

On Protecting Internally Displaced Persons in Non-International Armed Conflict, Specifically
Regarding the Civilian Population of the Rohingya People of Burma

A Nation Divided?
Assessing Freedom and the Rule of Law in a post-2020 World

Elizabeth Tonkin
March 24, 2022

Elizabeth Tonkin is completing her Juris Doctorate with a concentration in National Security and U.S. Foreign Relations at The George Washington University Law School. Elizabeth holds a Bachelor of Arts from Liberty University in History and International Studies. Professionally, she has spent time as a Legal Intern with the United States Department of Homeland Security and aspires to return to the field of Public Service upon her graduation in May 2022. Elizabeth is a member of King's Church DC where she serves as a Deaconess.

Introduction

Although a place with thousands of years of history, the modern nation of Burma is a relatively new nation on the world stage, only having gained its independence from the British Empire in 1948. At the time of its liberation, Burma was one of the most successful Southeast Asian countries, with a booming industrial economy; now, it is one of the poorest countries in Southeast Asia, with its GDP only reaching \$357.3 billion in 2019.¹ One of the largest contributing factors for this downward trend is the prolonged and ongoing internal armed conflict.

International standards regarding the protection of civilians during armed conflict are relatively newly codified legal principles. In 1949, Common Article III to the Geneva Conventions on the Protection of Civilian Person in Time of War was ratified. In Article III, the Convention requires parties who are engaged in non-international armed conflict to, at a minimum, adhere to the following prohibited actions against civilians,

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.²

The legal status of civilian, along with the protections therein, were clarified by the ratification of the Protocol Additional to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts. This Protocol enumerates protections afforded to the civilian population in Article 51, declaring,

1. Civilians shall enjoy general protection against dangers arising from military operations. . . 2. The civilian population shall not be the object of attack...Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Section...Indiscriminate attacks are prohibited.³

Article 51 is explicitly clear in what is and is not acceptable behavior during armed conflict. In fact, it continues, stating, “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”⁴ Since its passage in 1977, it is recognized as Customary International Law (CIL) and is routinely referenced as controlling.

Under International Law (IL), the United Nations Guiding Principles on Internal Displacement has set out expectations regarding the response to displaced peoples both by the government responsible as well as the international community at large. Specifically, Principles 14-18 of the UN Guiding Principles outline the basic rights of Internally Displaced Persons (IDPs), while Principles 25 and 30, outline government permissions and responsibilities.⁵ Therefore, although

¹ *Index of Economic Freedom: Burma*. The Heritage Foundation. (March 4, 2021).

https://www.heritage.org/index/pdf/2021/countries/2021_IndexofEconomicFreedom-Burma.pdf.

² Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Art. 3, Aug. 12, 1949. 6 U.S.T. 3516, 75 U.N.T.S 287.

³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Art. 51, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287

⁴ *Ibid.*

⁵ *Guiding Principles on Internal Displacement*. UN High Commissioner for Refugees (UNHCR). July 22, 1998. ADM 1.1,PRL 12.1, PR00/98/109.

there is no universal, legally binding instrument that particularly addressed the many issues surrounding IDPs, the UN's Guiding Principles on Internal Displacement have found broad support from within the international community, with many States incorporating them into their domestic law.⁶ These protections afforded to IDPs are not contingent upon the reason for their displacement; however, the reason for the displacement may influence what other actions States may or should make in response. The UN Convention on the Prevention and Punishment of the Crime of Genocide declares that State parties "may call upon the competent organs of the United Nations to take such action...as they consider appropriate for the prevention and suppression of acts of genocide."⁷ Although IDPs are not only the result of armed conflict, most often they are. Non-international conflict, then, is defined as,

all armed conflicts...which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.⁸

CIL, also referred to as "The Law of Nations," is binding IL arising from "general practice accepted as law."⁹ This area of IL, which covers laws regarding state responsibility, is significant as countries who are parties to relatively few international treaties are still bound by particular provisions of treaties that have risen to the level of CIL.¹⁰ The International Committee of the Red Cross (ICRC) keeps a database of the rule of International Humanitarian Law (IHL), also known as the Law of War, which have reached the status of CIL.¹¹

Finally, Crimes Against Humanity, although not codified in any dedicated treaty of international law, are defined in the 1998 Rome Statute which established the International Criminal Court as

(1) any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder...(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law...(g) rape...(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender.¹²

The ICC statute's Explanatory Memorandum states that crimes against humanity

⁶ *Addressing Internal Displacement in Time of Armed Conflict and Other Violence*, The International Committee of the Red Cross. (January 28, 2018).

⁷ UN Convention on the Prevention and Punishment of the Crime of Genocide. art. VIII, Dec. 9. 1948, 78 U.N.T.S. 227, 282.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3.

⁹ Statute of the International Court of Justice, art. 38(1), June 26, 1945, 156 U.N.T.S. 77.

¹⁰ Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law*, Volume I & II (International Committee of the Red Cross 2005) [hereinafter ICRC CIHL]. The ICRC also maintains a regularly updated database which updates the study, ICRC, Customary IHL Database, <http://www.icrc.org/customaryihl/eng/docs/home>.

¹¹ Customary IHL Database. The International Committee of the Red Cross. http://www.icrc.org/customary-ihl/eng/docs/v1_cha.

¹² Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

are particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority.¹³

What's Happening in Burma?

In 1948, at 4:30 a.m., the nation of Burma officially gained its independence from the British Empire. After a brief rule of the federal parliamentary constitutional republic, an authoritarian takeover occurred in 1962. This resulted in twenty-six years of one-party rule and the political dominance of the military. Then in 1982, the Citizenship Law was passed. In addition to refusing to recognize the Rohingya people as an ethnic group among the government's more than 130 ethnic races, the Rohingya people have been denied Burmese citizenship and prohibited them from traveling without permission, owning land, or having more than two children. Although not passed until 1982, this ethnic targeting began in the 1970s by the Burmese military, which was accused of ethnic cleansing and genocide by various United Nations agencies, International Criminal Court (ICC) officials, human rights groups, journalists, and governments. In October 2016, the government of Burma began a systematic crackdown on the Rohingya people of the Rakhine State, and more recently, a new wave of attacks has caused a massive movement of displaced people both within the nation and across the borders of Burma into Bangladesh. Despite numerous international criticisms, the conflict and questionable actions of the Burmese government continue to this day.

Prior to 2017, an estimated 1.4 million Rohingya lived in Burma, mostly within the Rakhine State.¹⁴ However, following a Rakhine insurgent attack, the Burma Armed Forces (Tatmadaw) switched its focus to the Arakan (Rakhine) people who, like the Rohingya, live in Arakan (Rakhine) State. The civilians living there, regardless of religion, continued to suffer in the indiscriminate violence of the Tatmadaw's attempts to defeat the Arakan Army. Estimates claim that more than 10,000 Chin and Khumi villagers, 70,000 Arakan villagers, and over one million Rohingya villagers remain displaced from their homes and are living in either IDP camps in Burma or refugee camps in Bangladesh.¹⁵

Reuters obtained a police document in March 2017 which listed 423 Rohingyas that had been detained by police since October 9, 2016, 13 of whom were children, with the youngest being only

¹³ *Myanmar: Coup Leads to Crimes Against Humanity*. Human Rights Watch. (July 31, 2021). <https://www.hrw.org/news/2021/07/31/myanmar-coup-leads-crimes-against-humanity#>.

¹⁴ UNHCR Calls for Solidarity, Support, and Solutions for Rohingya Refugees Ahead of an Urgent Donor Conference. UNHCR News Briefing. (October 20, 2020). <https://www.unhcr.org/news/briefing/2020/10/5f8d7c004/unhcr-calls-solidarity-support-solutions-rohingya-refugees-ahead-urgent.html>, accessed

¹⁵ *Caught in the Crossfire: Witness and Survivor Accounts of Burma Army Attacks and Human Rights Violations in Arakan State*. Free Burma Rangers. (November 10, 2020). <https://www.freeburmarangers.org/2020/11/10/special-report-witness-survivor-accounts-burma-army-attacks-human-rights-violations-arakan-state/>.

10 years old.¹⁶ The documents were verified by two police captains in Maungdaw, and Burmese police claimed the children had willingly confessed during interrogations to the alleged crimes.¹⁷ Overall, the average age of the Rohingya population detained is 34, with the oldest being 75 and the youngest 10.¹⁸

During this time, the Tatmadaw had resumed their “clearance operations” in the northern Rakhine State, and according to a report released on October 11, 2017, by the Office of the U.N. High Commissioner for Human Rights (OHCHR), the humanitarian crisis continued to worsen. In 2018, a report from fact-finding mission, presented to the UN Human Rights Council (UNHCR) that the Tatmadaw had committed “the gravest crimes under international law.”¹⁹ The full report, which was 440 pages, included, among other atrocities, accounts of women tied by their hair or hands to trees and then raped.²⁰ The account continued, stating that the rape and sexual violence were of a “particularly egregious and recurrent feature” of the Tatmadaw’s conduct, citing eyewitness accounts of the Rohingya population claiming to have seen naked women and girls running through the forests “in visible distress” and villages scattered with dead bodies who had “large amounts of blood...visible between their legs.”²¹

On February 1, 2021, the Tatmadaw Commander-in-Chief Min Aung Hlaing launched a successful coup d’état. When the military seized power, they deposed the democratically elected government under the leadership of Aung San Suu Kyi, detaining her and other key leaders of the National League for Democracy (NLD) party. Of the over half a million IDPs in Burma, almost half (219,000) have been displaced by conflict and unrest since 1 February 2021.²² The UN Security Council has expressed its “deep concern” about the unrest in Burma and called for an “immediate cessation of violence” as well as efforts to ensure civilians are not harmed.²³ Since the takeover in February, hundreds of thousands of people have been forced from their homes by the fighting and violence, including 37,000 from the northwest Chin State in recent weeks, making the number of IDPs around 223,000 people.²⁴

A Legal Analysis of the Ongoing Situation in Burma

The situation in Burma is a Non-International Armed Conflict because the armed forces currently fighting with the Burma Army are (1) under responsible command and (2) exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

¹⁶ Lone, Wa; Lewis, Simon; Das, Krishna N. *Exclusive: Children Among Hundreds of Rohingya Detained in Myanmar Crackdown*. Reuters. (March 17, 2017). <https://www.reuters.com/article/us-myanmar-rohingya-detainees-exclusive-idUSKBN16N342>.

¹⁷ *Hundreds of Rohingya held for Consorting with Insurgents in Bangladesh*. The Star. (March 18, 2017). <https://www.thestar.com.my/news/regional/2017/03/18/children-among-detainees-hundreds-of-rohingya-held-for-consorting-with-insurgents-in-bangladesh/>.

¹⁸ *Ibid.*

¹⁹ Michael Safi, *‘Tied to Trees and raped’: UN Report Details Rohingya Horrors*. The Guardian. (September 18, 2018). <https://www.theguardian.com/world/2018/sep/18/tied-to-trees-and-raped-un-report-details-rohingya-horrors>.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *The Refugee Brief*. UN High Commissioner for Refugees (UNHCR). (October 22, 2021). <https://www.unhcr.org/refugeebrief/the-refugee-brief-22-october-2021/>.

²³ *The Refugee Brief*, 12 November 2021, available at: <https://www.unhcr.org/refugeebrief/latest-issues/>.

²⁴ *The Refugee Brief*. UN High Commissioner for Refugees (UNHCR). (November 12, 2021). <https://www.unhcr.org/refugeebrief/latest-issues/>.

Therefore, the civilians ought to be protected under Common Article III to the Geneva Conventions on the Protection of Civilian Person in Time of War.

The situation in Burma fulfills the first element of the is a Non-International Armed Conflict standard because the armed forces currently entrenched in fighting are under the responsible command of the Arakan Army (AA). The AA is the primary force fighting against the Burma Armed Forces (Tatmadaw) along the western front of the nation. The AA, as the armed branch of the United League of Arakan (ULA), was founded on April 10, 2009, to protect the Rakhine people, and to establish peace, justice, freedom, and development and is currently under the Command of Major General Twan Mrat Naing.²⁵ Since 2014, the AA has established their own training camps within the Rakhine State to train their troops for combat. In 2014, according to the Myanmar Peace Monitor, the AA had more than 1,500 troops; in June 2020, the AA chief claimed more than 20,000 soldiers.²⁶

The situation in Burma fulfills the second element of the Non-International Armed Conflict standard because the AA exercises such control over the majority of the northern Rakhine State to enable it to carry out sustained and concerted military operations. Over the past two years, the United League of Arakan (ULA) – in conjunction with the AA (ULA-AA) – have established a government referred to as the Arakan Authority, as well as a judiciary system, local administrative structures and divisions (different than the Burmese government settings), and the Arakan Authority also has in place mechanisms to regulate taxation, health, education, and other social issues.²⁷ This functioning governance in concert with the military not only demonstrates asserted control over a particular region in order to engage in sustained military operations, but demonstrates such control over a region that the military is able to work alongside an established administrative authority to self-govern in defiance of the State’s authority.

In 1992, Burma ratified the 4th Geneva Convention, submitting itself to the authority of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Common Article III to the 4th Geneva Convention covers civilian protections, including the right to humane treatment and the prohibition of “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.”²⁸

The Burmese government, under the direction of the Tatmadaw is in violation of International Law, specifically Common Article III of the Geneva Convention, and CIL, specifically the UN Guiding Principles on Internally Displaced Peoples and Article 51 of the Additional Protocol I.

The Tatmadaw is violating Common Article III laws by (1) not providing even the minimum of protection to persons taking no active part in hostilities, (2) taking hostages, and (3) committing outrages against personal dignity. The status of civilian is clearly defined by Protocol Additional

²⁵ AA (*Kachin Region*). Myanmar Peace Monitor. (September 28, 2015).

<https://www.mmpeacemonitor.org/1522/>.

²⁶ Edward Cowley. *Tour Guide Turned Arakan Army Commander Sees Nationhood in Victory*. Coconut Media. (June 23, 2020). <https://coconuts.co/yangon/news/tour-guide-turned-arakan-army-commander-sees-nationhood-in-victory/>.

²⁷ Kyaw Lynn. *The Arakan Army, Myanmar Military Coup and Politics of Arakan*. The Transnational Institute. (June 10, 2021). <https://www.tni.org/en/article/the-arakan-army-myanmar-military-coup-and-politics-of-arakan>.

²⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287.

to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts and clearly states, “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”²⁹ Common Art III of the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field states “persons taking no active part in hostilities ...shall in all circumstances be treated humanely.”³⁰ It continues, defining humane treatment, by stating that it is prohibited to commit violence or cruel treatment, to take hostages, or to commit any outrages against personal dignity.

Here, the Tatmadaw is in direct violation of international law by not providing even the minimum of protection to persons taking no active part in hostilities, taking hostages, and committing outrages against personal dignity. First, since 2017, the Tatmadaw has increasingly adjusted its focus to the Rakhine State and has continued its fight against the AA with indiscriminate attacks on the villages.³¹ This has resulted in more than a million displaced people. Second, the Tatmadaw has been documented to have detained hundreds of civilians, including children and the elderly.³² Finally, there are extensive reports documenting the vast sexual abuse and atrocities committed by the Tatmadaw against thousands of Rohingya women.

The Tatmadaw is in violation of CIL as articulated by Article 51 of the Additional Protocol I by (1) not protecting civilians from military operations, (2) targeting civilians as the object of attack, and (3) allowing civilians to be the brunt of indiscriminate attacks. These violations are often referred to under the International Law of War as the rule of Distinction. This is first listed by in Article 51(4) under the prohibition of indiscriminate attacks, defined as: “(a) those as which are not directed at a specific military object... or (c) those which...are of a nature to strike military objectives and civilians...without distinction.” Again, Article 50(3) reiterates that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”³³

Here, the Tatmadaw is in violation of International Law because it does not practice the principle of distinction when engaging in warfare against the AA but participates in concerted targeting of the civilian population of the Rakhine State. Due to the nature of the overlap between the AA and the ULA – and the extensive autonomous control of the area – the civilian population has been largely impacted by the violence. In addition to the thousands that have already been displaced,

²⁹ *Ibid.*

³⁰ *The Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.* Geneva Convention. (August 12, 1949). <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>.

³¹ *Caught in the Crossfire: Witness and Survivor Accounts of Burma Army Attacks and Human Rights Violations in Arakan State.* Free Burma Rangers. (November 10, 2020). <https://www.freeburmarangers.org/2020/11/10/special-report-witness-survivor-accounts-burma-army-attacks-human-rights-violations-arakan-state/>.

³² Lone, Wa; Lewis, Simon; Das, Krishna N. *Exclusive: Children Among Hundreds of Rohingya Detained in Myanmar Crackdown.* Reuters. (March 17, 2017). <https://www.reuters.com/article/us-myanmar-rohingya-detainees-exclusive-idUSKBN16N342>.

³³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Art. 50, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287.

the indiscriminate airstrikes and shelling by the Tatmadaw that take place in both the Rakhine and Chin States continue to displace civilians.³⁴

The Tatmadaw is violating CIL as articulated by the UN Guiding Principles on Internally Displaced Peoples because it is denying them a right to seek safety in another part of the country, the right to an adequate standard of living, and is denying and obstructing the free passage of humanitarian assistance to internally displaced peoples. These outline the basic rights of IDPs, which specifically include the right to liberty of movement, the right to seek safety in another part of the country, and the right to an adequate standard of living.³⁵ Principles 25 and 30, then, outline government permissions, stating, “all authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced” in addition to the obligation to “grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.”³⁶

Here, humanitarian groups that are seeking to help IDPs are facing strict restrictions on their activities, which is severely limiting their access to at-risk populations.³⁷ In August 2021, IDP camps in the Rakhine State were being cut off from aid by a Tatmadaw prohibition for camps to receive support, resulting in the prevention of most outside aid or assistance from making it to the civilians living in camps.³⁸

The Tatmadaw is participating in Crimes Against Humanity because they are knowingly committing actions of targeted violence against the civilians of the Rakhine State, specifically the Rohingya population. In order to meet the threshold of this categorization of crime, the alleged crime must meet three elements: (1) a physical element – the commission of an action, (2) a contextual element – the commission of an action as part of a widespread or systemic attack, and (3) a mental element – the commission of an act against any civilian population knowingly.

Here, the Tatmadaw is engaging in Crimes Against Humanity because its killing of numerous protesters, enforced disappearance of dissidents, torture and rape of many detainees, and mass political detentions demonstrate widespread abuses committed at the hands of the Tatmadaw. In response to widespread demonstrations, on March 26, 2021, the State MRTV news channel told viewers that they “should learn from the tragedy of earlier ugly deaths that you can be in danger of getting shot to the head and back” and warned that “parents should also talk their children out of it [joining protests], let’s not waste lives for nothing.”³⁹ This language clearly communicates

³⁴ *Myanmar 2020*. Amnesty International. Accessed February 10, 2022.

<https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/myanmar/report-myanmar/>.

³⁵ *Guiding Principles on Internal Displacement*. UN High Commissioner for Refugees (UNHCR). (July 22, 1998). ADM 1.1,PRL 12.1, PR00/98/109, <https://www.refworld.org/docid/3c3da07f7.html>.

³⁶ *Ibid*.

³⁷ *Myanmar 2020*. Amnesty International. Accessed February 10, 2022.

<https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/myanmar/report-myanmar/>.

³⁸ *Chin Rangers Support IDPs in Rakhine State’s Conflict Areas*. Free Burma Rangers. November 9, 2019. <https://www.freeburmarangers.org/2019/11/09/chin-rangers-support-idps-rakhine-states-conflict-areas/>.

³⁹ *Four Killed in Myanmar Protests; Military Warns of ‘Danger’ of Demonstrations*. Reuters. (March 26, 2021). <https://www.reuters.com/world/asia-pacific/myanmar-sees-more-protests-world-bank-warns-economic-slump-2021-03-26/>.

that the Tatmadaw security forces were knowingly planning to respond in violent force to planned protests on Armed Forces Day.

Since February 1, 2021, the State Administration Council junta has responded to massive protests with excessive and lethal force. The police and military have killed over 900 people, most of whom were protesters and bystanders. Additionally, medical doctors reported to Human Rights Watch that security forces prevented them from reaching protesters who had been wounded, causing many to die from blood loss.⁴⁰ Since the coup, Burmese authorities have also taken into custody and forcibly disappeared more than 100 politicians, election officials, journalists, activists, and protesters, refusing to confirm their whereabouts in violation of international law. On June 25, 2021, Pramila Patten, the UN special representative of the secretary-general on sexual violence, condemned the continuing alleged sexual violence by the Burmese authorities, stating,

Night raids, arbitrary arrests, sieges of townships and neighborhoods, torture and deaths in detention, attacks on locations and sites where civilians are gathered or have fled, and reports of sexual violence in detention sites, particularly sexual assault, torture, physical and verbal abuse, and intimidation, have become an alarming feature of daily life.⁴¹

Policy Concerns Relevant to the International Community's Response

The current response of the international community to the IL violations taking place in Burma has been minimal. Article III of the Additional Protocol to the Geneva Convention outlines the principle of non-intervention, stating

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government. . . [or] be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.⁴²

Not surprisingly, then, the international community has been slow to intervene in this matter. In 1996, Europe introduced the first sanctions on Burma. The 2003 Burmese Freedom and Democracy Act was passed and in 2008, under the Bush Administration, the United States passed the Block Burmese JADE Act of 2008 which banned the sale of Burmese gems and jade sold both in Burma and those processed in third countries. This sanction was coupled with other international pressures, including extensive, targeted sanctions against senior leaders of the Burmese government and military, their immediate family, and any key supports in an attempt to curb the serious human rights violations that were taking place. This specific sanction remained in place until 2017. Many key allies from the European Union (EU) – including Canada, Australia, Japan, and Korea – also participated in concerted actions to encourage the Burmese government to initiate meaningful changes.⁴³ In 2011, the EU renewed its Common Position on Burma, which authorized

⁴⁰ *Myanmar Coup Leads Crimes Against Humanity*. Human Rights Watch. (July 31, 2021). <https://www.hrw.org/news/2021/07/31/myanmar-coup-leads-crimes-against-humanity>.

⁴¹ *Ibid.*

⁴² Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Art 3 section 1, 2.

⁴³ Joseph Yun. *Testimony Before the House Committee on Foreign Affairs, The United States Department of State*. (June 2, 2011.) <https://2009-2017.state.gov/p/eap/rls/rm/2011/06/164819.htm>.

sanction on key regime officials, and as of 2021, forty-one countries have imposed some form of arms embargo against the Tatmadaw.⁴⁴

On November 11, 2019, the Gambia filed a suit at the International Court of Justice (ICJ) accusing Burma of breaching its obligations under the 1948 Genocide Convention.⁴⁵ On January 20, 2020, The Independent Commission of Enquiry – established by the Burma government – submitted its final report to the then President of Burma, concluding that although the Burma security forces may have been the party responsible for war crimes and “disproportionate use of force,” they found no evidence of genocidal intent. On January 23, 2020, the International Court of Justice (ICJ) ordered Burma to take “provisional measures” to prevent genocidal acts committed against the Rohingya community.⁴⁶ Additionally, the ICJ ordered Burma to regularly report on the implementation of the order. In May 2020, Burma submitted its first report in compliance with the ICJ ruling and the second was submitted in November of 2020.⁴⁷ This was the last report to be filed.

The Responsibility to Protect, also known as R2P, is a growing international standard which seeks to ensure that the international community does not again fail to prevent mass atrocities such as genocide, war crimes, ethnic cleansing, and crimes against humanity from occurring. This concept developed in response to the failures of the international community from adequately addressing the mass atrocities committed both in the former Yugoslavia and Rwanda during the 1990s. In 2001, The International Committee on Intervention and State Sovereignty established the concept of R2P. Then, in 2005 at The UN World Summit, R2P was adopted unanimously by the Heads of State and Government in attendance. The World Summit Outcome Document articulated these principles in paragraphs 138 and 139. Paragraph 138 established individual State responsibility, stating,

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity...The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.⁴⁸

Paragraph 139, then, addressing the responsibility of the international community, claims

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against

⁴⁴ Myanmar: *UN Human Rights Expert Issues Report and Urges Decisive, Unified Action to Put an End to Brutality*. United Nations Human Rights Office of the High Commissioner (UNHRC). (March 4, 2021.) <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26845&LangID=E>.

⁴⁵ Myanmar: *World Court Orders Myanmar to Protect Rohingya*. Amnesty International. (January 23, 2020.) <https://www.amnesty.org/en/latest/news/2020/01/myanmar-world-court-orders-myanmar-protect-rohingya/>.

⁴⁶ Myanmar 2020. Amnesty International. <https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/myanmar/report-myanmar/>.

⁴⁷ Riyaz ul Khaliq. *Myanmar Submits 2nd Rohingya Report to Top UN Court*. Anadolu Agency. (November 24, 2020). <https://www.aa.com.tr/en/asia-pacific/myanmar-submits-2nd-rohingya-report-to-top-un-court/2054175>.

⁴⁸ Resolution Adopted by the General Assembly, United Nations. (September 16, 2005). https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁹

Therefore, the international community has not only begun to discuss mechanisms to prevent atrocities in the future but has made steps to see them become a reality. This is, understandably, a very controversial action, especially in light of state sovereignty. However, for the purposes of combatting and preventing crimes against humanity, this type of action may not only be reasonable, but necessary. In 2008, Kenya was on the brink of an ethnic war following a disputed election, as over the course of two months 1,133 Kenyans were killed and over 600,000 were driven from their homes.⁵⁰ In response, the international community reacted swiftly with a 41 day African- Union (AU)-led mediation process supported by the UN, the neighboring countries, key donors, and civil society at large. This is widely cited as the first successful example of R2P in practice.

Crimes against humanity, as defined in the 1998 Rome Statute, must satisfy three elements: (1) a physical element – the commission of an action, (2) a contextual element – the commission of an action as part of a widespread or systemic attack, and (3) a mental element – the commission of an act against any civilian population knowingly. The Tatmadaw has repeatedly acted in ways which satisfy each, opening the door for international intervention.

Due to the nature and extent of the violence occurring in Burma, the international community has an obligation to respond. First, the international community should continue to place sanctions on Burma until the violence ceases. Sanctions do and could include anything from blocking payments to the junta and State-owned enterprises – particularly foreign-financed oil and gas projects – to increased duties and tariffs to arms embargos. Second, a resolution should be passed by the UN Security Council to condemn the actions of the Tatmadaw against the civilian population in the Rakhine State and to authorize the international community in what ways to respond. This action would be in line with the 1999 UN Security Council Resolution 1244 regarding the situation in Kosovo. Specifically, that resolution provided “a framework for the resolution of the conflict in Kosovo by authorizing the deployment of an international civilian and military presence that would provide an international transitional administration and security presence that would oversee the return of refugees and the withdrawal of military forces from Kosovo.”⁵¹ Specifically, the resolution authorized an international civil and security presence in Kosovo to establish and monitor the peace so that there was a safe environment in which the refugees could return. The main function of the civil force included the continued promotion of autonomy for Kosovo, performing administrative function, overseeing and helping continue the development of

⁴⁹ *Ibid.*

⁵⁰ Abdullahi Bori Halakhe. “R2P in Practice”: *Ethnic Violence, Elections, and Atrocity Prevention in Kenya*. The Global Centre for the Responsibility to Protect. (December 2013). http://www.globalr2p.org/wp-content/uploads/2020/07/Kenya_OccasionalPaper_Web.pdf.

⁵¹ Security Council Resolution 1244. The United Nations Peacemaker. (June 10, 1999). <https://peacemaker.un.org/kosovo-resolution1244>.

institutions that would manage election, maintaining general law and order, protecting human rights and ensuring the safe passage and return of refugees.

Likewise, a security council resolution could authorize and define the role of international troops in responding to the ongoing non-international conflict in Burma. At the very least, the UN should approve the sending of peace keeping troops to help maintain security at the IDP camps within the Rakhine State.

Conclusion

This paper has addressed the international legal frameworks and protections for displaced civilians during non-international armed conflict that are applicable and controlling in the ongoing conflict in Burma. The situation in Burma is a non-international armed conflict because the armed forces currently fighting with the Burmese Army are (1) under responsible command and (2) exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. The Burmese government, under the direction of the Tatmadaw is in violation of International Law, specifically Common Article III of the Geneva Convention by (1) showing no distinction in its attacks, (2) taking hostages, and (3) committing outrages against personal dignity. The Tatmadaw is also in violation of Customary International Law by disregarding the UN Guiding Principles on Internally Displaced Peoples because it is denying them a right to seek safety in another part of the country, the right to an adequate standard of living, and is denying and obstructing the free passage of humanitarian assistance to internally displaced peoples. Finally, the Tatmadaw is in violation of CIL as articulated by Article 51 of the Additional Protocol I by (1) not protecting civilians from military operations, (2) targeting civilians as the object of attack, and (3) allowing civilians to be the brunt of indiscriminate attacks.

Through a careful analysis of the situation in Burma in light of both International Law and Customarily International Law, it has been clearly established that Burma, under the direction of the Tatmadaw, is in violation of both International Law and CIL in its direct and indirect treatment of the Rohingya people of the Rakhine State. Therefore, in this instance, it would be proper for the international community to intervene in order to protect and prevent further harm to the civilian population.

Bibliography

- AA (Kachin Region)*. Myanmar Peace Monitor. September 28, 2015. <https://www.mmpeacemonitor.org/1522/>.
- Addressing Internal Displacement in Time of Armed Conflict and Other Violence*, The International Committee of the Red Cross. January 25, 2018. <https://shop.icrc.org/addressing-internal-displacement-in-times-of-armed-conflict-and-other-violence-pdf-en.html>.
- Caught in the Crossfire: Witness and Survivor Accounts of Burma Army Attacks and Human Rights Violations in Arakan State*, Free Burma Rangers. November 10, 2020. <https://www.freeburmarangers.org/2020/11/10/special-report-witness-survivor-accounts-burma-army-attacks-human-rights-violations-arakan-state/>.
- Chin Rangers Support IDPs in Rakhine State's Conflict Areas*. Free Burma Rangers. November 9, 2019. <https://www.freeburmarangers.org/2019/11/09/chin-rangers-support-idps-rakhine-states-conflict-areas/>.
- Cowley, Edward. *Tour Guide Turned Arakan Army Commander Sees Nationhood in Victory*. Coconut Media. June 23, 2020. <https://coconuts.co/yangon/news/tour-guide-turned-arakan-army-commander-sees-nationhood-in-victory/>.
- Customary IHL Database. The International Committee of the Red Cross. http://www.icrc.org/customary-ihl/eng/docs/v1_cha.
- Halakhe, Abdullahi Bori. "R2P in Practice": Ethnic Violence, Elections, and Atrocity Prevention in Kenya, THE GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (December 2013), available at: (http://www.globalr2p.org/wp-content/uploads/2020/07/Kenya_OccasionalPaper_Web.pdf).
- Henckaerts, Jean-Marie, Louise Doswald Beck, *Customary International Humanitarian Law*, Volume I & II. International Committee of the Red Cross 2005. [hereinafter ICRC CIHL]. <http://www.icrc.org/customaryihl/eng/docs/home>.
- Hundreds of Rohingya held for Consorting with Insurgents in Bangladesh*, The Star. March 18, 2017. <https://www.thestar.com.my/news/regional/2017/03/18/children-among-detainees-hundreds-ofrohingya-held-for-consorting-with-insurgents-in-bangladesh/>.
- Index of Economic Freedom: Burma*. The Heritage Foundation. March 4, 2021. https://www.heritage.org/index/pdf/2021/countries/2021_IndexofEconomicFreedom-Burma.pdf.
- Khaliq, Riyaz ul. *Myanmar Submits 2nd Rohingya Report to Top UN Court*. Anadolu Agency. November 24, 2020. <https://www.aa.com.tr/en/asia-pacific/myanmar-submits-2nd-rohingya-report-to-top-un-court/2054175>.
- Lone, Wa; Lewis, Simon; Das, Krishna N. *Exclusive: Children Among Hundreds of Rohingya Detained in Myanmar Crackdown*, Reuters. March 17, 2017. <https://www.reuters.com/article/us-myanmar-rohingya-detainees-exclusive-idUSKBN16N342>.

- Four Killed in Myanmar Protests; Military Warns of 'Danger' of Demonstrations.* Reuters. March 26, 2021. <https://www.reuters.com/world/asia-pacific/myanmar-sees-more-protests-world-bank-warns-economic-slump-2021-03-26/>.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art 3. August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art 3. 50, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art 3. 51, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287.
- Guiding Principles on Internal Displacement. UN High Commissioner for Refugees (UNHCR). July 22, 1998, ADM 1.1,PRL 12.1, PR00/98/109. <https://www.refworld.org/docid/3c3da07f7.html>.
- Lynn, Kyaw. *The Arakan Army, Myanmar Military Coup and Politics of Arakan.* The Transnational Institute. June 10, 2021. <https://www.tni.org/en/article/the-arakan-army-myanmar-military-coup-and-politics-of-arakan>.
- Myanmar: Coup Leads to Crimes Against Humanity.* Human Rights Watch. July 31, 2021. <https://www.hrw.org/news/2021/07/31/myanmar-coup-leads-crimes-against-humanity#>.
- Myanmar: UN Human Rights Expert Issues Report and Urges Decisive, Unified Action to Put an End to Brutality.* United Nations Human Rights Office of the High Commissioner (UNHRC). March 4, 2021. <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26845&LangID=E>.
- Myanmar: World Court Orders Myanmar to Protect Rohingya.* Amnesty International. January 23, 2020. <https://www.amnesty.org/en/latest/news/2020/01/myanmar-world-court-orders-myanmar-protect-rohingya/>.
- Myanmar 2020.* Amnesty International. Accessed February 10, 2022. <https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/myanmar/report-myanmar/>.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). June 8, 1977.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977.
- Resolution Adopted by the General Assembly, United Nations. September, 16 2005. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf
- Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

- Safi, Michael. *'Tied to Trees and raped': UN Report Details Rohingya Horrors*. The Guardian. September 18, 2018. <https://www.theguardian.com/world/2018/sep/18/tied-to-trees-and-raped-un-report-details-rohingya-horrors>.
- Security Council Resolution 1244, The United Nations Peacemaker. June 10, 1999. <https://peacemaker.un.org/kosovo-resolution1244>.
- Statute of the International Court of Justice, art. 38(1), June 26, 1945, 156 U.N.T.S. 77.
- The Refugee Brief*. UN High Commissioner for Refugees (UNHCR). November 12, 2021. <https://www.unhcr.org/refugeebrief/latest-issues/>.
- The Refugee Brief*. UN High Commissioner for Refugees (UNHCR). October 22, 2021. <https://www.unhcr.org/refugeebrief/the-refugee-brief-22-october-2021/>.
- UN Convention on the Prevention and Punishment of the Crime of Genocide, art. VIII, Dec. 9. 1948, 78 U.N.T.S. 227, 282.
- UNHCR Calls for Solidarity, Support, and Solutions for Rohingya Refugees Ahead of an Urgent Donor Conference*. UNHCR News Briefing. October 20, 2020. <https://www.unhcr.org/news/briefing/2020/10/5f8d7c004/unhcr-calls-solidarity-support-solutions-rohingya-refugees-ahead-urgent.html>, accessed December 20, 2020.
- The Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention. 12 August 12, 1949. <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>.
- Yun, Joseph. *Testimony Before the House Committee on Foreign Affairs*, The United States Department of State. June 2, 2011. <https://2009-2017.state.gov/p/eap/rls/rm/2011/06/164819.htm>.