 2008 Constitution, will it continue taking place endlessly.

Federalism Principle 4: (Formation & Division of Power)

Para 2 of the federalism principle 2[176] is also not a new finding arisen out of a number of so-called dialogues. Nor does it address the will of the ethnic leaders who have constantly expressed support for the formation of the Union with national states/provinces and nationalities' states/provinces.[177] The stated para 2 just reflects Article 9 of the 2008 Constitution.

The formation of the Union and the division of powers is inextricably linked to each other. The Union is a created entity, but not an intrinsic existence. The ethnic states/provinces are intrinsic existence, but not created entities. Only when the former exists, the latter has appeared. The former is basic while the latter is superficial, and vice versa must not be made. A Federal Union must be established by practicing the principle of "coming together." The concept of "holding together" articulated by MAL is incorrect as he consciously ignores the fact that the Union has come into existence merely based on the historic Pang Long Accord. With this underpinning, the division of powers cannot be taken into account as something like a division between the left hand and the right hand for whatever it deems fit.

Myanmar nationals must have a separate state/province akin to other ethnic nationals. Only then, a basic foundation for seeking equality would have been established based on collective rights. When equality can be sought among various ethnic nationalities from the aspect of individual as well as collective rights, the peace-seeking process would become meaningful. Afterwards, the division of power between the governmental institutions at the central/federal level and those of the state level would be meaningful only when the doctrine of the provincial sovereignty is realized.

176 Para 2 of the federalism principle 2: 'The Union based on democracy and federalism must be formed by Regions and States. (Note: Regions and States must have equality. As regards naming, it will be discussed later.')

177 Note: Such expressions can be observed in both first and second drafts of the Federal Constitutions.

4.1 Provincial Sovereignty

The ethnic territories existed independently historically, and based on that, an attempt was made to establish a Union in accordance with the Pang Long Accord, which emphasizes, *inter alia*, the full autonomy of ethnic states.[178] The stated status can be realized as the right to 'Self-determination' demanded by the ethnic states/provinces, based on historical, political and legal contexts. Reasonably reflecting the historic Pang Long Accord, the 1947 Constitution was drawn up. Therein, the term "State," included by both the Union and the constituent units, was defined.[179] The term connotes that sovereign power lies not only in the Union but also in the constituent units. Hence, the ethnic Provinces deserve both provincial and popular sovereignty. Accordingly, sovereign authority, apart from the power division between federal- and provincial-level state organs, must be shared by the Union and the constituent units, in terms of the ethnic States/Provinces. The latter shall have the right to draw up their Constitutions.

In Burma, a 70-plus-year history has shown that the devolution of powers from the Union to the ethnic provinces and local levels was neither workable nor beneficial to all ethnic nationalities and their provinces. Rather, the devolution of powers was just superficial rhetoric and never actualized. When this practice continues, division within the ethnic nationalities transpire; and, as a result, civil war can never be terminated. However, by recognizing and accommodating diversities,[180] federalism would allow for unity.

The Union—constituted by diverse component units with different historical, social, linguistic, traditional, and cultural backgrounds—is a created entity that lacks an intrinsic existence. Undoubtedly, the diverse component units provide a foundation for the Union. Unless the ethnic provinces, in terms of component units, constitute the Union, however, the latter does not exist. Therefore, instead of devolution, the delegation of power from the ethnic provinces to the Union must be practiced for Burma, similar to Switzerland.[181] This basic characteristic of provincial sovereignty constitutes a part of State sovereignty. If such type of provincial sovereignty is applied, the underlying issues arisen from the right of 'Self-determination' would have been resolved.

As stated above, the 1947 Constitution defined "State" to partially

178 The Pang Long Accord 1947 (n 159) para 5.

179 Constitution of the Union of Burma 1947 Art 9: Chapter III and IV, the term 'State' means the executive or legislative authority of the Union or of the unit concerned according as the context may require.'

180 G Alan Tarr, 'Symmetry and Asymmetry in American Federalism' in Christian Leuprecht and Tom Courchene (eds), *The Federal Idea: Essays in Honour of Ronald Watts* (McGill-Queen's University Press, Montréal 2011) 27.

181 The Federal Constitution of the Swiss Confederation 1999 art 3: 'The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation'.

reflect the Pang Long Accord. However, when the provincial sovereignty concept was unclear, the rights of the ethnic provinces could not be sufficiently enshrined therein. Since then, ethnic nationalities and their provinces have suffered due to inadequate constitutional provisions. When provisional sovereignty was totally ignored under the 1974 Constitution, the plight of the ethnic nationalities worsened. Currently, state sovereignty neither protects the welfare of nor provides security for its people, yet sovereignty is highlighted and brazenly applied under the 2008 Constitution while almost all ethnic nationalities face situations more desperate than at any point in Burmese history.

Provincial sovereignty does not mean ethnic provinces enjoy almost absolute sovereignty. The three major concerns arise: (1) authoritarian regimes may emerge; (2) natural resources that might cause environmental degradation could be abused and devastated; and (3) corruption might occur by allowing foreign investment companies to operate without complying with international norms such as the United Nations Guiding Principles on Business and Human Rights and customary land right, particularly collective ownership and use right of land for indigenous peoples. To overcome these issues, the Federal Constitution (First Draft) included a list of concurrent legislative powers to be simultaneously exercised by Federal and Provincial level authorities, particularly for the following items:

Concurrent Legislative Powers[182]

Member States shall concurrently possess legislative powers in relation to the following areas:

(i) ----------,
(ii) protection of the environment,
(iii) ----------,
(iv) ----------,
(v) Federal Union energy and development projects within Member States,
(vi) exploration, exploitation and sale of natural resources within a State,
(vii) investment by foreign governments and companies within a Member State,
(xii) regulations relating to rivers and waterways crossing Member State's borders, domestic sea and coastal transportation.

In addition, to prevent the exploitation and sale of natural resources, foreign investment, and energy production, a separate provision was also

182 Federal Constitution of the Union of Burma (First Draft) art 74. < https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs09/ENC-draft-bur.pdf > accessed 25 September 2020.

included.[183] Legislative power in relation to health lies in the undeclared list for Provinces.[184] These measures reflect the right to 'Self-determination' in the context of Burma. Unfortunately, under the 2008 Constitution, the abuses committed by the central authorities, the military-dominated government, are much greater[185] than the provincial-level ones, covering state or non-state actors. This situation occurs primarily because, in regard to the stated list, the Constitution endows the ethnic provinces with little to no power.

Federalism Principle 5: Democracy

The principle 5 states multi-party democracy: multi-party democratic systems must be practised; and, free and fair elections must be held in accord with the provision included in the Constitution. These agreements are quite general, and also not new. Formally, they have been implemented over the past one decade. The status of multi-party democracy – practiced with the underpinnings of basic freedoms, independent judiciary, free and fair elections, the absence of the military personnel in the legislative assemblies and administrative institutions, and etc., pursuant to the 1947 Constitution – was much higher than the incumbent one. Nevertheless, even under the 1947 Constitution, civil war started and has prolonged to date for some reasons.

First, the entire structure of the said Constitution did not guarantee the collective rights insofar as "full autonomy" of the ethnic nationalities and their states/provinces, in terms of the right to self-determination, could be implemented. Second, by practicing a majoritarian electoral system, Myanmar nationals – who constitute a majority number of populations – commonly occupied majority seats in both legislative assemblies. Third, as stated before, the Prime Minister was endowed power to select someone who would become the Head of a respective ethnic state.

Fourth, the Ethnic States/Provinces, despite having affluent natural resources, did not possess the right to manage their resources. Rather, the central government wielded power and benefited directly from these resources.[186] Development occurred primarily in the low land where the majority Myanmar nationals have been living. Fifth, human rights violations

183 ibid art 76: 'Joint Agreements Laws relating to the exploitation and sale of natural resources, foreign investment and production of energy, shall come into force only after, in case of federal law, the Member States involved, and in case of a state law, the Federal Congress have agreed upon the said law.'

184 ibid art 77: Legislative Power of Member States; Member States have the right to legislate in so far as this constitution does not confer legislative powers on the Federal Congress.'

185 HRC, 42nd Session 9-27 September 2019 'The economic interests of the Myanmar military, Independent International Fact-Finding Mission on Myanmar' (5 March 2019) UN Doc A / HRC/42/CRP.3.

186 Presentation by the delegation of Shan State in the Ethnic Nationalities Conference held at Rangoon City Hall (29 September 1957) 7.

against the ethnic nationalities were committed by the Myanmar Army. The principle 5, even if it is amalgamated with other principles, is evidently unable to deal with the stated underlying issues.

5.1 The Issues of Direct and Representative Democracy

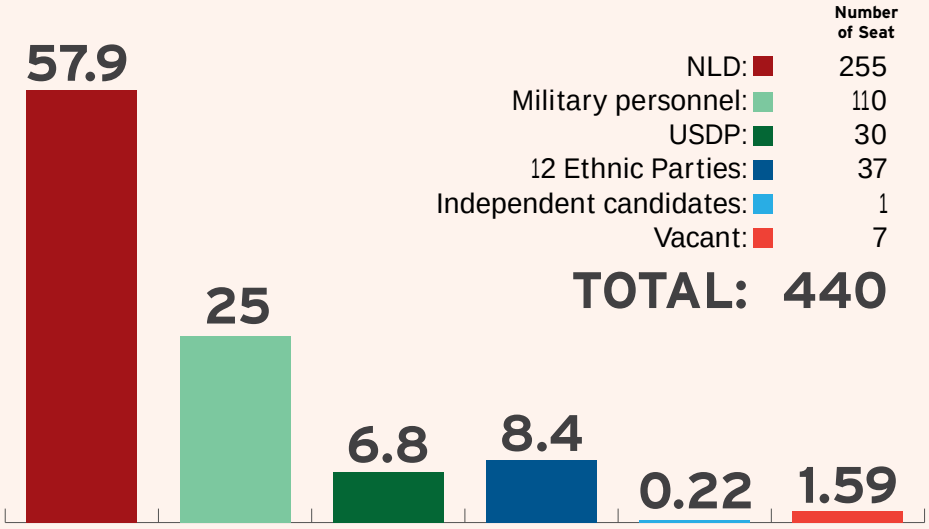
Direct democracy and representative democracy are foundations of democracy. In modern time, the former is primarily practiced by convening referendums in ways that the will of people are collected to decide certain underlying issues. During the previous decade, to these ends, no referendum was held in Burma notwithstanding claiming that democratic transition is taking place. Furthermore, representative democracy is also encountering serious problems given that the active military leaders, without being elected, occupy seats equivalent to one fourth of a total number of MPs in all legislative assemblies. They do not even represent the soldiers in the entire army. They just have to obey order of only one person, their military Chief MAL.

There is no single agreement on how to deal with this significant, but infamous, representation issue in the entire NCA or UA from the aspect of a genuine democracy. The NLD does not elaborate how this issue would be resolved although, in its election memorandum for 2020, it claims that efforts would be exerted to achieve a genuine democracy. Similarity goes to all other political parties which are preparing to participate in the forthcoming elections. Keeping silence of those political parties has negatively resulted in that the presence of the unelected military leaders in all legislative assemblies as well as administrative bodies has somewhat achieved legitimacy by implications. This situation seriously impedes seeking peace.

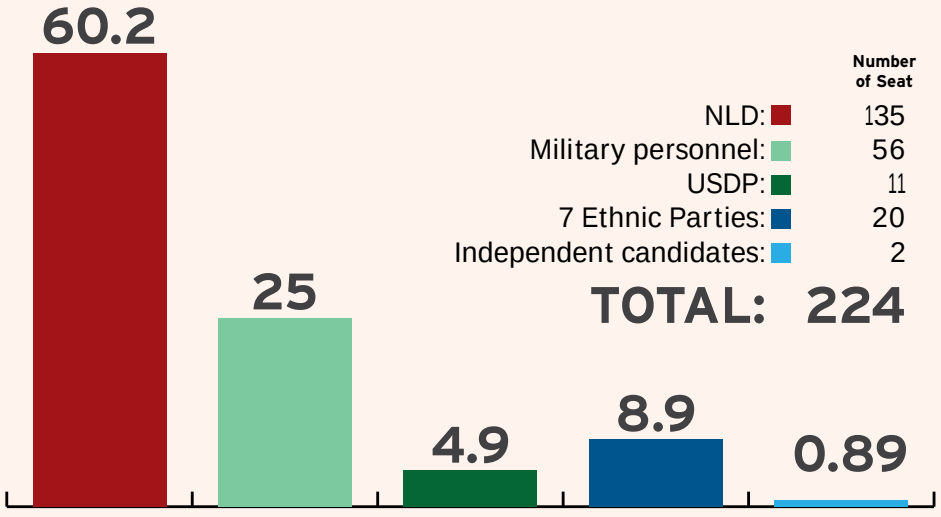
5.2 The Issue of Electoral System

History has described that, under democracy, the majoritarian electoral system – also known as the First Past the Post or winner take all, being practiced since independence – is unfit for the minority ethnic nationalities and their states/provinces. It can be observed the following diagrams that describes names of parties, seats received, and their percentage, in the 2015 elections.

2015 General Elections
People's Assembly



2015 General Elections
National Assembly



(The relevant data on seats, but not the above diagram, are collected from a report of the Transnational Institute)[187]

187 Transnational Institute: The 2015 General Election in Myanmar: What Now for Ethnic Politics? 17, Decemberber 2015. <https://www.tni.org/en/publication/the-2015-general-election-in-myanmar-what-now-for-ethnic-politics> accessed 8 September 2020.

Some ethnic political parties such as All Mon Region Democracy Party (AMRDP), Chin Progressive Party, Chin National Party (now Chin National Democratic Party, CNDP), Phalon-Sawaw Democratic Party (PSDP) and Shan Nationalities Democratic Party received no seat.[188] The above diagram shows that in the People's Assembly, altogether 12 ethnic political parties won 8.4% seats; and, in the National Assembly, 7 parties won 8.9% seats. It is highly unlikely for all ethnic parties in each assembly, even if they stand together unitedly, to reach the threshold of the absolute majority (50+1 seats) to make laws that would protect their rights, or to repeal any laws that infringe their rights.

The opportunity is also a bit slim for the ethnic political parties to achieve support of the NLD in making laws to promote minority rights, particularly the collective rights, given that the NLD does not have a clear policy on federalism, which should be based on the 1947 Pang Long Accord. During the previous five years term, the NLD government was unable to produce any law to lay the foundation for "full autonomy" of the Ethnic States/Provinces. Nor did it repeal any land and natural resources related abusive laws which deprive the ethnic nationalities of their rights. Rather, the NLD had continued maintaining the Law Protecting Ethnic Rights of 2015 which was enacted at the time of the former President Thein Sein. The said law primarily accentuates language, literature, arts, culture, custom, and religion.[189] It keeps silent about the rights of the ethnic nationalities for land and natural resources. Unfortunately, albeit the existence of the said law, the NLD government never initiated to make any ethnic languages as official languages in their respective Ethnic States/Provinces.

The number of seats for all ethnic political parties might increase in the forthcoming 2020 elections. However, it would be a daunting task to obtain even 25% seats in each assembly — the Peoples' Assembly and the National Assembly.. Hence, the concern of the United Wa State Party (UWSP) is somewhat reasonable that the ethnic political parties would never get an opportunity to influence the law and law-making process; and, it recommends that the ethnic minorities should replace the military who occupy 25% seats.[190]

To resolve this, there are the three ways: (1) 25% seat occupied by the military must be permanently removed, even if it is not constitutionally reserved for the ethnic minorities, as was the case in Indonesia; (2) in a new Federal Democratic Constitution, more law making powers should remain in the State/Province legislative assemblies; (3) Rather than the FTPT, a

188 Ibid. Transnational Institute 7.

189 The Law Protecting Ethnic Rights of 2015, Sections 3 (c) & 4 (a).

190 United Wa State Party, 'The general policy of the Wa state on political dialogue: Detailed Requests' (UWSP, document submitted to the First Union Peace Conference 31 August 2016) pt 3 Seat Allocations for Members of the Legislative Assembly. Available at https://drive.google.com/file/d/1bMDbw2m0kP06fFBcv2mgnjyDcEvDyniv/view accessed 5 August 2020.

Proportional Representation electoral system should be replaced. Even if it is rather complicated, it would be beneficial for the long-term interests of the entire Federal Union, particularly those of the ethnic States/Provinces. C-in-C MAL introduced about this as follows: if national races want to participate more comprehensively in legislation, I would like to advise all to consider the contrast of current election system with the proportional representation (PR) system.[191]

However, he didn't assert that Article 109 (a) of the 2008 Constitution, which provides township constituencies, would be amended given that, if the PR system is practiced, at least state wide or nationwide constituencies are compulsory. To amend this Article, the prior approval of more than seventy-five percent of all MPs is required. As such, without his order, a single military MP would not cast a support ballot for the related bill.

Land Issue

In regard to land issues, the agreements reached in the Union Accord are quite vague, and they merely buttress the existing land related abusive laws.[192] The unfair and unjust exploitation of land and natural resources is the major cause for engaging civil war by the EROs. Not only the NCA but also UA are unable to lay down the foundation for land reform by which the rights of the ethnic states/provinces and individual citizens to manage their own land would be ensured. Nor do they provide any guarantee for sharing of revenue extracting from the natural resources between the central/federal government and provincial governments.

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191 C-in-C Min Aung Hlaing delivered a speech at the opening ceremony of the Fourth Secession of the Union Peace Conference, held on 19-21 August 2020.

192 The Union Accord: Land and natural environmental sector agreement (29 May 2017)

1. A countrywide land policy that is balanced and support people centered long-term durable development.
2. Based on justice and appropriateness
3. A policy that reduce central control
4. Include human rights, international, democracy and federal system norms in drawing up land policy.
5. Policy on land matter should be transparent and clear.
6. In setting up policy for land development, the desire of the local people is a priority and the main requirements of the farmers must be facilitated.

Ownership Right

7. All nationals have a right to own and manage a land in accordance with the land law. Women and men have equal rights

Management Right

8. Both women and men have equal rights to manage the land ownership matters in accordance with the land law.
9. If the land right granted for an original reason is not worked on in a specified period, the nation can withdraw the granted right and concede it to a person who will actually do the work.

Preventive Program

10. To aim toward protecting and maintaining the natural environment and preventing damage and destruction of lands that were social, cultural, historical heritages and treasured by ethnic nationals.

Differently, in Indonesia, the Helsinki peace agreement, concluded between the Islamic Free Aceh Movement (GAM) and the Indonesia government, strengthens the autonomy granted to Aceh in 2001 agreement, and 70 percent of the natural resources remain in Aceh and 30 percent goes to the central government.[193]

Regarding the management of natural resources, the Sierra Leone model[194] in connection with the peace-seeking process is worth observing for Burma although it was not long-lasting due to RUF's serious human rights violations[195] and capture of several hundred UN soldiers.[196] Sierra Leone is rich in gold, diamond and other natural resources. The Peace Agreement was concluded between the Governement of Sierra Leone and the RUF (Lomé Peace Agreement) on 7 July 1999 after taking time about two weeks long dialogue process.[197] According to Article 7 of the said agreement, Commission for the Management of Strategic Resources, National Reconstruction and Development was formed.[198] The Commission was governed by a Board whose chair wasnot a government official, but the Leader of the RUF/SL, Corporal Foday Sankoh.

In Burma, the agreements in the NCA are unable, at least, to prevent unfair and unjust exploitation of land and natural resources and the rapid depletion of natural environment, being done primarily by the Myanmar Army, its leaders and their political and economic cronies, let alone the Sierra Leone model.

The Issue of Security Sector Reform

In the entire peace-seeking process, the most challenging issue remains how to transform the diverse ERO-established ethnic armies into ones that will legally serve state/province security forces under a single federal army.[199] Regarding the security sector reform, the agreement reached in the UA is

193 Esther Pan, 'Indonesia: The Aceh Peace Agreement' Council on Foreign Relations (15 September 2005) <https://www.cfr.org/backgrounder/indonesia-aceh-peace-agreement> accessed 24 August 2020

194 The Board shall also comprise:
- i. Two representatives of the Government appointed by the President;
- ii. Two representatives of the political party to be formed by the RUF/SL;
- iii. Three representatives of the civil society; and
- iv. Two representatives of other political parties appointed by Parliament.

195 https://cpj.org/2001/03/attacks-on-the-press-2000-sierra-leone/

196 https://www.theguardian.com/world/2000/may/17/sierraleone

197 https://peacemaker.un.org/sierraleone-lome-agreement99

198 http://www.sierra-leone.org/Laws/1999-5.pdf

199 Note: The United Nationalities Federal Council repeatedly articulated the Federal Army and it also initiated to establish it in EROs' designated areas.

quite vague;[200] accordingly, unending meetings with no achievements or progress will continue. The single federal army expected by the EROs differs from the one envisioned by MAL.

According to him, the single army is the existing Myanmar Armed Forces operating under his command, and any fighters from the ethnic armies are welcome to individually join it. This situation connotes that the ethnic armies, which presumably defend their respective ethnic nationalities, must eventually lay down their arms. Given the opposite views on the security sector, the ongoing so-called peace-seeking process will not be feasible nor will stability be attainable. Further, while MAL has been pressuring all EROs to surrender, the ground situations below illustrate that a surrender policy will never be achievable.

In the aftermath of the 1988 coup, the ensuing military regimes adopted two policies which continue to be practiced by the incumbent regime. One is to insist on unconditional surrender of the EAOs; and another is to force them to transform into a Border Guard Force ('BGF'). However, both policies failed.[201]

In regard to the first policy, the experience of the Palaung ethnic armed group – known as the Palaung State Liberation Organization, the only group which completely surrendered in April, 2005 – is instructive. When the ceremony of surrender was conducted, the former President – the then Deputy General Thein Sein – attended. The PSLO chairperson was forced to declare that the organization as well as its army had ceased to exist, and the regime claimed victory. Some years later, the Palaung ethnic nationalities re-organized themselves, took up their weapons again, re-established themselves as an armed group renamed the Taang National Liberation Army. This army, which is growing, has been fighting against the regime for about one decade now.[202]

Article 338 of the 2008 Constitution provides that "all the armed forces in the Union shall be under the command of the Defense Services." In violation of this provision, the successive ruling military regimes have formally recognized the separate and independent United Wa State Army (UWSA). The UWSA has noticeably grown over the last three decades, and it might never surrender. Similar built-in commitment is also found in all major EROs. For instance, the KIO has already learned lessons from their

200 Union Accord Part III Addendum- A, Part (1), Para 12 (b): To undertake bilateral negotiations on security sector reintegration in accordance with Paragraph 30 of the NCA; to discuss work programs; to implement bilaterally agreed preparatory undertakings; and to establish a mechanism for security sector reintegration through bilateral coordination with an aim of building sustainable peace in a Union based on democracy and a federal system.

201 Legal Aid Network, Potential for Peace in Burma or Regional Instability, (15 May 2015) 10-11: <https://www.scribd.com/document/227575553/Potential-for-Peace-in-Burma-or-Regional-Instability>

202 Ibid

experiences: after a 17-year ceasefire with the Myanmar Army, fighting resumed in 2011. Only when the KIO can strengthen their army can they continue their struggle for self-determination.[203] This situation is analogous for almost all ethnic armies operating in the northern, northeastern, and eastern parts of the country.

In western Burma, in Rakhine State, the Arakan Army (AA) has proven its military might by resisting the major offensives launched by the Myanmar Army for about five years. Similar circumstances are found in southern Burma: New Mon State Party, which rearmed itself after its 1959 surrender, might not do it again under the uncertain NCA- related processes. The small but politically powerful Karenni National Progressive Party had an experience similar to the KIO, and when MAL continued pressuring for surrender by implicating the Karen National Union (KNU), the strongest ethnic group in southern Burma, the Karen National Liberation Army founded by the KNU publicly stated it would never surrender.

Currently, a key legal question has arisen: who should surrender to whom? Simply because the Myanmar Army is the government force, will all of its actions be legitimate, and will that legitimacy continue under any circumstances? The international legal and human rights community, including the UN Independent International Fact-Finding Mission, have already publicized the commission of genocide, crimes against humanity, and war crimes allegedly committed by the Myanmar Army insofar as it violated the international legal doctrine—the peremptory norm or *jus cogen*. Given such serious violations, the country is now facing trial in the International Court of Justice for the alleged commission of genocide. In addition, the Prosecutor of the International Criminal Court is also investigating crimes against humanity, possibly including war crimes allegedly committed by top military leaders led by C-in-C Min Aung Hlaing. Such international legal actions negatively impact the institutional legitimacy of the Myanmar Army to the extent that it, as a criminal institution, can no longer legitimately continue standing as the official government force.

203 Interview with the KIO leaders in Liaza, their Headquarters, in October 2012.

In this file photo taken on April 25, 2018, taken from Maungdaw district, Myanmar's Rakhine state shows Rohingya refugees gathering behind a barbed-wire fence in a temporary settlement setup in a "no man's land" border zone between Myanmar and Bangladesh. – AFP

CHAPTER: VI

LACK OF THE PROCESS TO DEAL WITH THE PREVIOUS HUMAN RIGHTS VIOLATIONS IN BOTH NCA AND UA

One of the characteristics found in the peace agreements is the incorporation of relevant paragraphs on how to deal with the past – accentuating the previous human rights violations, which had occurred before the agreements were signed. In this regard, the National Peace Accord concluded between the 26 political opponent groups, including the African National Congress led by Nelson Mandela, and the white-minority regime led by F.W de Klerk[204] constituted a landmark model. Based on the said agreement, the Promotion of National Unity and Reconciliation Act 34 of 1995 emerged;[205] and accordingly, South Africa was able to establish the Truth and Reconciliation Commission (TRC) and dealt with the past successfully. Then the concept and practice spread to about 40 countries in the world.

In Indonesia, ten years after the emergence of the Memorandum of Understanding concluded between the Indonesian Government and Free Aceh Movement on 15 August 2015,[206] Aceh Truth and Reconciliation Commission has come into existence.[207] It is a notable step in seeking

204 Christine Barnes 'Conciliation resources accord: an international review of peace initiatives' London (2002). <https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Owning_the_process_Public_participation_in_peacemaking_Accord_Issue_13.pdf> accessed 17 August 2020.

205 Promotion of National Unity and Reconciliation Act 34 of 1995. Available at <https://www.justice.gov.za/legislation/acts/1995-034.pdf> accessed 17 August 2020.

206 The MOU between the Indonesian Government and Free Aceh Movement: <http://www.acehpeaceprocess.net/pdf/mou_final.pdf> accessed 17 August 2020

207 Galuh Wandita, 'The Aceh Truth and Reconciliation Commission: Giving a Voice to Survivors', For Justiceinfo.Net (01 August 2019): <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/42061-aceh-truth-and-reconciliation-commission-giving-a-voice-to-survivors.html> accessed 17 August 2020.

justice for the victims who suffered from human rights violations during the previous armed conflicts in Aceh, Indonesia.[208]

Although there have been a number of incompetence and flaws in the peace-seeking process in Columbia today,[209] for the victims "justice, truth, reparation and no repetition" were at the center of the agreement of 2016.[210]

In Nepal, in conformity with para 5.2.5 of the Comprehensive Peace Accord (CPA),[211] the Truth & Reconciliation Commission has been set up in order that human rights violations, including crimes against humanity, are investigated, and an environment for social reconciliation is created.[212] Primarily, to investigate into the incidents of the gross violation of human rights, and find out and record the truth and bring it out for the general public, the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014) was produced.[213]

Regarding the previous human rights abuses and other serious crimes under international law, the ICTJ elaborates on victim-centered truth seeking in Nepal, *inter alia*, as follows:[214]

> *The widely used phrase by families of the forcibly disappeared was the demand for ki las kisas (literally "either body or breath"), meaning either a dead body or a living breathing person. In the words of the woman whose husband had been disappeared in Daliekh, "If they were killed, we should be told where and how they were killed. If they're alive, we should be told where they are. This is our biggest need."*

208 [Press Release]Aceh Truth and Reconciliation Commission Public Hearing in North Aceh: The Urgency to Provide Reparation for Victims, (18 July 2019): <https://asia-ajar.org/2019/07/aceh-truth-and-reconciliation-commission-public-hearing-in-north-aceh-the-urgency-to-provide-reparation-for-victims/> accessed 17 August 2020.

209 Nicholas Casey, 'Colombia's Peace Deal Promised a New Era: So Why Are These Rebels Rearming?' New York Times (17 May 2019): <https://www.nytimes.com/2019/05/17/world/americas/colombia-farc-peace-deal.html> accessed 17 August 2020.

210 Democracia Abierta, Colombia's 2016 peace agreement: has it been fulfilled?, 12 December 2019; Available at <https://www.opendemocracy.net/en/democraciaabierta/si-se-ha-cumplido-con-lo-acordado-v%C3%ADctimas-instituciones-y-paz-en/> accessed 17 August 2020.

211 The Comprehensive Peace Accord (CPA) between Government of Nepal and the Nepal Communist Party (Maoist) on 21 November 2006: <https://peacemaker.un.org/nepal-> accessed 17 August 2020.

212 Truth & Reconciliation Commission, Nepal: <https://trc.gov.np> accessed 17 August 2020.

213 Section 13 of the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014): <http://trc.gov.np/wp-content/uploads/2018/03/actsrulesguidelines-1.pdf> accessed 19 August 2010.

214 International Center for Transitional Justice and Martin Chautari,'Nepal: "We Cannot Forget" Truth and Memory in Post-Conflict Nepal" (23 May 2017) 15: <https://www.ictj.org/sites/default/files/We%20Cannot%20Forget%20Book.pdf> accessed 19 August 2020.

In the Philippines, pursuant to the principles of implementation stated in the Bangsamoro Comprehensive Agreement concluded between the government of the Philippines and the Moro Islamic Liberation Front (MILF),[215] Transitional Justice and Reconciliation Commission was formed on 27 September 2014;[216] and, based on people's right to know, right to justice, right to reparation and right to guarantee of non-recurrence, the Commission is operating with the following objectives:[217]

- To address legitimate grievances of the Bangsamoro people;
- To correct historical injustices;
- To address human rights violations;
- To address marginalization through land dispossession.

Regarding the previous human rights violations occurred particularly in ethnic states/provinces of Burma, if the issues on how to deal with the past were discussed during the dialogue processes before the NCA was signed on 15 October 2015, it would be hugely beneficial to peace seeking. As was the case in South Africa, 15 October 2015 would be the deadline for all serious human rights violations, particularly for grave crimes. As a result, a certain type of commission – Truth and Reconciliation Commission, Transitional Justice Commission, and so on – would have emerged. If so, the process for seeking accountability would have continued; and, even if perpetrators could not be indicted, working programs on seeking justice for the victims of grave crimes would have been started. In that case, the gravest crimes under international law against the Rohingya people, mainly occurred in August 2017 and later periods, would have been deterred.

Nevertheless, the pivotal issue on how to deal with the past, focusing on serious human rights violations, has been explicitly ignored. In this regard, all dialogue partners, who participated in the previous so-called peace seeking processes, are responsible.

More negligence occurred in all meetings of, including those before and after, the Union Peace Conference, held on August 19-21, 2020. At that time, the UN's Independent International Fact-Finding Mission had already submitted its comprehensive report formally in September 2018. Therein, the plight of Rohingya people, along with that of other ethnic nationalities, were explicitly mentioned, highlighting the top Myanmar Generals, led by C-in-C Min Aung Hlaing, as the most responsible persons.

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215 The original text of the Comprehensive Agreement on Bangsamoro (the Philippines): <https://peacemaker.un.org/sites/peacemaker.un.org/files/PH_140327_ComprehensiveAgreementBangsamoro.pdf> accessed 19 August 2020.

216 Transitional Justice and Reconciliation Commission; https://www.menschenrechte-philippinen.de/tl_files/aktionsbuendnis/dokumente/weiterfuehrende%20Dokumentensammlung/Transitional_Justice_and_Reconciliation_Commission_-_Report_2016.pdf

217 Ibid, TJRC 6.

On 23 January 2019, Gambia had brought Burma at the International Court of Justice (ICJ) for the alleged violations of the Convention on the Prevention and Punishment of Crime of Genocide. On 14 November 2019, the Pre-trial Chamber III of the International Criminal Court had already authorized the Prosecutor to proceed with a formal investigation for the heinous crimes, allegedly committed by the Myanmar military leaders, in the situation in Bangladesh/Burma. All of these international legal actions are explicitly related to, and negatively impact, the peace-seeking process in Burma.

Unfortunately, in the above Peace Conference, no stakeholder or dialogue partner initiated to discuss about them. With a huge support of international donors, the said Conference looked superficially splendid and dignified, in terms of form. However, the Conference lacks humanity, justice and accountability to international human rights laws, in terms of essence. In that Conference, rather than "peace," "power" played an overarching role.

CHAPTER: VII

NEW APPROACHES TO THE PEACE-SEEKING PROCESS

In the context of Burma, unless a genuine Federal Union can be established, opportunity is quite slim to achieve a genuine peace. Simultaneously, only when "federalism" is rhetorically claimed, rather than peace, war and other rights violations would continue unabated. The stated term "a genuine Federal Union" is rather controversial. To facilitate resolving this, federalism dynamics and dynamic federalism may be realized, and possibly practiced to a noteworthy extent.

A. REALIZATION OF FEDERALISM DYNAMICS AND DYNAMIC FEDERALISM

In terms of Burma's nation-building, the establishment of a genuine federal union is a sine qua non at minimum. Nation-building and peace-seeking are inextricably linked to each other. Peace can never be achieved unless nation-building can be done in the right direction, effectively, wilfully, and energetically. Peace may be achieved only when the needed federalism can be adopted with the underpinning of balancing unity and diversity consistent with historical legacy, the particularities of the respective society, the requirements of the present, and possible fulfilment of future expectations. When a reasonable type of federalism is sought, the peace-seeking process itself should be dynamic by welcoming a lot of ideas and enthusiasm from national and international communities. To this end, the participation of the constituent units of Ethnic States/Provinces, including social elements, and the general public therein should be encouraged.

Constitutional reform to adopt a reasonable type of federalism may not be feasible in the event that public hearings are symbolic, interest

intermediation remained fruitless, and/or innovative suggestions by experts are ignored or just applied so as to conform positions of individual policy-makers.[218]

In addition to division and sharing of powers, the emergence of a successful federal union depends on other dynamics in terms of influential/stimulating factors. These include but are not limited to: human rights, the rule of law, seeking centralization while sustaining self-determination of the constituent units, internationalization and globalization, political ideologies and operation of political parties, type of democracy practiced in both levels (national and constituent units), utilization and preservation of land, natural resources, and environment, the status and function of the civil society organizations, technological innovation, competitive nature of global economy based on market, conservation of custom, culture, and language, maintaining balance between vertical power flow, from national government to constituent units, and horizontal cooperation, among the constituent units themselves. The Constitution and its legal framework need to underpin these values in order to lead to federalism dynamics. Some of them will be elaborated below:

A.1 Human Rights

Protection and promotion of all internationally recognized human rights should be placed at the centre of all operations[219] both in peace seeking and nation building processes, at minimum, as far as Burma is concerned. In spite of having controversial and/or complicated situations, both processes should go together. The ruling regime – which takes the role of "State" under the 2008 Constitution –[220] needs to be clearly held to all Burma's international treaty obligations, under the laws of armed conflict as well as human rights law, bearing in mind that the State has the duty not just to not commit, but also to prevent and to protect human rights.[221] Even during peace seeking processes, promotion and protection of human rights should be undertaken, apart from upholding the Rule of Law, in line with the fundamental federalism principles, particularly suited to Burma.

218 Arthur Benz, 'Gradual Constitutional Change and Federal Dynamics – German Federalism Reform in Historical Perspective' (2016) 26(5) Regional & Federal Studies 77, 78.

219 Prof. Suzannah Linton, Prof. David Fisher, Dr. Venkat Iyer, Prof. Simmon Young, Prof. Josef Silverstein, and Aung Htoo, Potential for Peace in Burma or Regional Instability (Legal Aid Network 15 May 2014) 21, 33 <https://drive.google.com/file/d/0BzC8VZhwp11AWEFtYjVCenBYak0/view> accessed 4 February 2020.

220 Constitution of the Republic of the Union of Myanmar 2008 art 47: '...the term "State" means person or body exercising legislative or executive authority under this Constitution according as the text may require.'

221 Suzannah Linton (n 219).

A.2 The Rule of Law

Federalism dynamics may take place in any federal union only when the rule of law is upheld. All state organs[222] and state institutions[223] which exist in both levels, central/national as well as the constituent units, in terms of the two orders of government which are independent and coordinated rather than hierarchically linked,[224] shall have to operate under the "Rule of Law", not "Rule by Law".

The independent judiciary[225] plays a significant and instrumental role in upholding the rule of law. To facilitate it, all courts, whether a unified or a dual system is applied in a federal union, shall have to adopt formal judicial values such as institutional independence,[226] decisional independence, constitutional protection of judges from arbitrary dismissal and from reduction of emolument, endowment of strong powers to judges, keeping the Judiciary well-resourced and adequately staffed,[227] selection of legally qualified and dignified judges with integrity, dismissal of corrupt and misbehaving judges promptly from the system, and repudiation of judicial tyranny.

The Supreme Court is the apex court of the country which stands as the final arbiter to adjudicate significant contentious legal, human rights and political issues and may be formed on the basic principles of federalism, including symmetric federalism or asymmetric federalism or a combination of both. In Canada, for instance, with the underpinning of asymmetric federalism, Quebec enjoys the right to send the three judges from their province to the Supreme Court of Canada by law, passing through the appointment process primarily implemented by Independent Advisory Board for Quebec.[228]

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222 The Legislature, the Executive and the Judiciary

223 The Courts, the Independent Commissions, the Security Forces, and the Government Institutions

224 Paolo Dardanelli and others, 'Analysing Dynamic De/Centralization in Federations: A Conceptual and Methodological Framework' (International Political Science Association, 23rd World Congress, Montréal 19-24 July 2014) 7 <https://pdfs.semanticscholar.org fbea/1ee0cafe7758e18547597bc802556c6353f5.pdf?_ga=2.41109922.1047979257.1581698901-664976260.1581698901> accessed 14 February 2020.

225 When the United States of America broke away from its British colonial masters more than 200 years ago, its founding fathers insisted that their new country should have a judiciary that would protect the rights of the people fearlessly and without any interference from any other branch of government.

226 See: Basic Principles of Judicial Independence 1985 (UNGA resolutions 40/32 and 40/146), European Standards on the Independence of the Judiciary 2008, The Bangalore Principles of Judicial Conduct 2002, Mt. Scopus International Standards of Judicial Independence 2008.

227 Elaborated by Dr. Venkat Iyer, constitution and media law expert: 'This includes financial resources (salaries of judges and other staff), physical resources (suitable buildings and equipment), and human resources (an optimum number of judicial and administrative personnel).'

228 Arrangement concerning the appointment process to fill the seat that will be left vacant on the Supreme Court of Canada (Canada-Quebec) (15 May 2019). Available at https://pm.gc.ca/eng/news/2019/05/15/arrangement-concerning-appointment-process-fill-seat-will-be-left-vacant-supreme accessed 13 January 2020; Sean Fine, 'Quebec to have to say on its Supreme Court picks' The Globe and Mail (online edn 15 May 2019) <https://www.theglobeandmail.com/canada/article-quebec-to-have-say-on-its-supreme-court-picks/> accessed 13 February 2020.

Only when the practice of federalism, whether asymmetric or symmetric or a combination of both, upholds the Rule of Law, can federalism dynamics happen and peace and development be realized.

A.3 Seeking Centralization While Sustaining Self-determination of the Constituent Units

So long as the federal system is in place in any country, the centralization issue cannot be avoided or discarded. On one hand, the national/central government shall seek a certain type of centralization; on the other, self-determination of the constituent units needs to be sustained. Making a balance between the two entities is a daunting task, and a static formula may not exist to resolve it. Noteworthy is that the level of centralization, whether robust or flexible, depends on historical legacy, territorial and heterogeneous interests, and policy of the ruling regime or influential parties.

The historical context from which a particular federal system has emerged varies as to whether it stems from a process of coming-together or holding-together federalization.[229] For instance, Switzerland, the US, Germany, and Malaysia have become federal unions based on coming-together federalization; as such, the flexible centralization was exercised despite that the status of centralization in each country varies over time. As Australia, Canada, Brazil, and India were federalized on the holding-together process, their centralization is somewhat robust. From the aspect of historical legacy firstly, it is evident that Burma' federalization stems from a process of coming-together.

A.4 Internationalization and Globalization

Today is an era of internationalization and globalization. Transcending the boundaries of not only states but also locals and constituent units of those states, information, travel, trade, migration, education, culture, technologies, market-based competitions, and investment of multi-national corporations have been spreading tremendously. In terms of financial, technological and human resources, if locals and constituent units are feeble, they cannot resist the negative aspects of globalization nor can they take advantage of its positive aspects. To overcome these issues, locals and constituent units within a federal union must exert efforts to establish horizontal relationships among themselves and to promote vertical cooperation between the three levels

229 Arthur Benz and Jörg Broschek (eds), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford University Press, Oxford 2013) 5.

of governments effectively, systematically and energetically. To this end, all legal barriers should be abrogated. On one hand, positive aspects of internationalization and globalization must be embraced; on the other, locals and constituent units need to be protected legally from the perils of harmful intrusion of globalization.

A.5 Political Ideologies and Operation of Political Parties

When substantial political ideology changes, the direction of a respective country also changes. For instance, although China is a unitary state, it has somewhat stepped forward to the establishment of a federal union. It is identified by some academicians as Federalism in Chinese style. It emphasizes three principal factors: (1) a major shift in ideology from the Maoist version of Marxism-Leninism to a pragmatic, market-oriented approach; (2) political decentralization which enhanced the powers of local government and alteration of central/local government relations; (3) opening of the country's economy by the communists.[230] It is also characterized as market-preserving federalism.[231]

In the case of Yugoslavia, political ideology conflicts, in addition to other causes, threatened the stability of the state and resulted in the collapse of the entire federal union. In the 1980s the outcome of the political crisis was firstly the illegitimacy of the federal administration, followed separately in each of the republics by a struggle between liberal, conservative, centralist, and de-centralist political parties or tendencies, which were all absorbed or defeated by an exclusivist, extreme nationalist ideology which led to the war. To establish a successful federal union, blossoms of political ideologies must be encouraged while extremism is abandoned.

The operational system of political parties portrays the status of federalism. In this regard, a contrast between Australia and Canada can be found as follows:

> *"A major difference between Canada and Australia is the distinctive role played by the national party leadership in nominating candidates for parliament. Major Australian national parties are federations of state branches. In Australian parlance, preselection for the Senate and the House of Representatives seats is controlled by these state branches."*[232]

230 Gabriella Montinola, Yingyi Qian and Barry R Weingast, 'Federalism, Chinese Style: The Political Basis for Economic Success in China' (1995) 48 World Politics 50, 52.
231 ibid 53.
232 Arthur Benz and Jörg Broschek (n 229) p.195.

A.6 Type of Democracy Practised in the Three Levels of Government

The practice of representative democracy, albeit having flaws,[233] cannot be discarded at the national level to facilitate resolving the issues of larger territories and populations. Nevertheless, for constituent units which practice self-determination it may be more suitable to exercise direct democracy. For example, in Germany, more direct democracy is practiced in the Länder by electing mayors directly and convening referenda increasingly on the local and Land levels, different from the exclusively representative democracy on the national level. The participation of citizens in the Länder has increased, especially in the fields of education and culture, administrative reforms and the economy.[234]

A.7 Utilization and Preservation of Land, Natural Resources, and Environment

Land and natural resource issues are inextricably linked to each other. If management and ownership systems of land and natural resources are incorrect and unfair, denying historical legacy and the rights of ethnic nationalities and indigenous peoples,[235] the concept of sustainable development and stewardship of natural resources, including forests will be depleted, thereby negatively impacting the environment and causing global concern.

> *"In Canada, for example, dualism is quite clear from the text of the Canadian Constitution, and therefore the Canadian federal government is even more restricted than the U.S. federal government in the area of subnational forest management policy. Canada's provinces own 77% of the nation's vast forest resources and also maintain the constitutional authority to regulate directly the 7% of forests in private ownership. Canada's constitution contains explicit provisions relegating forest policy to the provinces for non-federally-owned forests. These provisions have made it virtually impossible for the Canadian federal government to get any foothold whatsoever on subnational forest policy."*[236]

233 Existence of unfair election laws, impartiality of election commissions, prevention of judicial interventions in major electoral disputes, denial of the right to vote, in sufficient knowledge of people regarding elections and electoral system adopted in their country, electoral fraud or vote rigging, unlawful collection of election fund and abuses of it, lack of national and international election monitoring organizations, lack of neutrality of government, security threat on voting day or days, etc.

234 Roland Sturm, 'The World of the German Länder' (2013) 369 L'Europe en Formation 53. 63.

235 UN Declaration on the Rights of Indigenous Peoples.

236 Blake Hudson, 'Dynamic Forest Federalism' (2014) 71 Washington and Lee Law Review 1643, 1660. <https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss3/3/> accessed 14 February 2020.

In the event a country becomes a federal union arising out of the coming-together federalization process, constituent units should have among their powers the primary power for the management of land and natural resources. If laws cannot guarantee constituent units rights of individual and/or collective ownership and land use, particularly by the indigenous peoples[237] and local communities in the local territories, and if the government of the said constituent unit lacks accountability and transparency, power abuses may take place which can cause natural resources depletion leading to environmental concern and other rights violations. For example, on November 5, 2018, Musa Aman, a former chief minister of Sabah, a constituent unit of federal Malaysia, was charged with 35 counts of corruption involving about US$63 million, for allegedly receiving bribes in exchange for offering timber concessions in the East Malaysian state.[238]

A.8 The Status and Function of Civil Society Organizations

The essential responsibility of civil society organizations, independent people's organizations and NGOs alike, is to monitor the operational mechanisms, policies, and functions of the government and to analyse them as to whether the government is complying with its obligations or abusing its power. Such monitoring and analysis should detail the underlying societal issues, including their causes and effects, and conduct advocacy, lobbying, and public campaigns to alleviate the suffering of people, alter the law and policies of government, and promote the status of society. Only then can those organizations be categorized as civil society organizations (CSOs).

In a federal union, existence and operation of such CSOs are vital, *inter alia*, for two reasons: they can check the power abuses of the three levels of government and their operations, transcending boundaries of at least one or more constituent units, tackling common issues being suffered by people inhabiting in many constituent units, and facilitate unification of the entire federal union. Although state and state agencies are highly valuable, they are not the only actors; the CSOs have proliferated in recent decades and their participation in global governance activities have increased dramatically.[239]

237 Declaration on the Rights of Indigenous Peoples art 3, 4, 9, 10.

238 — —, 'Former Sabah chief minister Musa Aman charged with 35 counts of corruption' (Channel News Asia, Singapore 5 Nov 2018) <https://www.channelnewsasia.com/news/asia/former-sabah-chief-minister-musa-aman-arrested-macc-10898334> accessed 14 February 2020.

239 Martin Westergren, *The Political Legitimacy of Global Governance Institutions: A Justice-Based Account* (doctoral thesis, published by Stockholm University, Stockholm Studies in Politics 169, 2016) 36; Jonas Tallberg and others, *The Opening Up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press, Cambridge 2013).

Conclusion

In the event the values enumerated above from 1 to 8 and others are feasible, federalism dynamics may take place. Afterward, it may be combined with dynamic federalism.

> *Dynamic federalism means that all levels of government in a federal system maintain legal authority.[240] It "rejects any conception of federalism that separates federal and state authority under the dualist notion that the states need a sphere of authority protected from the influence of the federal government" and posits that "federal and state governments function as alternative centers of power and any matter is presumptively within the authority of both the federal and the state.[241] Dynamic federalism recognizes the importance of multilevel allocations of regulatory authority in federal systems and "conceives the states and the federal government as an alternative-- not mutually exclusive--sources of regulatory authority.[242]*

As far as Burma is concerned, dynamic federalism may be applicable, at minimum, only when:

- historical legacy is honored;
- the existence of the constituent units, in terms of Ethnic States/ Provinces along with local elements, are formally recognized; and
- with the underpinning of self-determination, self-rule therein is activated, in addition to adoption and implementation of the values stated under the federalism dynamics.

If so, will the nation-building process be meaningful and genuine peace be achieved.

240 Blake Hudson, 'Dynamic Forest Federalism' (2014) 71 Washington and Lee Law Review 1643, 1645. <https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss3/3/> accessed 14 February 2020.
241 ibid 1646.
242 ibid 1647.

B. ETHNIC-BASED COOPERATIVE FEDERALISM HEADING TOWARD HUMAN RIGHTS

The previous decade has illustrated two key truths: the ruling military regime will never allow any amendments to the core provisions of the 2008 Constitution, and the current so-called peace-seeking process effectively ends within the current constitutional framework. Hence, to achieve genuine peace, the only alternative is to leave the 2008 Constitution behind and produce a new federal democratic constitution, along with individual constitutions for the ethnic states/provinces. The two processes should occur together. Unfortunately, no common understanding has been achieved regarding the specific type of federalism that would be well-suited to Burma. In order to facilitate this, with the underpinning of the "dynamic federalism and federalism dynamics" outlined in the previous chapter, we posit that ethnic-based cooperative federalism is the answer.

Cooperation will be meaningful only when the existence of separate entities is formally recognized. Under dual federalism, the federal and state/province governments separately existed without intervening in the operation of one another. It was transformed into the current status and the power of the central government has been increased one step after another. It was primarily to minimize trade barriers between one state/province and another. Currently, the federal/central government wields more power on foreign affairs to deal with globalization properly while maintaining "full autonomy" of the constituent units, in terms of state/provinces.

Switzerland approaches the centralization issue differently. It promotes cooperation, mutual support and assistance within the constituent units of the Federal Union, in terms of Cantons in the context of Switzerland,[243] rather than delegating more powers to the Federal/Central government. Negotiation and mediation are also a robust principle under the Federal Constitution of Switzerland to resolve disputes.[244] To facilitate this, interstate/province agreements are also legalized.[245]

Ethnic federalism is currently being practiced in Ethiopia, primarily actuating the two types of sovereignty.[246] Under this system, Ethiopia has

243 Federal Constitution of the Swiss Confederation, Art 44 (1)(2): 'The Confederation and the Cantons shall support each other in the fulfilment of their duties and shall generally cooperate with each other; they owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance.' <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html#a45>

244 Federal Constitution of the Swiss Confederation, Art 44 (3): Disputes between Cantons or between Cantons and the Confederation shall wherever possible be resolved by negotiation or mediation.

245 Federal Constitution of the Swiss Confederation, Art 48 Intercantonal agreements: 'The Cantons may enter into agreements with each other and establish common organisations and institutions. In particular, they may jointly undertake tasks of regional importance together.'

246 Ethiopia Constitution, Article 50:

shifted from being the world's poorest country to one with a strong, broad-based growth averaging 9.9%, compared to a regional average of 5.4%.[247]

> *Since the early 1990s Ethiopia has experienced reduced state repression, a relatively stable political climate, and has made encouraging strides to improve the living standards of its people. Education, health, infrastructure and economic growth have all improved, especially in the past decade.*[248]

In Burma, invoking the historical legacy and addressing the underlying issues currently occurring on the ground are a sine qua non to establishing a reasonable foundation for a stable, free, just, peaceful, and developed society in accordance with the constitution in Burma. In so doing, it would be beneficial if some crucial experiences of successful federal democratic countries are also referenced. The positive aspects of both dual federalism and ethnic federalism are also applicable after ensuring they are developed in line with globalization, orienting to human rights. Afterward, all ethnic nationalities and their states/provinces would be able to create a new type of federalism, likely entitled "ethnic-based cooperative federalism." Finally, a combination of ethnic-based cooperative federalism and asymmetric federalism would be even more beneficial for Burma. Given the above, some key characteristics are explored below.

In the context of Burma, "political means" must be activated with the clear objective of embracing ethnic-based cooperative federalism, with the backdrop of the minimum standards of the Rule of Law, and striving to ensure the protection of human rights. Through such an objective, a comprehensive change in the constitutional and legal framework would occur.

3. Supreme power of the Federal Government shall reside in the Council of Peoples' Representatives which shall be accountable to the Ethiopian people. Supreme power of states shall reside in the State Parliament which shall be accountable to the people of the state which elected it.
8. The respective powers of the Federal Government and the States is determined by this Constitution. Powers of the Federal Government shall be respected by the States and powers of the States shall be respected by the Federal Government.
9. The Federal Government, may, when it deems it necessary, delegate to the States, some of the powers given to it under Article 51 of this Constitution. States may also delegate some of their powers and responsibilities to the Federal Government.

247 The world bank in Ethiopia: <https://www.worldbank.org/en/country/ethiopia/overview> accessed 15 September 2020.

248 Stellah Kwasi and Jakkie Cilliers, 'Study, measured reform would help Ethiopia each its potential' (20 February 2020): <https://issafrica.org/iss-today/steady-measured-reforms-would-help-ethiopia-reach-its-potential> accessed 15 September 2020.

B.1 Ethnic Based Cooperation

Ethnic-based cooperative federalism differs from ethnic federalism, which guarantees the right to secession in the constitution.[249] On the one hand, the former is a certain type of federalism that adopts the historical legacies of the ethnic nationalities and brings unity to the diversities within the ethnic constituent units and their nationalities. This type of federalism also ensure "full autonomy" for the ethnic constituent units, seek "optimum centralization" rather than "rigid centralization," or address the underlying issues on the ground by further accentuating the collective rights of all ethnic nationalities.

On the other hand, ethnic-based cooperative federalism may somewhat motivate extreme nationalism if each ethnic group focuses more heavily on its own interests than on the interests of the entire union and other, different ethnic nationalities. To circumvent this, ethnic-based cooperative federalism must strive to promote and protect human rights, based on the Rule of Law. Human rights should be the overarching value in each and every ethnic state/province.

B.2 Seeking Optimum Centralization

Under the 1947 Constitution, no single soldier occupied any seat in the legislative assemblies or any position in the government. However, the then democratic governments, notwithstanding being successful in promoting democracy to a noticeable extent, failed in implementing the rights of ethnic nationalities; and the civil war has prolonged. It transpired given the flaws of the 1947 Constitution which was unable to deal with the centralization issue properly. Under the incumbent 2008 Constitution, the centralization has become rigid much more than the status under the 1947 Constitution given that without being elected the soldiers occupy seats in the legislative assemblies and also take high-ranking positions in the government.

There are no federal or democratic countries that allow influential positions of soldiers in legislative and administrative bodies in today's world. Any organizations, leaders or academicians who articulate about federalism, in connection with peace seeking processes, are responsible to deal with this situation firstly, effectively and empirically. Afterwards, seeking optimum centralization will become a reality. Only after that, shared rule and self-rule, described by federalism, in terms of the system of shared governance not only between federal and state/province governments but also among the state/province governments themselves will become meaningful.

249 The Ethiopia Constitution: Art 39(1) recognizes the "unconditional right to self-determination, including the right to secession" of every nation, nationality and people.

B.3 Provincial Sovereignty and the Formation of Ethnic States/Provinces

In the context of Burma, based on the historic and still-legitimate Pang Long Accord, the doctrine of provincial sovereignty[250] should be practiced, and in terms of seeking equality within ethnic nationalities, a Myanmar State/Province should be formed by Myanmar nationals. However, the principle of forming the union with only the eight ethnic states, as submitted at the 1961 Taunggyi Conference, can no longer address the situations on the ground. The wishes of the ethnic nationalities, who have been struggling and sacrificing their lives for the emergence of their own ethnic states/provinces, should be heeded in a way that recognizes their self-determination.

On the other hand, the unreasonable proposals for the formation and emergence of new states/provinces should be discarded. A proposal, for instance, could unreasonably argue that only a population requirement of, say, 300,000 must be met for a group of ethnic nationals to enjoy the right to form a state/province, without having any background struggle to this end and without meeting other requirements. Simply being a group of ethnic nationals should not be a valid reason for forming an ethnic state/province.

B.4 Division of Power

Based on the doctrine of provincial sovereignty, rather than a devolution of power, the delegation of power should shift from the constituent units of the union (i.e., the ethnic states/provinces) to the central/federal level. Collective ownership and use of land for indigenous peoples must be formally recognized by both states/provinces and federal governments. These rights should be codified and applied accordingly. Further, all ethnic states/provinces should own 70% of not only the vacant, fallow, and virgin lands, but also the vast forest resources. For farm land and other types of land located primarily in lowland areas, with certain limitations, the right to individual ownership should be granted.

In Burma, all ethnic states/provinces have neighboring countries, such as China, Laos, Thailand, Bangladesh, and India. Hence, if the states/provinces enjoy a certain limited right to establish official relations and seek cooperation with those countries for some matters—such as border trade, education, social affairs, immigration, or the

250 Federal Constitution of the Swiss Confederation, Art 3: 'The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.'

eradication of narcotic drug trafficking and human trafficking—it would be beneficial for development.

Thus, in addition to other circumstances stated in the federalism dynamic chapter, recognizing land rights of the ethnic states/provinces and granting limited authority on foreign affairs would, at a minimum, meaningfully establish the right to self-determination of the ethnic states/provinces. As a result, the major concern of most Myanmar national politicians regarding the possible secession of non-Myanmar ethnic nationalities would be eliminated. Simultaneously, the central/federal government would assume power for 30% of land and forest resources management and wield most of the foreign affairs power by expanding relations with all other countries globally, beyond just the stated neighboring countries, primarily to pursue unionwide projects.

B.5 Separation of Powers

In terms of power, the separation of powers between the judiciary and the other two branches of the government—the legislature and the executive—should be more focused, and such focus should be practiced at both the union level and the state/province level. In terms of judicial institution, the emergence of an independent, impartial, efficient, and resource-rich judiciary should be a priority. For that to become a reality, the courts should have three complementary components: (1) the practice of a jury system where judicial power is partly conferred on citizens, (2) the formation of a Ministry of Justice, and (3) the presence of operational, independent, and efficient legal aid organizations and lawyers' associations.

B.6 Participation of the Ethnic States/Provinces in Federal Decision-Making

In this regard, firstly the practice of Switzerland should be referenced: in the cases specified by the Federal Constitution, the Cantons shall participate in the federal decision-making process, and in particular in the legislative process.[251] Similar practice is also found in Germany. The German Bundesrat,[252] known as Federal Council, is

251 Federal Constitution of Switzerland Confederation, Art. 45, Participation in Federal Decision-Making.

252 Basic Law for the Federal Republic of Germany, Article 51(1): The Bundesrat shall consist of members of the Land governments, which appoint and recall them. Other members of those governments may serve as alternates. < https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 19 September 2020.

a legislative body that represents the sixteen Länder, in terms of states/provinces.[253]

In Burma, over the previous seven decades, almost all Supreme Court Justices were Myanmar nationals, who do not realize the plight of non-Myanmar ethnic nationalities. In the Supreme Court of the Union, out of nine, five judges should be appointed by and sent from some Ethnic States/Provinces which are rich in natural resources, as has been the case for Quebec province in Canada: at least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.[254] All military tribunals shall operate under the oversight of the civilian justices of the Supreme Court in the Federal Union and those of the Chief Courts of the Ethnic States/Provinces.

B.7 Guaranteeing Basic Rights

The federal constitution should guarantee the basic rights and freedoms of all citizens in the entire union. Simultaneously, the constitutions of the ethnic states/provinces should address their individual diversities while heeding the particularities of each ethnic group within the territory of the respective states/provinces. Every ethnic state/province should have the right to choose an official language to be used within its respective borders, in addition to the Myanmar and English languages for use within the entire Union and for relations with the international community.

Based on a proportional representation electoral system, the MPs should be elected to the lower houses, also known as the People's Assemblies, at both the union and state levels. At the union level, the upper house, or the National Assembly, should be formed with the state governments, elected by the people, from each and every state/

253 Another House of the German Parliament, the Bundesrat, is composed of appointed Members representing the 16 states of Germany at the national level. To counterweight the power of the Bundestag, the Bundesrat is granted with a number of legislative and scrutiny powers. For example, the Basic Law provides for the Bundesrat to make initial comments on the draft law before it is submitted to Parliament for scrutiny and vote. The Bundesrat may also veto a bill that substantially affects the state interests. Legislative Council Secretariat, Research Office, 'Political System of Germany', <https://www.legco.gov.hk/research-publications/english/1415fsc05-political-system-of-germany-20150218-e.pdf> accessed 19 September 2020.

254 The Supreme Court Act, Article 6, Three judges from Quebec; The Supreme Court Act of Canada: https://laws-lois.justice.gc.ca/eng/acts/s-26/page-1.html#h-443189; "Of the nine, the Supreme Court Act requires that three be appointed from Quebec. Traditionally, the Governor in Council has appointed three judges from Ontario, two from the Western provinces or Northern Canada and one from the Atlantic provinces." See Supreme Court of Canada: <https://www.scc-csc.ca/contact/faq/qa-qr-eng.aspx> accessed 19 September 2020.

province. However, representation therein should be based on an equal number thereof.

For administration and legislation at the union level, a parliamentary system should be practiced. Yet the president should not play merely a ceremonial role and should instead wield a certain level of power. During a state of emergency, for instance, the president should be the C-in-C of the Armed Forces. In normal periods, the Armed Forces of the Union should operate under the supervision of the elected civilian government. The Minister for Defense should also be an elected civilian, male or female. This approach to administration and legislation is one of the ways civilian supremacy is practiced.

B.8 The Three Paradigms

The interests of the union and those of the ethnic states/provinces should be amalgamated and balanced. Focusing only on one entity should be avoided. Rather, placing the interest of the union as a first priority by any leaders or organizations is the ideal approach and requires evaluating three paradigms. The first paradigm looks at how much effort such leaders and organizations have exerted to not only repeal the core provisions embedding the military dictatorship in the 2008 Constitution but also produce a new federal democratic constitution and new constitutions for the ethnic states/provinces. The second paradigm looks within a constituent unit or an ethnic state/province to assess to what extent the collective rights of other ethnic nationalities have been recognized, protected, and activated. The third paradigm involves moving from impunity to accountability for the international grave crimes allegedly committed by the ruling regime, in order to examine which types of efforts have been made within local, national, and international communities. Only if all three paradigms are realized will ethnic-based cooperative federalism be feasible and genuine peace be achieved.

B.9 Democracy and Constitutionalism

Norberto Bobbio's minimal definition of democracy is highly valuable,[255] but inaccurate; for instance, the term 'a set of rules' is vague. In addition, 'collective decisions' may be actualized in the countries where the parliamentary system is practised, but not in the others where the presidential system is in place. As a minimum characteristic of democracy, let's say, apart from guaranteeing free and fair regular

255 Democracy is characterized by a set of rules which establishes who is authorized to take collective decisions and which procedures are to be applied.

general elections or by-elections, in which voting is done by secret ballot, known as the representative democracy, crucial political affairs be decided by collecting will of citizens in a way that, at minimum, national as well as regional or state level referendums are convened, in terms of practicing direct democracy.

In conducting elections, in order that all citizens possess political rights, the rule prescribes universal suffrage; today's common grounds for exclusion from suffrage are for non-nationals, minors under 16, imprisoned, legally incapacitated, non-human animals, robots & IA agents.[256] In addition, in democracy, everyone's vote has equal weight: this rule concerns ballot systems and electoral constituencies and the principle prescribes proportional representation.[257] The referendum and proportional representation were those proposed by George E Fellows for democratic reform over one hundred years ago.[258]

In connection with constitutionalism, democracy is to facilitate establishing a stable decentralized society, deter power abuses of strong men, from tribal leaders to kings and governments, respect will of people, and create political landscape for people to be rulers. Similar to majoritarian democracy, consensus democracy may also have a number of flaws even though a proportional electoral system is adopted. Under it, a large number of parties can be represented in the legislature, and it is unlikely that any single organization will control a majority of the seats.[259] On one hand, it is beneficial for minority groups, social strata and ethnic or indigenous communities. On the other, it may threaten the stability of society as it leads to the practice of minority veto as unanimous decisions can quite rarely be achieved when there is a motion to change the form of a state. As such, rather than choosing between majoritarian or consensus, a combination of both, to be practiced in accordance with the Constitution, may be fruitful.

Only when the issues surrounding democracy, as stated above, are resolved properly and practiced accordingly within each and every ethnic state/province, will ethnic based cooperated federalism be feasible and a genuine peace be achieved.

256 Lecture provided by Patricia Mindus, associate professor in Practical Philosophy, Uppsala University, Sweden on 27 Nov, 2018.
257 ibid.
258 George E Fellows, 'Constitutionalism' (1908) 1 Main Law Review 132.
259 Aníbal Pérez-Liñán, 'Democracies' in Daniele Caramani, Comparative Politics (4th edn, Oxford University Press, Oxford 2017) 85, 90.

B.10 Citizenship

Ethnic-based cooperative federalism should not be a racist federalism. In regard to citizenship, the 2008 Constitution sets out a racist-oriented provision that conforms to the 1982 Burma Citizenship Law. Under Article 5 of the latter, every indigenous race and every person born of two parents of indigenous races[260] are citizens by birth. However, the other children—those born to parents who are not recognized as one of the indigenous races—are deprived of their right to citizenship.

Even though a similar promulgation was enshrined in Article 11 (1) of the 1947 Constitution, there was another significant provision that created an opportunity to acquire citizenship for persons born of two parents not of indigenous races. 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/her election of citizenship would occur in the manner and within the time prescribed by law would be eligible for citizenship. Unfortunately, such a constitutional guarantee disappeared with the abrogated 1947 Constitution.

Under a new federal democratic constitution based on human rights, the right to citizenship should be granted; the1982 Citizenship Law should be repealed; a new citizenship law should be prescribed by the federal congress; and corrupt practices within the government ministries, particularly the Ministry of Interior, at both the central and provincial levels must be eradicated. With these underpinnings, the power for granting citizenship status should be exercised by the federal/central government, primarily with the recommendation of the respective ethnic state/province governments, in terms of exercising the right to self-determination.

Additionally, all patriots who have become citizens of other foreign countries should be allowed to enjoy dual-citizenship status with certain conditions. For instance, the applicants must be those who meet two to three of the following requirements: (1) struggled against the rule of military dictatorship, (2) have certain academic skills to contribute to the country, (3) are able to make financial investments, (4) agree to be subject to obligations of citizenship, or (5) have no intention to hold public office.

260 In the official translation of 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.

If the citizenship issue can be resolved legally and appropriately, the peace-seeking process would have been noticeably facilitated.

C. OTHER APPROACHES

C.1 Confidence Building for the Emergence of a New Federal Democratic Constitution

So long as the military dictatorship, chauvinism, and extreme/ultra-nationalism exist within the constitutional and legal framework, a genuine peace, which is elaborated in Chapter I, will never be achieved. The superficial political reform granted under the 2008 Constitution cannot resolve this situation; a radical societal change is undoubtedly required. In modern times, no constitution across the world ensures an incremental role of the military personnel appointed by the C-in-C of the Armed Forces in legislative and executive positions, except for in Burma. The 2008 Constitution allows the Myanmar Armed Forces to separately establish a military justice system, totally denying the oversight of the civilian judiciary. In its practical operation, all crimes—including those committed against civilians by soldiers—are also empirically included in its jurisdiction.

Efforts must be exerted to foster the emergence of a new federal democratic constitution, along with constitutions of the ethnic states/provinces. To this end, confidence must be established by all people that the 2008 Constitution, which embeds the military dictatorship and racism, will be terminated like the case of the 1983 Constitution of South Africa, in which the practice of apartheid was incorporated, by the UN Security Council.[261]

Convinced that the so-called "new constitution" endorsed on 2 November 1983 by the exclusively white electorate in South Africa would continue the process of denationalization of the indigenous African majority, depriving it of all fundamental rights, and further entrench apartheid, transforming South Africa into a country for "whites only",

1. Declares that the so-called "new constitution" is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the "new

261 Resolution 554 (1984) / adopted by the Security Council at its 2551st meeting, on 17 August 1984. https://digitallibrary.un.org/record/68689?ln=en#record-files-collapse-header

constitution ' will further aggravate the already explosive situation prevailing inside apartheid South Africa.

2. Strongly rejects and declares as null and void the so-called "new constitution" and the "elections' to be organized in the current month of August for the 'coloured' people and people of Asian origin as well as all insidious manoeuvres by the racist minority regime of South Africa further to entrench white minority rule and apartheid.

C.2 Upholding the Rule of Law

The emergence of a federal democratic union will become a reality only when the Rule of Law—but not "the Rule by Law"—is effectively and extensively upheld. The entire country needs to adopt and implement the minimum standards of the Rule of Law in dealing with all other underlying issues—political, legal, and societal. Only then will a genuine peace be achievable.

1. No one is above the law; equality before and in the law; equal situations shall be treated equally; and non-discrimination in practice.
2. Operation of government is governed by law.
3. The existence of just laws, equal protection of law, and accessibility to law.
4. Accuracy, generality and non-selectivity of law.
5. 'Law is to limit power, rather than to underpin arbitrary rule'.
6. Protection of individuals as well as groups against crimes, and injustices.
7. Procedural Justice and Fair Trial.
8. Independent, Impartial, Efficient and Resource-Rich Judiciary which practices Judicial Review.

C.3 Dealing with the National Reconciliation Issue Correctly

Under a national reconciliation concept articulated by Aung San Suu Kyi (ASSK), a friendly relationship between the leaders of the NLD government and the Myanmar Army has been established. Nevertheless, this relationship remains purely superficial as the NLD has been unable to resolve the underlying issues surrounding federalism, democracy, human rights, and the Rule of Law under the 2008 Constitution during the previous decade. Importantly, serious human rights violations—which have escalated to the alleged commission of genocide, war crimes, crimes against humanity, and ethnic cleansing—

have remained unresolved. The plights of the ethnic national victims of the stated grave crimes have never been dealt with properly, with humanity based on human rights. While a few perpetrators were indicted by the civilian Judiciary, no victims have received any reparation. Not a single effort for institutional reform, in terms of reformation of abusive state institutions, has yet been made. Given the above, national reconciliation exists only as a sham, desperately impeding the peace-seeking process.

The so-called transition to democracy has brought a tiny development to the big cities—such as Yangon, Nay Pyi Taw, Mandalay, and so on—that Myanmar nationals largely inhabit. Conversely, the status of the ethnic states/provinces have remained extensively devastating. In Burma, the term "national reconciliation" is virtually useless for most ethnic nationalities.

C.4 Seeking Criminal Accountability for a Genuine National Reconciliation

The path to a genuine national reconciliation will be meaningful only when the serious human rights violations that occurred in the past are dealt with based on the principles of seeking accountability and ending impunity. Such actions would ensure justice and reparation for victims of grave crimes committed by the Myanmar Army and government authorities; guarantee security for the ethnic nationalities and their constituent units; and create circumstances in which development can occur in the ethnic states/provinces by the respective ethnic nationalities and their own organizations.

To seek criminal accountability for all grave crimes, the ruling regime, on behalf of the State, must illustrate respect for the obligations arising from the treaties,[262] including the Geneva Convention and Genocide Convention. The commission of genocide, war crimes, crimes against humanity, and ethnic cleansing violates a peremptory norm of general international law (known as *jus cogen*), and such actions constitute internationally wrongful acts.[263] This promulgation is relevant not only to state parties but also to non-state parties—the EROs in the context of Burma—under customary international law.

Within several days of the two Myanmar government soldiers' confessions at The Hague while in the custody of the ICC Prosecutor on September 10, 2020, the European Parliament decided to suspend

262 The Vienna Convention on the Law of Treaties (1969).
263 Responsibility of States for International Wrongful Acts (2001), Art 40.

ASSK from Sakharov Human Rights Prize.[264] European Parliament Vice-President Heidi Hautala supported the decision by saying, "Today's decision is a clear response to her lack of action, her aiding and enabling of the persecution of the Rohingya in Myanmar and her denial of responsibility of her country's government for the ongoing crimes against this community."[265]

The terms "her lack of action, her aiding and enabling of the persecution of the Rohingya" used by Heidi Hautala somewhat indicates the criminality on the part of ASSK. The stated manner is criminalized under the Rome Statute, in terms of aiding, abetting, or otherwise assisting [266] in the alleged commission of genocide. Similarly, the international community, including the international funding agencies, also has a responsibility to cease providing aid to all activities surrounding the NCA and the UA as both agreements would end in the framework of the 2008 Constitution, which provides blanket amnesty to the military regimes.[267] Otherwise, any aid from international funding agencies might fall under the "otherwise assists in its commission" promulgation of the Rome Statute.

C.5 The Role of Women in the Peace-Seeking Process

More than two decades after UN Security Council Resolution 1325,[268] women are still rarely and inconsistently represented in most peace negotiations.[269] The two main dimensions of women representation in peace processes[270]—(1) "… the participation of women at decision-making levels in conflict resolution and peace processes" and (2) "measures … that involve women in all of the implementation mechanisms of the peace agreements"[271]—remain unfulfilled in most cases, despite the efforts and advocacy of various local and international actors and entities. However, there are some positive examples of the inclusion of women representatives and

264 Daily Sabah, 'EU parliament suspends Myanmar's Aung San Suu Kyi from human rights prize community,' (10 September 2010): <https://www.dailysabah.com/world/eu-parliament-suspends-myanmars-aung-san-suu-kyi-from-human-rights-prize-community/news> accessed 11 September 2020.

265 Ibid.

266 Rome Statute of the International Criminal Court, Article 25 (3)(c): 'for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.' <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> accessed 17 September 2020.

267 Constitution of the Republic of the Union of Myanmar 2008, Art. 445.

268 UN Security Council Res 1325 (31 October 2000) UN Doc S/RES/1325.

269 UN Security Council, 'Women and peace and security: Report of the Secretary-General' (9 October 2019) UN Doc S /2019/800, [12, 14, 15].

270 Ibid, 1.

271 Ibid, 8(b).

organizations in negotiations and implementation processes.[272]

For CSOs representing women, there are different ways to be included in peace processes. Direct representation at the negotiation table or participation in the official delegations of the conflict parties is only one possibility. Other options include participating in negotiations as observers and/or being included in consultations or commissions on specific parts or issues related to the peace agreement and its implementation. In addition, participating in high-level problem-solving workshops, such as peace conferences, and securing political endorsements for the agreement and its implementation are significant opportunities for women's involvement at both the national and local level. Public demonstrations and other forms of pressure on the political elite have also shown efficacy.

Although women and their organizations are often not included or represented at the main negotiation table, there are examples of women mediators or CSO members in official delegations. In the 1996–98 Northern Ireland negotiations, the Northern Ireland Women's Coalition (NIWC), a political party representing both Catholics and Protestants, was founded with the specific intent to contest the special election to the Northern Ireland Forum and have the right to send two delegates to the forum, multiparty talks, and official negotiations. Other political parties also had women elected to the forum, but the NIWC played a fundamental role in making the negotiations inclusive and advocating for equality and human rights, with a special focus on representing marginalized groups, such as former soldiers and political prisoners.[273]

In Kenya, the chief mediators in the official peace talks were women. However, while each of the parties had one woman in their four-member delegations, the inclusiveness of this peace process was mostly due to the influence of a wide coalition of CSOs that was able to suggest and recommend gender-related topics in the negotiation agenda. In this case, the CSOs relied on their pre-existing capabilities and networking capacity. Women with a well-recognized professional capacity and active role in society then emerged in organizations not specialized in women's rights and founded the Kenya Women's Consultative Group (KWCG) with the specific aim to contribute to

272 UN Security Council (n 268) [13, 16-18].

273 Inclusive Peace and Transition Initiative, 'Women in Peace & Transition Processes. Northern Ireland (1996–1998)' (Association for Inclusive Peace, The Graduate Institute of International and Development Studies, Geneva, December 2018) <https://www.inclusivepeace.org/content/women-peace-and-transition-processes-northern-ireland-1996%e2%80%931998> accessed 7 September 2020; see also Kate Fearon, 'The Northern Ireland Women's Coalition: Origin, Influence and Impact' (2018) 1 Hiroshima Journal of Peace 1, available at https://ir.lib.hiroshima-u.ac.jp/ja/journal/HJP/1/--/article/45350 accessed 7 September 2020.

the peace process; the KWCG received strong support from the African Union mediation team. Research also stresses the relevance of the women CSOs creating a common document[274] containing the main requests, recommendations, and points for the peace-seeking strategy, accompanied by the endorsement of the international entities supporting the process. KWCG had a very relevant role on the ground as well, coordinating and supporting the humanitarian activities of women's groups in the conflict-affected areas.[275]

A highly relevant outcome of peace negotiations is the creation of constituent assemblies, which often are the actual group determining the long-term results of a peace process. In the cases of both Nepal and Yemen, the constituent assemblies had a quota for women, respectively 33% and 30%, in addition to reserved seats for marginalized communities in Nepal and 40 additional seats for women CSO representatives in Yemen.[276] In both cases, the reserved quotas did not, *per se*, favor the inclusion of gender-related rights and issues in the constitution-drafting process.

Overall, the findings from both the scholarship and comparative analyses highlight that increasing women's participation does not automatically mean their requests are heard or that the process becomes more inclusive. Therefore, it is necessary to analyze the case-by-case dynamics and conditions that make women count.[277] In Burma, it is now time for women and their organizations to play a significant role in the entire peace-seeking process. They might be able to push society toward starting a new process, rather than simply placing themselves in the current NCA process, which will eventually end within the framework of the 2008 Constitution.

C.6 The Eradication of the Narcotic Drugs

Burma should observe the experience of Columbia, which is infamous globally for narcotic drug trafficking, and the advantages and disadvantages it experienced in connection with the peace-seeking processes that primarily occurred in 2016.

274 For example, Women's Memorandum to the Mediation Team, Nairobi 25 January 2008 available at https://www.pambazuka.org/gender-minorities/women%E2%80%99s-memorandum-mediation-team accessed 7 September 2020; see also Thania Paffenholz and others (n 6) 45.

275 Inclusive Peace and Transition Initiative, 'Women in Peace & Transition Processes. Kenya (2008–2013)' (Association for Inclusive Peace, The Graduate Institute of International and Development Studies, Geneva, August 2016) <https://www.inclusivepeace.org/content/women-peace-and-transition-processes-kenya-2008%e2%80%932013> accessed 7 September 2020.

276 Thania Paffenholz and others 26.

277 Thania Paffenholz 188-189.

In Colombia, the drug issue was already present in the 1990 political agreement[278] that followed the 1989 political pact[279] between the Colombian government and the Movimiento 19 de abril de 1970 M-19, a Colombian guerrilla organization movement. This agreement cleared the way for the 1991 constitution, which was the actual outcome of this first peace process. Again, the drug eradication issue was a main point in the failed negotiations that lasted from 1999 to 2002. Out of more than 40 agreements and declarations issued and/or accepted during this time, only about 10 included the problem of illicit drugs.[280]

The four years of negotiations that culminated in the 2016 final agreement[281] saw the inclusion of drug-related issues in the most relevant agreements, starting with the 2012 general agreement,[282] which mentions illicit-crop substitution programs, consumption prevention, and public health programs. The 2012 agreement was the product of exploratory meetings in Havana, Cuba, the main venue for the following negotiations. This document set the agenda for the process, and new agreements were produced whenever negotiations were successfully ended; for example, the 2014 framework or draft agreement document[283] on illicit drugs was followed a few weeks later by a similar document[284] on rural reform.

In addition, "the fight against corruption in institutions" is mentioned in the peace agreement as an essential condition. The agreement states that "the definitive solution is possible if it is constructed collectively by the communities – men and women – and the authorities by means of processes for participative planning, on the basis of the Government's commitment" to an effective implementation.[285] In Colombia, even though rather comprehensive agreements on how to tackle the narcotic drug issues were included in the peace agreement, the problem has not yet been resolved explicitly. For instance, fighting occurred between the drug cartels in the public

278 Political Agreement between the National Government, the Political Parties, M-19 and the Catholic Church as Moral and Spiritual Guardian of the Process 9 March 1990.

279 Political Pact for Peace and Democracy 2 November 1989; see Mauricio García Durán (ed), Alternatives to War: Colombias peace process (Conciliation Resources, London 2004), 40, available at https://www.c-r.org/accord/colombia/peace-processes-1990-1994; Mauricio García Durán, Vera Grabe Loewenherz, and Otty Patiño Hormaza. M-19's Journey from Armed Struggle to Democratic Politics (Berghof Foundation, Berlin 2008) 28, available at https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Papers/Transitions_Series/transitions_m19.pdf accessed 4 September 2020.

280 PA-X Peace Agreement Database <https://www.peaceagreements.org/> accessed 3 September 2020; all agreements except the 1989 Political Act are available on this website.

281 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace 24 November 2016.

282 General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace 26 August 2012.

283 Solución al Problema de las Drogas Ilícitas 16 May 2014.

284 Hacia un Nuevo Campo Colombiano: Reforma Rural Integra 6 June 2014.

285 Ibid.

scene in August 2020, and a certain part of the FARC that entered the peace agreement with the government has taken up arms again.[286]

Seeking peace should not be construed merely as establishing dialogue between the belligerent parties. Although dialogue is important, dialogue alone is unable to bring peace, at least, as far as Burma is concerned. The peace seeking process is inextricably intertwined with the eradication of narcotic drugs. Only when the factors highlighted in the FLA's analysis paper[287] are addressed legally, effectively and efficiently, may the objective for eradication of narcotic drugs be feasible and peace seeking process achievable.

C.7 Reformation of the Existing Political Party System

Eventually, the reformation of the existing political party system must be heeded. Political parties should be established primarily based on political ideologies, rather than dictatorial rule, or individual heroism or extreme nationalism, while other parties which focus on societal issues are also valuable. Importantly, instead of primarily practicing elite leadership, inner party democracy should be promoted; more participation of grassroots party members be encouraged; in decision makings, the will of party members be reflected more; and, a good balance be made between the interest of a respective party and of the entire society or of the constituent unit of the Union.

C.8 Fundamentals for Societal Change

In exerting efforts for societal change, the following underlying issues must be addressed: non-compliance with the Rule of Law, socio-economic inequality, lack of guarantee for livelihood, social insecurity, flaws in public healthcare systems, environmental degradation, corrupt political systems, socially or politically divided communities, insufficient social welfare systems, unfair income distribution (both among individuals and between central governments and state governments), hegemony of one social strata or state institution over all others, local people's lack of power to fuel community development, information and communication technology management issues, and so on.

286 Nicholas Casey, 'Colombia's Peace Deal Promised a New Era: So Why Are These Rebels Rearming?' New York Times (17 May 2019): https://www.nytimes.com/2019/05/17/world/americas/colombia-farc-peace-deal.html

287 The Eradication of the Narcotic Drugs and the Peace Seeking Process in Burma/Myanmar Research Paper of the Federal Law Academy, August 31, 2020. <https://mega.nz/file/qY9BySAB#sY2kPyUKZpoHQHVqfCU0iZAwggztO8nAMoGSoJ5pHCU> accessed 18 September 2020.

Conclusion

The peace-seeking process in Aceh, Indonesia, was notably successful[288] as it was undertaken with the underpinning of societal change occurring at the national level, leading to the fall of the military dictatorship. In May 1998, President Suharto, the former military general who established a military-dominated government and ruled the country for about three decades, resigned due to rapidly escalating antigovernment protests. A small group of military leaders who had quietly discussed reform for years then initiated the elimination of the military from many aspects of politics.[289]

Previously, out of a 700-member upper body, called the People's Consultative Assembly or DPR, 38 seats were reserved for the military.[290] However, pursuant to the Second Amendment of the 1945 Indonesia Constitution in 2000, the DPR is constituted merely by the elected representatives;[291] the appointment of military and police representatives in the DPR, which is the highest legislative body, was terminated.[292] Similar to the case of Indonesia and many other countries that transformed from the rule of dictatorship to democracy, in Burma, only when a certain type of societal change occurs will the peace-seeking process be achievable. Only then would a new constitution-making process for the emergence of a federal democratic constitution arise. Under such a constitution, the ethnic states/provinces, including Myanmar State, would enjoy "full autonomy" as an implementation of their right to self-determination in the context of Burma.

288 Note: The major difference between Indonesia and Burma is related to the security sector reform. Unlike GAM in Aceh, the major EROs in Burma is highly unlikely to surrender.

289 Princeton University, 'Back to the Barracks: The Indonesian Military out of Politics, 1988-2000,' Innovation for successful society, (August 2015) <https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/TD_Military_Indonesia_One.pdf> accessed 24 August 2020.

290 https://www.voanews.com/archive/indonesia-agrees-remove-police-army-parliamentary-seats-2002-08-14

291 Article 19 para (1) of the Indonesia's 1945 Constitution as amended by the Second Amendment
(1) Members of the DPR shall be elected through a general election. (2) The structure of the DPR shall be regulated by law. (3) The DPR shall convene in a session at least once a year.

292 Susi Dwi Harijanti and Tim Lindsey, 'Indonesia: General elections test the amended Constitution and the new Constitutional Court' 142.

CHAPTER: VIII

THE PROSPECT FOR THE PEACE-SEEKING PROCESS IN BURMA

The NLD, even with assuming government power from 2015 to 2020, failed to keep the election promises, one of which was to amend the 2008 Constitution,[293] it made since the "by elections" were held in 2012. Furthermore, the NLD has proven incapable of explaining to its supporters and voters how this unsuccessful attempt to amend the Constitution would be transformed into achieving even if it wins in a landslide again in the forthcoming general elections to be held in November 2020.

The stated commitment has been replaced by another promise for 2020 elections: "The emergence of the Constitution that would facilitate the establishment of a genuine Democratic Federal Union." Unfortunately, the latest promise totally blurs whether the NLD will continue exerting efforts to amend the 2008 Constitution or the party will attempt to produce a new constitution for a democratic federal union. Such an uncertain objective, apart from other disadvantages, incapacitates the NLD to strive for amending the core provisions of 2008 Constitution, in which the military dictatorship is extensively embedded, let alone the drawing up a new federal democratic Constitution. Under such a feeble work plan along with an unclear policy, a genuine peace cannot be achieved. As such, the new approaches, stated in the previous chapter, must be applied.

On January 29, 2017, U Ko Ni, a distinguished lawyer who was the NLD's top legal adviser, was assassinated due to his bold and frank comment about the 2008 Constitution, that the military regime would never allow for

293 MCN TV interview with U Kyi Myint, Chairperson of the Union Lawyers and Legal Aid Providers' Association, (21 September 2020): <https://www.youtube.com/watch?v=ZmN_R0EUTf8>

the core provisions of the 2008 Constitution to be amended and that a new constitution must be drawn up.[294] U Ko Ni stated below:

> *"From the outset, the soldiers wrote this Constitution with the prior intention of ruling the country for ever in one way or another. They knew that people would exert efforts to amend it. Therefore, in accordance with the Constitution, the soldiers have occupied 25% of the seats of all legislative chambers, while the amendment process is granted only with a 76% requirement. Can we amend it after the forthcoming elections? The answer is clear. No. Because the soldiers will continue to occupy 25% of the seats. So long as they don't agree to amend it, efforts for amendment will fail. That is why, since the beginning, I have said that this Constitution can never be amended. What we should do is to draw up a new Constitution, and replace the incumbent Constitution with a new one. This is the only alternative."*

The assassination of U Ko Ni has caused a state of panic to erupt in both the general public and legal communities.[295]

Currently, a lawyers' organization led by an experienced advocate, U Kyi Myint,[296] has adopted U Ko Ni's insight and recently made analogous legal statements publicly.[297] U Kyi Myint also posited that, after receiving a decision from the Union Legislative Assembly, in which the NLD MPs occupy a majority seat, the NLD could initiate a constitutional referendum to determine whether a new constitution would be drawn up—which would ensure the will of the people prevailed. According to him, if such a referendum is approved by voters merely with the support of a simple majority, the process for drawing up a new Constitution can be started. He also elaborated that, to implement this, a constitution drafting body—comprising the leaders of the political parties including the USDP,[298] army representatives, legal academicians etc.—could be formed, and the process could be completed within two years. In this context, he referred to the process for drawing up the 1947 Constitution and highlighted that it was completed within a short time.

294 Wai Moe, Mike Ives, and Saw Nang, "Brazen Killing of Myanmar Lawyer Came After He Sparred With Military, The New York Times (2 Feb 2017) <https://www.nytimes.com/2017/02/02/world/asia/myanmar-ko-ni-lawyer-constitution-military.html> accessed 23 September 2020.

295 Ibid; "This bullet was not only for Ko Ni," the colleague, U Thein Than Oo, a human rights lawyer in Mandalay, Myanmar, said by telephone. "It was for the N.L.D. and the people who want to amend and replace the 2008 Constitution and support the peace process."

296 U Kyi Myint (n 293)

297 ibid: U Kyi Myint continued to state publicly that, under the 2008 Constitution, the Rule of Law cannot be upheld as the Chief Justice of the Supreme Court is a Lieutenant-colonel appointed by the Armed Forces and that army personnel supervises all the courts in the entire country; similarly, a military general is also appointed to be Attorney General. U Kyi Myint continued to state that democracy can be achieved under the 2008 Constitution, let alone federalism.

298 The Union Solidarity and Development Party (USDP) is formed by the ex-army personnel.

Both senior lawyers' enthusiasm to produce a new constitution is highly appreciable as they assertedly provided a clear message to the general public that, under the 2008 Constitution, democracy itself remains unachievable, let alone federalism. Those lawyers' comments are remarkable. Their suggested way for the emergence of a new constitution is also somewhat valuable.

However, their proposal has some flaws. First, probably due to time constraints, they are unable to propose any principles or norms related to constitutionalism to be invoked when a new constitution is drafted. Importantly, they did not comprehensively mention the importance of the 1947 Pang Long Accord, which must be formally adopted as a historical legacy of the country. Second, their proposal for convening a constitutional referendum is to be implemented in line with the 2015 referendum law amending the 2008 Constitution. According to Article 2 (a) of the stated law, a referendum can be held only to amend any provision involving Article 436 (a) of the 2008 Constitution, but not for collecting the will of the people whether a new constitution would be drawn up.

Third, according to the aforementioned experienced lawyers, a blank check would essentially be provided to the stated constitution-drafting body for whatever the body wants to include in the draft constitution. Similar to other political leaders, including Aung San Suu Kyi, the two lawyers were thus unable to suggest any type of federalism that was well suited to Burma and could be exercised accordingly.

Fourth, their suggested process portrays the process as a "top down" one that conforms to the "Rule by Law" in the context of Burma. In fact, the process should be a "bottom up" in light of the "Rule of Law." Fifth, they failed to establish the nexus between the constitution-drafting process and peace seeking. Sixth, they also welcome the inclusion of soldiers from the Myanmar Army in the constitution-drafting body. Such inclusion has not historically been a common practice of successful federal democratic countries when drawing up their constitutions—with good reason. Seventh, in connection with the efforts for the emergence a new constitution, U Kyi Myint and his group of lawyers are unable to posit how the impunity issue would be addressed to uphold the Rule of Law, in cooperation with the international legal communities working for seeking accountability in Burma.

After the completion of such a stated process, a beautiful new constitution would be seen only in terms of form, but in essence, the military dictatorship and chauvinism would have been incorporated therein. Eventually, such a process might not be beneficial as a genuine peace would remain unattainable.

The constitution-making process is extremely important when a constitution is produced. As far as Burma is concerned, that process should

occur alongside the process for peace seeking. The US Constitution has lasted for over two hundred years now because the will of the people and that of their states/provinces are adequately embodied in the constitution, apart from other constitutional and societal values.

Comparatively, and similar to several other countries across the world, in Burma, the 1947 and 1974 Constitutions each lasted for merely 14 years, respectively. The 1947 Constitution, although it somewhat embodied the 1947 Pang Long Accord, was urgently drawn up to fulfill an instrumental requirement for independence of the country. Hence, the constitution was unable to adequately collect the will of the ethnic nationalities and their states/provinces. For the 1974 Constitution, the process was much worse as it was extensively controlled by the military regime led by General Ne Win. The worst process, however, occurred when the 2008 Constitution was produced. The military regime had already created the 104 basic principles to be incorporated in the constitution.

In modern times, another process primarily proposed by U Kyi Myint to hold a constitutional referendum also comes with high risks as the country has not forgotten the undesirable experience of the 2008 Constitution being approved by a rigged referendum. If another similar referendum approves the stated constitution again in 2021 or in later periods, the efforts for the emergence of a new federal democratic constitution would have been terminated. As a consequence, the peace-seeking process would encounter a similar destiny.

Ultimately, the ethnic-based cooperative federalism posited in this paper is not a blueprint but an alternative for discussion, debate, and deliberation within the wider general public—particularly to encompass the ethnic states/provinces, at a minimum, by using modern online communication devices, in addition to other face-to-face meetings. Afterward, it may also extend into inter- and intra-states/provinces for further discussion, debate, and deliberation. Eventually, the process may culminate in the emergence of a new federal democratic constitution (a common draft), along with new constitutions for the ethnic states/provinces.

Such efforts will also tremendously impact the operation of the 2008 Constitution as the unjust and unfair practices that transpire under its umbrella would be uncovered as a result of the new constitutions although the ethnic states/provinces have not yet officially approved them. In the event the ethnic nationalities and their states/provinces broadly participate in a new constitution making process reflecting ethnic-based cooperative federalism, the doctrine of unity in diversities, required in a genuine Federal Union, would become a reality. In addition, the stated preparation would also be beneficial to any type of peace related negotiations now and in future. Eventually, will such a remarkable collective effort result in the emergence of

a well-prepared constitutional arrangement which may be able to avoid a power vaccum when the country faces a standstill under the 2008 Constitution for any causes.

However, during a new peace-seeking process that may possibly start today, the most crucial efforts should focus on seeking criminal accountability for the grave crimes allegedly committed by the ruling military leaders led by C-in-C Min Aung Hlaing and his inferior accomplices. Without such accountability, the legitimacy of future meetings will remain under threat as the perpetrators are formally regarded as criminals from a legal perspective, both nationally and internationally.

As long as endless impunity continues to prevail in Burma/Myanmar, peace will never be achieved, for the following reasons:

- The so-called peace-seeking processes would be valueless, wasting time, money, and resources.
- Justice and treatments for trauma of, and reparations for, the victims of the stated grave crimes would never be sought.
- The tears, grief, and plight of the diverse ethnic nationalities would continue unabated.
- Institutional reform to prevent such crimes in the future would never materialize.

It is therefore now time for all EROs, ethnic CSOs, religious institutions, human rights organizations, women's organizations, lawyers' associations, legal and paralegal organizations, and national and international funding agencies to facilitate, and join hands with, the international legal and human rights organizations to seek criminal accountability. Only then can a true peace-seeking process unfold in Burma.

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