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Ensuring Accountability for the Junta Crimes Against Humanity Violation in Myanmar: Usage of the Rome Statute and Possible Involvement of the UNSC Via UNSCR Referral

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Abstract

The objective of this journal article is to analyze as well as understand the scope of crimes that has been done by the recent Myanmar Juntas, specifically the crimes against humanity. It analyzes the determination of the crime based on the Rome Statute of the International Criminal Court as well as the possible applicability's-applicability applicability' towards the ICC. The article will analyze the Junta action of using the basis of unfair election to enact crimes against humanity and the mechanism to bring the Juntas towards the ICC, either by UNSC Referral or the ICC investigation. In addition, the writer has also used several basis as a way to deem the current Junta government as illegitimate as well as the need to enact the UNSC referral.

Keywords: Juntas, ICC, Myanmar Coup D'etat, ICC Referral, Crimes Against Humanity, Human Rights

A. INTRODUCTION

The current situation in Myanmar could be very concerning, especially regarding the coup that the Juntas did. This is due to the power struggle between the Juntas and the incumbent Aung San Suu Kyi political party, the National League for Democracy, and has once again secured the seat at the 2020 General election. This has resulted in the Juntas questioning the election claim from the very first point, as well as using the constitution as the basis for seizing power

that at least 20% of the seat must belong to the Juntas, even though the democratic election has stated that the people have chosen to trust the leadership towards the Aung San Suu Kyi Government².

In the case of Myanmar, the Juntas has had claimed the recent election of Myanmar to be illegitimate and biased and thus enacted a situation of emergency towards the situation in Myanmar³. As a result, the Juntas has claimed that they

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² Goldmen, Russel. "Myanmar Coup: What To Know About the Unrest and Protest" *New York Times* February 1 2021 <https://www.nytimes.com/article/myanmar-news-protests-coup.html>

³ Myet Htet Min Tun, et al. It was buttressing the Anti-NLD Project: Data on the Civilian Members of Myanmar's State Administration Council Junta", *Perspective Issue*: 2021 No 119, pp. 1-27, at 1.

have the basis and permanence to enact the coup based on the constitution. Regarding this, the people of Myanmar have protested in the streets towards actions to partake, especially as their democratic voices have not been respected; the elected politicians have also been declared null and void by the Juntas⁴. In addition, further debates have been enacted on the legality of the government themselves, especially by using customs based on the Montevideo Convention of 1933. One sufficient part of the convention for a state to be legal, there needs to be an acknowledgment from other states. Indeed, Myanmar does not sign the Montevideo convention. However, it should be argued that the convention is eligible to be a widely accepted custom in international law⁵.

In addition, as a result, the Juntas have dissolved the parliament and the appropriate party.⁶ This is undemocratic, as it has ceased the voice of the people. However, a shadow government called the National Unity Government (NUG), which the dissolved parliament and elected politicians create, has been designed to ensure that they are given the rightful right of the democratically chosen people⁷. The National Unity Government has also been recognized by several countries, most notably the European Parliament⁸, further

ensuring that the NUG has gained recognition and strengthening the belief that the Juntas' decision will not be able to stand⁹.

Thus, the Juntas have been enacting various human rights violations, from killings of targeted people, reported to be around 1000 people, to force disappearance and forced deportation. Under the Rome statute, these actions are classified as crimes against humanity, which are heavily punishable. The legality of bringing the case is further questioned that Myanmar isn't a signatory of the Rome statute, which will impact the situation and status quo, and further question the legality of the government at hand¹⁰.

The situation in Myanmar is still new and under international tension. While international law is indeed a concept deemed to ensure that states would follow such a mechanism, especially regarding the protection of their citizens, a classic case of a disruption of the situation has further questioned the legality of the government at hand. The United Nations hand is further explicitly forced, as they need to recognize one of the governments: either the Au San Suu Kyi, which is currently detained and nowhere to be found, or the Juntas

⁴ Cambridge University Press. "Military Coup In Burma Draws International Condemnation and Pressure." *American Journal of International Law* Vol 115, 21 July 2021, pp. 1-10.

⁵ Montevideo Convention, December 26, 1933, online: United Nations: <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf>

⁶ Report of the Special Rapporteur on The Situation Of Human Rights In Myanmar, Thomas H Andrews, Un Doc. A/HRC/46/56

⁷ International Trade Union Confederation. "Myanmar: National Unity Government Must Be Recognized. Available at: <https://www.ituc-csi.org/myanmar-national-unity-government>

⁸ European Parliament Resolution on the Human Rights Situation In Myanmar, Including the Situation Of

Religious and Ethnic Groups, European Union. 2021/2905(RSP)

⁹ Saxena, D. I. Myanmar's Military Coup: Security Trouble in Southeast Asia. *Journal of Indo-Pacific Affairs*, Special Issue, August 2021

¹⁰ Jatmika, M. I. *Military Coup 2021 and the Stalemate of Democratization Process in Myanmar*. Institute of International Studies, 2021, available at: <https://iis.fisipol.ugm.ac.id/2021/02/03/military-coup-2021-and-the-stalemate-of-democratization-process-in-myanmar/>.,accessed on 5th January 2021

government, which has questionable actions¹¹.

This article will mainly give an understanding of the background of the Coup D'état In Myanmar and a brief overview of the status quo. The discussion will consist of differing section sections: Coup D'état in Myanmar, Myanmar and Its Status Towards the Rome Statute, Legality of the Junta's Government, Feasibility towards bringing the Case Towards International Court, UNSC Referral Towards the International Criminal Court, Principle of ASEAN Non-Interference and its relevance, theoretical framework, and conclusion.

Thus, there need to be actions from states to ensure that the civilian of Myanmar can be protected. The author believes intervention is not merely military but intervention via other means- for example, investigation or usage of the UNSC referral to adhere to the issues at hand.

Regarding the theoretical framework, R2P, or Responsibility to protect, is chosen for its importance in upholding human rights. This is due to understanding the importance of R2P and how it is deemed to ensure that there would be an intervention to protect these human rights. Thus, R2P does not merely talk about intervention on a mere military basis but also ways to ensure that there would be accountability. Therefore, the writer will focus more on

providing the relevance of R2P via its relevance in Myanmar via upholding justice and international law.

B. ANALYSIS AND DISCUSSION

1. COUP D'ÉTAT IN MYANMAR

While currently, there is limited access to journal publishing talking specifically about the situation in Myanmar, there are journals that have talked about the principle of peremptory norms or *jus cogens*. This is quite understandable, as the Myanmar case is quite a new case. However, in terms of *Jus Cogens*, it has been argued that it is the highest hierarchy of international law and would apply universally in some instances¹².

Antonio Tritande has defined *jus cogens* as the international community's obligation¹³. There is no specific definition of *jus cogens*. However, it is widely accepted that *jus cogens* are an international law in the highest order, where it may cancel out other actions if deemed against such international law. Thus, the three magnitudes of *Jus Cogens* are given towards the highest amount of atrocity. In this case, it refers to three clauses: Crimes Against Humanity, War Crimes, and Genocide. Crimes Against Humanity are defined as actions that are against the protection of civilians, such as killing of civilians, abduction, and even forced departure¹⁴.

¹¹ Humans Rights Council." Myanmar: UN Expert Says Current International Effort Failing, Urges Change Of Course." United Nations, 2021, available at: <https://news.un.org/en/story/2021/09/1100752https://news.un.org/en/story/2021/09/1100752>., accessed on 5th January 2021

¹² Gastorn, Kennedy. "Defining the Imprecise Contours of *Jus Cogens* in International Law". *Chinese Journal of International Law*, Volume 16, Issue 4, 2018, pp. 643-662., at 643

¹³ TRINDADE, A. A. *International Law For Humankind*, Hague: Martinus Nijhoff Publishers, 2013 TRINDADE, A. A. *International Law For Humankind*, Hague: Martinus Nijhoff Publishers, 2013

¹⁴ *Rome Statute of The International Criminal Court*, 17 July 1998 (entered into force 1 July 2002), online: ICC < <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>> [Rome Statute]

Jus cogens were formulated in the Vienna Convention on the Law of Treaty, specifically on article 53, where a treaty may be declared null and void if it is against *jus cogens*¹⁵. The United Nations Legal Committee further enhanced such meaning towards any criminal act under international law. Thus, the author would like to highlight crimes against humanity as a specific case that is happening under the Juntas in Myanmar¹⁶.

According to Darryl, Robinson defined crimes against humanity under the Rome Statute with the following information: "crime against humanity means 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." Thus, any attacks done systematically toward civilians are argued as crimes against humanity¹⁷.

While the action of declaring a state-wide emergency is not a violation of *Jus Cogens*, the steps that follow could be argued that it is violating the mere principle of *Jus Cogens*. There have been reports of hundreds of people missing and being killed, despite these actors being civilians. By continuing to pursue these actions and has not given a platform for the civilians to be given a fair trial and continue killing, the Junta's actions continue to ignore the mere basis of international law.

Thus, the Juntas has fulfilled the threshold of breaking the rule of law by enacting crimes against humanity. An example would be that targeted killings towards civilians are being done repeatedly, and even conducting actions of kidnapping and annihilation towards those against the government.

In addition, while the principle of the territory is the basis for a government, there is also the Montevideo convention, which has the following threshold to be given to justify as a state: a: permanent population, b: defined territory, c: government, and d: capacity to enter relations with other states¹⁸. Even in the argument that there are states that accept the Junta capacity, it is only a few to be argued the most, for example, China¹⁹. Thus, with many states boycotting the Juntas, such as the USA has enacted sanctions²⁰, it is hard to accept the justification that the Juntas is acknowledged at the end of the day.

2. MYANMAR AND ITS STATUS TOWARDS THE ROME STATUTE

However, what should be noted is the fact that it is a limitation of cases that can be brought towards the International Criminal Court. According to Dr. Ray Murphy, the specifics to bring a case to the international criminal courts is either by initiating the Rome statute, which needs to fulfill the

¹⁵ Vienna Convention on the Law Of Treaties, 23 May 1969(entered into force 27 January 1980), online: United Nations Office of Legal Affairs < https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>

¹⁶ Ibid.

¹⁷ Robinson, D." *Oxford Scholarly Authorities on International Law (OSAIL)*. United Kingdom: Oxford University Press, 2013

¹⁸ Ibid.

¹⁹ White, Edward & Reed, John. "China Bolster Ties With Myanmar Junta Despite International Condemnation, June 23 2021, available at: <https://www.ft.com/content/ca43da4c-4287-4de6-ad8a-57a2a32fe7f3>

²⁰ United States Department of State." The United States Takes Further Actions Against the Burmese Military Regime." Available at: <https://www.state.gov/the-united-states-takes-further-actions-against-the-burmese-military-regime/>

requirement of a state to ratify the Rome statute, or the second option is the UNSC referral, where if the Security Council agrees to refer the case towards ICC, it may be viable and doable²¹. While it has been argued that, indeed the Juntas have broken the principle of crimes against humanity, the two challenges arise from both options brought.

Myanmar is not the ratifying party towards the Rome statute, and thus the Rome statute does not have its jurisdiction to investigate crimes against humanity²². Indeed, the actions that Juntas has done are against such articles. However, as told before, the Myanmar government has not ratified the Rome statute. This means that ICC jurisdiction cannot be allowed. Despite this fact, there has been an ongoing case that Bangladesh files towards Myanmar. This option is enacted due to the reason that the Bangladesh government has ratified the Rome statute. As a result of the Rohingya refugees being spread towards Bangladesh, Bangladesh has the grounds to do so. What makes the Junta case different is due to the reason that while there are reports of refugees affected by the Junta occupation, it is still quite unclear towards which state²³.

There are also options of using the UNSC referral to bring the case towards ICC, which is highly probable that that while not all UN members are a member of the Rome Statute, the UNSC decision is binding, and therefore can bring the case towards such

means²⁴. This is a highly probable notion, if not under the fact that all states have their interest. While the western states in the UNSC that have permanent powers, for example, the USA, France, and the UK will agree to this notion, it is hard to see that Russia and China will agree to bring the case to ICC due to their non-intervention measures. This will be discussed in further sections.

In addition, China has also agreed to support the Junta government, and it could be highly predicted that such a resolution would be vetoed by either Russian Federation, or China. This brings further question and analysis from the literature: That bringing the case towards ICC is possible, but it is hard to be enacted²⁵.

3. THE LEGALITY OF THE JUNTA GOVERNMENT

Regarding international law in the Myanmar coup, the author defines such a thing as the action of forcefully ending one rule by another group. The situation would most of the time be done by the military of a certain group, or a party in one state. In the case of Myanmar, there are two major groups: The Civilians led group, called National League For Democracy, which always pushes for civilian-led representation, later changed to National Unity Government²⁶ and pushes for democracy as well as the Juntas, which hold 25% of the seat in the parliament²⁷.

²¹ Murphy, D. R.. *International Criminal Accountability and the International Criminal*.

²² The States Parties Towards the Rome Statute, International Criminal Court. Accessed at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

²³ Fortify Rights. (2021). *Myanmar: Engage the International Criminal Court to Hold Military Perpetrators of Mass Atrocity Crimes Accountable*. Fortify Rights.

²⁴ Article 13(B) Of the Rome Statute 1998

²⁵ Ibid

²⁶ Ibid.

²⁷ Egretau, Renaud. "Towards Legislative Institutionalization? Emerging Patterns of Routinization in Myanmar Parliament." *Journal of Current Southeast Asian Affairs*, vol. 38(3), 2020, pp. 265-285 at 268,

This has always caused a situation of power struggle, as the Juntas to want to win the election, while traditionally the Myanmar people have always pushed for democracy-based leaders, and thus the National League of Democracy won the recent election. However, the Juntas enacted the Coup D'état as a response towards the situation, which is framed as an unlawful and unfair election²⁸.

This is also done despite the democratic majority, which has voted for another landslide win under Au San Suu Kyi. This has caused the question of whether the Juntas is legal and lawful, as the coup itself has quite a questionable standing²⁹. The reasoning is simple, that because the Juntas fail to prove their argument that the election is not unfair. This begs the question, for exactly the parameter of a state to be recognized. Using the Montevideo Convention, it can be argued that the Juntas Government is questioned in the very first place. Referring to article 1 of the convention, there are four things that constitute a state of being recognized under international law, which can be seen as the following: Permanent population, defined territory, government, and lastly, the capacity to enter relations with other states³⁰.

Even with the basics of using the argument of territory as a basis, such means have been received unlawfully³¹. Such a government would not allow its citizens and

people to be killed. Instead, it would poke a blind eye towards the situation, specifically if the means being done is via crimes against humanity and inciting crimes³².

While the Juntas may say that they hold the situation and prerequisite of the first three sections of article 1, there is a section that they cannot fulfill, which is the capacity to enter relations with other states.

While the Montevideo Convention is a different convention and is not explicitly catered for coup d'état or the Myanmar government, it could be acknowledged that the convention is a custom that most countries will accept³³. Specifically, by proving the last section of article 1- regarding recognition by other states, no matter what means are given by such a government to take into power. Thus, this is something that Juntas fail to acknowledge due to a simple thing- the refusal of other states.

This is since various countries and states refuse to acknowledge the Junta's presence, with a select few, for example, the People's Republic of China. A simple reason would be the fact that once again, the situation is by allowing a democratically led government to be instead banished and taken by power and force. Thus, it can be concluded that the Juntas does not have legal standing by most states, which has resulted in Juntas trying to take control³⁴.

²⁸ Strangio, Sebastian. "Myanmar Junta Forms Caretaker Government." Retrieved from: <https://thediplomat.com/2021/08/myanmar-junta-forms-caretaker-government-promises-elections-in-2023/>

²⁹ Ibid.

³⁰ Ibid.

³¹ Yangon." Myanmar Junta Cancels Results of 2020 Polls". France24. Retrieved from France24.com: <https://www.france24.com/en/live-news/20210726->

[myanmar-junta-cancels-results-of-2020-polls-won-by-suu-kyi-s-party](https://www.france24.com/en/live-news/20210726-myanmar-junta-cancels-results-of-2020-polls-won-by-suu-kyi-s-party)

³² Prevention of Armed Conflicts, UN Doc. A/75/PV.83, General Plenary Meeting

³³ Okeowo, Ademola Oladimeji, "Statehood, Effectiveness and the Kosovo Declaration of Independence", November 3 2008

³⁴ Myers, Lucas."China Is Holding Its Bets In Myanmar." Retrieved from: <https://foreignpolicy.com/2021/09/10/china-myanmar-coup-national-league-for-democracy/>

The constitutive theory of recognition explicitly mentions this. It is referred to the fact that recognition of a state is not automatic. Other states require acceptance to ensure that such a country is accepted internationally. This is the idea of a notable international law scholar, Lassa Francis Lawrence Oppenheim, regarding states' need to accept a new formulation.

Furthermore, it could be argued that one or two acceptance is not merely enough; it needs to be ensured that the majority of the country accepts such means. Otherwise, it will be invalid. Using the basis of the constitutive theory of recognition, there are very few- if any countries that acknowledge the recent Junta military.

Even in the case of ASEAN, the ASEAN invites the Juntas to ensure that no further violence is being done. While indeed there has been discussion in Jakarta, the Juntas are never explicitly referred to as the government of Myanmar. Furthermore, the agreement that has been produced further shows that the Juntas are unable to follow the agreement, specifically towards a ceasefire, which they have not been able to track and ensure viable protection. If anything, this further shows that the Juntas does not respect agreement³⁵.

In addition, it will not be as easy for the junta's government to be recognized, both by the world and the United Nations. Using the basis of the constitutive recognition, majority of the United Nations countries has not accepted the rule of the Juntas. There have been past precedent where various coup d'état has been enacted, yet the world and the United Nations choose

not to recognize such a government. The means and process to do so are not as easy as it seems, as the United Nations will have to discuss such trivial manners in the General Assembly, and the members have to discuss whether it would be viable from the very first place to allow another representative of a state to be changed

To add, there is a general verdict that the United Nations currently still recognize the Myanmar representative towards the United Nations. Not only the current representative but Kyaw Moe Tun is also unchanged, there has been support from other subsidiaries body of the United Nations, specifically the United Nations Special Rapporteur on Humans Rights in Myanmar, regarding the fact that various atrocities are being various atrocities are being done by the current Juntas, which has made the question of precisely the status of their legality. This has confirmed that at the end of the day, even the United Nations does not recognize the Juntas, despite requests to change towards a more chosen representative done by the Juntas³⁶.

Thus, it could be seen that this has fulfilled the criteria set by the Montevideo convention and has concluded that the Juntas' argument that they hold control in Myanmar as the basis for sovereignty and rule not to be liable from the very first place. This argument could also be further supported against the Juntas by citing the past cases of similar situations, for example would be the Libya conflict, which has two main actors: the unrecognized government, or the Libya National Army (LNA) and the GNA (Government of National Accords). Even though the LNA has a much more

³⁵ Wang, Phillip. "Myanmar Juntas Extremely Disappointed Over Leader's Exclusion From ASEAN Summit." Retrieved from: <https://edition.cnn.com/2021/10/16/asia/asean-excludes-myanmar-junta-intl-hnk/index.html>

³⁶ Al-Jazeera. "UN Urged to Retain Kyaw Moe Tun as Myanmar Ambassador." Retrieved from: <https://www.aljazeera.com/news/2021/9/13/un-urged-to-retain-kyaw-moe-tun-as-myanmar-ambassador>

extensive territory than the GNA, the United Nations has chosen to recognize the GNA instead due to the nature of democracy and the people that chose GNA. Thus, it could be argued that in the current status quo, the United Nations should recognize the election result by the Au San Suu Kyi Government and not the Juntas³⁷.

Further supported by the theory of the constitutive recognition, which it adheres to the Montevideo convention. The previous government had more basis and is recognized by other states, not the current Junta government.

This has caused the situation where it is highly questioned whether the Juntas themselves recognition does not have outside of the small pool of countries; an example would be China. This has caused questions on the legality of statehood, even if the Juntas currently occupy the land of Myanmar. The reason for this is quite simple, the action of the coup is questionable. This has caused countries to condemn the Junta's actions and possibly recognize the National Unity Government³⁸³⁹.

4. FEASIBILITY OF BRINGING THE CASE TOWARDS INTERNATIONAL COURT

Regarding referring the case to an international court, it is highly needed to be understood that the international court has limited jurisdiction at the end of the day. For this study, the court chosen is the

International Criminal Court (ICC). In this case, the principle that would be used is *Jus Cogens* or preparatory norms. A principle of universal jurisdiction, where such a concept would be able to be enacted towards all states regarding the case worst-case and violation of international law. In addition, it is indeed not that easy to simply bring a point towards the International Criminal Court as the court's jurisdiction is very limited⁴⁰.

It also needs to be understood, unlike other international courts, such as the International Court of Justice (ICJ), which would handle state vs state disputes. The purpose of ICC is to target a specific individual to be prosecuted, usually the leading actor of the conflict. Thus, as the Juntas are the conflict actors, Min Aung Hlaing would be the target to be prosecuted. Specifically towards reports of hundreds of civilians dying, torture of civilians, and persecution of civilians unlawfully. This has been proven numerous times as the Juntas refused to allow the freedom of expression to protest and instead chose to "silence" the civilians⁴¹.

The International Criminal Court jurisdiction is focused on four things, referring from article 5 of the Rome statute⁴² which are: The crimes of genocide, crimes against humanity, war crimes as well as crimes of aggression. However, the situation in Myanmar would be focused upon crimes against humanity, specifically towards the fair election, protection of

³⁷ Ilardo, M. "Conflict Analysis: The Second Libyan Civil war ", AIES., 2019

³⁸ "Recognition in International Law: A Functional Reappraisal." *The University of Chicago Law Review* 34, no. 4 (1967): 857-83. <https://doi.org/10.2307/1598995>.

³⁹ Ratcliffe, Rebecca., "Myanmar Junta Condemned Over Guilty Verdicts in Aung San Suu Kyi Trial", *The Guardian*, 6 December 2021. Retrieved from: <https://www.theguardian.com/world/2021/dec/06/au>

ng-san-suu-kyi-sentenced-to-four-years-in-prison-for-incitement

⁴⁰ Phillippe, Xavier., "The Principle of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh." *International Review of The Red Cross*, Vol 88, no 862, pp. 1-24, at 2

⁴² Article 5(A-D) of the Rome Statute of International Court. *Ibid*

civilians, torture, persecution against a specific group, and similar crimes, which can be seen in article 7 of the Rome statute⁴³.

However, this does not simply mean that Myanmar can be brought to the International Criminal Court due to several reasons. For a case to be brought towards the International Criminal Court, the state party must be a member of the Rome statute or being prosecuted by another state that is a state party towards the Rome Statute.⁴⁴ Myanmar is not a state party to the Rome Statute, which would make the situation much harder to be determined. However, there are other options as the United Nations Security Council will be able to refer a resolution towards the ICC if indeed there is found to be acclimation⁴⁵.

The other option would be if a State party to the Rome Statute would prosecute another state in ICC. This would also apply, even if the targeted state is not a member of the Rome Statute. However, such a requirement must be given if indeed the targeted party causes harm towards the state that brings the situation. It must be limited towards the jurisdiction of the ICC mentioned above⁴⁶.

Specifically for Myanmar, Bangladesh has brought the case of crimes against humanity against Myanmar back in 2019. Although the case is for an entirely different matter, specifically for Rohingya, the case is currently being investigated. It is heavily in

Bangladesh's favor, due to persecution, and unlawful killing of civilians, which falls under the jurisdiction of crimes against humanity. This has proven that it is indeed possible to bring the situation in Myanmar towards the ICC⁴⁷.

Thus, the concept became much more complex due to the reasoning of the question of the legitimacy of the Juntas government. There has also been a rival/shadow government, which is created regarding the people who have been kicked out from the government. Calling themselves the National Unity Government (NUG) and still receding in Myanmar, there have been competing claims and basis for the government⁴⁸.

However, the NUG has wished to refer the case to the International Criminal court. While indeed that one must be a state to bring the case, it could be even further argued that NUG is the legitimate government based on the voice of the people. In addition, the United Nations has not changed the current Myanmar ambassador to the United Nations, which is Kyaw Moe Tun. Kyaw Moe Tun has said that he designates himself to support the democratically led government, and therefore, it could be argued that the NUG has all the basics to bring the violations towards the international court⁴⁹.

In addition, under the Rome statute, there is the principle of *Proprio Motu*, where the judge of the International Court

⁴³ Article 7(1) of the Rome Statute of International Criminal Court. *Ibid*.

⁴⁴ Palmer, Emma. "Can the ICC Brings Justice Towards Myanmar?". Retrieved from: <https://www.lowyinstitute.org/the-interpreter/can-icc-bring-justice-myanmar>

⁴⁵ Garland, AS. "UN Security Council Referral to the International Criminal Court.". Leiden: European University Institute, 2020.

⁴⁶ Wenqi, Zhu. "On Co-operation by States Not Party To The International Criminal Court." *International Review of the Red Cross*, Vol 88, no 863, pp. 1-24 at 3

⁴⁷ International Criminal Court, "Situation In The People Republic of Bangladesh/ Republic of the Union of Myanmar, order of 14 November 2019, [2019] Pre Trial Chamber III 4 at 1-58

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

of Justice may be able to enact its investigation, even if the state that is being targeted is not a part of the Rome statute⁵⁰. This is based on Article 15 of the Rome Statute, where the court may exercise its jurisdiction and start its investigation⁵¹.

This shows two possibilities to ensure a viable solution: NUG can bring the case towards ICC, as they consist of former thrown-out politicians and parties supposed to be elected politically. This is further supported by the fact that the Juntas' actions are illegal. Even if the Juntas is currently holding power, there could be an interesting situation where the ICC can allow the NUG to bring the case, despite not currently being the ruling party. The second case would be allowing the fact that there is an independent investigation under article 15 of the Rome Statute. However, Myanmar is not a ratifying state of the Rome Statute. These two possibilities would ensure a viable solution to the situation in Myanmar⁵².

5. UNSC REFERRAL TOWARDS THE ICC

It is also possible for the United Nations Security Council to bring the case to the International Criminal Court. This is since UNSC, as the highest body of the United Nations, has such a responsibility to ensure peace and security and quoting article 13 of the Rome statute⁵³, which the security council can refer the situation towards the ICC. However, before continuing, it is

needed to be understood the mechanism of the UNSC, as this will play a huge role.

Under article 23 of the United Nations charter, it is stated that the UNSC consists of a total of 15 members, with five permanent members: the United States of America, Russian Federation, United Kingdom, France, and the People's Republic of China as well as a rotating ten non-permanent members⁵⁴. However, what makes the UNSC interesting is the permanent member sections. Whenever a resolution is made as a response for the United Nations towards an issue or discussion, there will be a vote on whether to adopt it or not.

In the case that any of the permanent members would not be in favor, even if the majority is in favor, it would not be adopted. This is also known as the veto power, and it is understandable due to the fact of unique nature of the UNSC: It would be binding, unlike other United Nations resolutions, and would be applicable as soon as possible⁵⁵.

This, would also be a very hard situation, especially for countries in the UNSC that is known to be having different stances, such as China and Russia against United State, the United Kingdom, and France. However, in the past ICC referral have been done by the UNSC in the past, specifically towards Sudan under resolution 1593 despite differing stances⁵⁶.

⁵⁰ Sjöström, Marcus. "The Initiation of an Investigation Proprio Motu by the Prosecutor of the ICC – A Reasonable Basis to Proceed?", Master thesis of Public International Law, Uppsala University, 2014

⁵¹ Peace and Justice Initiative. "Proprio Motu Investigation by the ICC Prosecutor. Retrieved from: <https://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor>

⁵² Simpson, Adam. "Myanmar Exile Government Signs Up For ICC Prosecution". Retrieved from:

<https://www.eastasiaforum.org/2021/09/17/myanmar-s-exile-government-signs-up-to-icc-prosecutions/>

⁵³ Article 15 of the Rome Statute of International Criminal Court. *Ibid*

⁵⁴ Charter of the United Nations, United Nations.

⁵⁵ Priscilla Suri, J. "THE UNITED NATIONS SECURITY COUNCIL RESOLUTION ON SANCTIONS TOWARDS INDIVIDUAL FROM THE PERSPECTIVE OF INTERNATIONAL LAW". *Padjadjaran Journal of International Law*, Vol. 3, no. 2, June 2019, pp. 202-218, at 205

⁵⁶ United Nations Security Council Resolution S/RES/1593, entered into force on 31 March 2005

The implication of such a resolution is quite interesting due to the fact: that Sudan is not a member of the Rome Statute, and in addition, both Russia and China also choose not to veto the resolution, as both countries are not usually associated with the ICC⁵⁷. Thus, the Sudan case is quite a landmark due to the reasoning the fact that Sudan will also need to accept the ICC jurisdiction. The main reasoning is that the crimes limited towards ICC are Genocide, War Crimes, and Crimes Against Humanity. However, the writer would like to focus on crimes against humanity, to bear relevance to the Myanmar situation, and whether the ICC referral can also be done.

Crimes such as persecution, rape, inhumane acts, and various other actions that are being enacted by the Sudanese government as well as the militias of Sudan are deemed to be fulfilled to be brought towards the case. This means that despite the UNSC referral and Sudan's position not as a member of the Rome Statute, it is indeed possible for such a mechanism to be done. This is also a landmark position for the international community, as, before 2005, there was no usage of ICC referral from UNSC⁵⁸.

Another exciting thing is the fact that the ICC can prosecute anyone who is deemed to be committing crimes against humanity, as long as it has jurisdiction or is done via the UNSC referral. This is important since not anyone is immune from the jurisdiction of ICC, including the head of state⁵⁹.

This is based on Article 27 of the Rome statute⁶⁰, which it explains that no individual shall enjoy the rights of the court's jurisdiction if indeed it has already been investigated by the ICC. At the same time, there has also been the justification for the usage of article 98 of the Rome statute⁶¹. It is explained that the ICC may not proceed with the request for surrender if it is not in compliance with the international obligation of a state⁶².

This has been causing to stir a debate whether ICC can prosecute a head of state/officials, even under the usage of UNSC referral, as thus it is argued that article 98 is a justification for state parties that have not signed the Rome statute. Thus the obligation under article 27 is not applied.

Thus, with the case of Sudan towards the ICC, it could be argued that it is possible if indeed the UNSC voted overwhelmingly in favor to refer to the point towards the ICC as per article 15 of the UN Charter⁶³. UNSC may also determine the limitation of such crimes for the ICC to proceed.

To further bring justification towards the case at hand, there are several supporting bases to further exclaim that some parts of the United Nations have been supporting the incumbent government, despite there is being an issue of double government. This can be seen in the fact that the current representation of Myanmar is still unchanged⁶⁴, and while there are requests for a changing of representation towards

⁵⁷ Ibid

⁵⁸ Happold, Matthew. "Darfur, the Security Council, and the International Criminal Court." *The International and Comparative Law Quarterly*, vol. 55, no. 1, Cambridge University Press, 2006, pp. 226–236, at 226

⁵⁹ Oyugi, Phoebe, "Head of State Immunity Under the Rome Statute of International Criminal Court: An Analysis of the Contemporary Legal Issues and the African Union Response to the Prosecution", Master of Laws Thesis, Rhodes University, 2015.

⁶⁰ Article 27 of the Rome Statute of International Criminal Court. *Ibid*.

⁶¹ Article 98 of the Rome Statute of International Criminal Court. *Ibid*.

⁶² Galand, Alexandre Skander. *United Nations Security Council Referrals to the International Criminal Court*, Leiden: Brill, 2018

⁶³ Article 15 of the UN Charter. *Ibid*.

⁶⁴ Simpson, Adam. "Two governments claim to run Myanmar. So, who gets the country's seat at the UN?" *The Conversation*, 24 September 2021, retrieved at:

the Juntas, it is unclear exactly whether the United Nations will be in favor of this statement.

However, the United Nations Special Rapporteur of Human Rights has stated that the situation in Myanmar is very detreating due to the Junta actions, and acknowledging that the Junta are the root causes of the issues. In addition, even the Special Rapporteur has stated the coup as illegal and against democracy⁶⁵.

In the report, the special rapporteur has also further stated that there are 7000 arbitrary detention and displacement of over more than 200.000 people. The report has also explained that Myanmar Junta has to met the threshold of crimes against humanity as per the Rome Statute and should be held accountable⁶⁶.

Furthermore, the United Nations General Assembly has stated and asked Myanmar Junta to be responsible and halt all attacks at once. Thus, although the UNGA resolution is not binding and customary, it is still relevant to be concluded that the United Nations acknowledges the Junta to be liable of crimes against humanity as well as the government to be illegal, especially the means of the coup d'état⁶⁷.

This mainly shows the fact that the United Nations, albeit the general assembly has a general agreement towards the status quo: that what the Myanmar Junta did is wrong and needs to be held severely accountable, otherwise there will be issues towards the situation at hand. It also shows

the failure of the international community to handle the situation if indeed that there would not be further repercussions.

Thus, it is the obligation of the international community, as well as the UNSC to ensure that although Myanmar is not a member of the Rome Statute⁶⁸, it is arguably deemed that the UNSC has the international obligation to ensure the protection of the situation in Myanmar, as the chaos and the effects of situation are already quite big.

Sadly, the possibility of the usage and enacting ICC referral via UNSC would be quite hard to be done. This is due to the nature of the UNSC, especially as the permanent five members' politics and ideas. This is mainly supported by the fact that China/Russia would not likely support the resolution via the usage of veto⁶⁹.

While indeed in the past Russia and China have supported the resolution that is given for ICC referral, such as the case of Sudan, it is mainly different for several reasons, mainly the fact that the current government of China has stated that they are willing to support the Junta government.

In addition, it can be seen generally that China and Russia are against actions that would put their interest towards Myanmar⁷⁰. This means that while indeed draft the UNSC can draft a resolution for the usage of referral, China/ Russia would most likely not be in favor of such resolution.

<https://theconversation.com/two-governments-claim-to-run-myanmar-so-who-gets-the-countrys-seat-at-the-un-167885>

⁶⁵ Situation of human rights in Myanmar, Thomas H Andrews, Un Doc. A/76/314.

⁶⁶ Ibid.

⁶⁷ UN General Assembly Resolution A/RES/75/287 became effective on 25 June 2021

⁶⁸ Ibid

⁶⁹ Ibid at 22

⁷⁰ Rukin, Artyom. "Why Russia is betting on Myanmar's Military Junta", East Asia Forum, 2021 retrieved at: <https://www.eastasiaforum.org/2021/04/27/why-russia-is-betting-on-myanmars-military-junta/>

Thus, it is quite hard to see the possibility of enacting ICC referral under the UNSC consent

6. PRINCIPLE OF ASEAN NON-INTERVENTION AND ITS RELEVANCE

The idea of bringing a case to the international court has something that has always been existing and entertained. However, it could be understood that not all states will accept the enactment of the case in an international court. In the creation of the Rome statute itself, there have been several concerns of actions that would be enacted and out of state control. This refers to the idea of the sovereignty of states as well the fact that states don't want to be intervened with. Again, it is understandable that several states see the creation of the International Crime Court as a way for western states to further intervene⁷¹.

There is also further justification for ASEAN statements that are not quite aggressive or severely accuse the Myanmar Juntas of conducting crimes against humanity. This is by article 2 of the ASEAN Charter⁷², where ASEAN members would commit a non-interference principle. The idea of non-interference can be argued towards other ASEAN states for the sake of the ASEAN principle. However, this is an issue if another part of the article of the ASEAN Charter is analyzed specifically under article 1, section 4⁷³.

Article 1, section 4⁷⁴ explains that ASEAN's purpose is to ensure that there is peace and democracy. This is an interesting fact for two reasons: Even though ASEAN

itself is non-interference, another article has exclaimed that it supports democracy and the need to maintain those parts. This shows that, in some capacity, ASEAN needs to ensure that there is peace in Myanmar and a further enactment of democracy, as the Juntas' actions are against the value of ASEAN.

Thus, ASEAN decided to take a much more subtle approach at hand by inviting the Juntas to the meeting of ASEAN. However, it is shown that ASEAN refuses to acknowledge this step as being in favor of the Myanmar Juntas merely to ensure peace at the end of the day⁷⁵.

But ASEAN as an organization is quite limited, and it must be admitted that this is where the international court system will be able to bring such cases as a balance mechanism. The feasibility is there to be brought upon- seeing that the UNSC is highly divided, the more precise outcome would be done by another member state that is ratifying the Rome Statute.

However, the ICC is an independent body, and it is highly pivotal in maintaining the situation and as a check and balance mechanism at the end of the day. Thus, it is also interesting to see that most ASEAN member states choose not to ratify the Rome statute due to the reasoning of non-intervention⁷⁶. This can be further explained based on the idea of intervention. While indeed intervention is something that is usually coined and related to the idea of the military, it could be argued that the action of enacting another body to investigate the situation at hand is also considered as

⁷¹ Dias, T. d.. The Nature of the Rome Statute and the Place of International Law before the International Criminal Court. *Journal of International Criminal Justice*, Volume 17, Issue 3, 507-535 at 511

⁷² The ASEAN Charter adopted on 7 January 2008.

⁷³ Article 1(4) of the ASEAN Charter. *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ Chairman Statement on the ASEAN Leader's Meeting, ASEAN Secretariat 2021.

⁷⁶ Takemura, Hitomi. *The ASEAN Region and the International Criminal Court*. Japan: Springer, 2017

meddling in another state's affair. Thus, it is understandable that ASEAN states would be reluctant to bring the case to the ICC.

However, The situation changed when ASEAN decided to conduct diplomatic talks with the Juntas in Jakarta to ensure that they could handle the situation peacefully, including ensuring that the Juntas would be able to have a ceasefire⁷⁷.

This has sadly been broken, and the Juntas are not able to keep their end at the end of the day, which has resulted in the Juntas being "thrown out" from further discussion. This can be seen by the fact that the Juntas is deemed not to be following the principle of democracy, and to some degree has been argued that ASEAN has indeed intervened with another member state⁷⁸.

Thus, it can be concluded that while indeed ASEAN is attempting to be as neutral as possible in the situation, the Juntas are not being invited for further talks as they have broken the principle of *Pacta Sunt Servanda*⁷⁹, based on the previous agreement at hand. This shows that the Juntas do not hold their part of the agreement. Thus, it can be inferred that ASEAN has taken a stance in believing the actions of the Myanmar Juntas as illegal.

7. THEORETICAL FRAMEWORK: RESPONSIBILITY TO PROTECT

Responsibility to protect has been a doctrine that is enacted to ensure that human rights will be able to be protected.

Enacted in the situation back in the 1990s under Yugoslavia, where it is argued that protection of human rights should be done, and thus under cases where extraordinary violation of human rights is done, states have the responsibility to protect such people, even if it comes not from one jurisdiction. Specifically looking at the case of Yugoslavia, there was a high amount of genocide done by Slobodan Milosevic, causing the deportation of various people of Yugoslavia. In addition, several ethnic killings were done and have caused a tremendous amount of disparity⁸⁰.

Due to this fact, North Atlantic Treaty Organization (NATO) has decided to intervene based on human rights violations. Thus, the doctrine of R2P was born and has been highly debated ever since, especially regarding actions that might destabilize such a country. Western countries highly believed in this doctrine, especially as an argument that certain countries do not respect humans' rights and democracy⁸¹. Cases of R2P after the NATO intervention have been highly popular, yet it does not always mean that it is highly successful. An example would be when the United States intervened in Afghanistan in 2001, after the 9/11 attack, where the terrorist group Al-Qaeda had attacked the USA⁸². While indeed it could be argued that the USA has been successful in such intervention to topple Al-Qaeda, there has been a disastrous effect of destruction and long-term impact. It could be felt even until

⁷⁷ Ibid.

⁷⁸ Reuters, "ASEAN summit starts with Myanmar junta excluded for ignoring peace deal", 2021. Retrieved from: <https://www.theguardian.com/world/2021/oct/26/asean-summit-starts-with-myanmar-junta-excluded-for-ignoring-peace-deal>

⁷⁹ Wehberg, Hans. "Pacta Sunt Servanda." *The American Journal of International Law*, vol. 53, no. 4, American Society of International Law, 1959, pp. 775–786, at 777.

⁸⁰ Molier, Geliijn, "Humanitarian Intervention and The Responsibility to Protect After 9/11", *Netherlands International Law Review*, Vol 53, 2006.

⁸¹ Global Centre for the Responsibility to Protect, "Occasional Paper Series", no 3, 2012

⁸² Special Inspector General for Afghanistan Reconstruction. "What We Need to Learn: Lessons From Twenty Years Of Afghanistan Reconstruction."

today, when the Taliban has gained power⁸³.

Under Article 2(4) of the UN Charter⁸⁴, states must respect the sovereignty of a state, and without consent, there cannot be an intervention. While this is the case, there are always past justifications for highly derivative crimes and need to be reviewed. Some states have also argued by using the justification of self-defense as a basis to interfere. While indeed that responsibility to protect has always been claimed as a way for military intervention, it also has another meaning: That states should attempt to enact international law, as it is their responsibility to ensure that peace would be upheld as a check and balance mechanism⁸⁵.

It should also be noted that it is the responsibility of the international community, specifically the United Nations Security Council to refer the situation to the ICC. This is one way to ensure that there will be able to enact peace, as Myanmar cannot bring the case to Rome Statute.

In addition, the notion of intervention via R2P does not always mean that a state needs to intervene via military option but via means such as ensuring peace. The UNSC involvement can be deemed to be done as an act of intervention, referring to the notion of international peace and security.

Thus, by using the doctrine of responsibility to protect, it is essential that other states focus on ensuring the protection of the Myanmar people and, at

the same time, enacting/bringing the case to the international criminal court. In the case of Yugoslavia in the past, it has resulted in creation an independent tribunal. However, it would be a much more complex situation and seeing the case right now. The international community will need to band forward and engage the point towards the International Crime Court as their commitment to ensuring international law.

However, it is necessary to understand that the reason for the theory of responsibility to protect to be chosen is not in the form of the military.; it is due to the reason that the idea of R2P is as a form of intervention towards military intervention. However more of an intervention to resolve the dispute in Myanmar at the end of the day. This is precisely why using the principle of *Proprio Motu* or translated "by one motion and initiative." This means that the judge may choose to initiate the investigation if needed, and states should ensure that it can be done from the very first place⁸⁶.

This is further solidified by the United Nations World Summit in 2005, which has concluded that states should prevent genocide, war crimes, crimes against humanity, and ethnic cleansing, something that the Juntas has been doing. Indeed, the most feasible way is to ensure that the UNSC can bring the case to ICC or another state representative to ensure that it would be viable at the end of the day. Thus, R2P is not merely a military doctrine but also a responsibility for all states to protect such values, including the people of Myanmar⁸⁷.

⁸³ Poerana, S. A, "ESTABLISHING THE STATUS OF RESPONSIBILITY TO PROTECT (R2P) AS CUSTOMARY INTERNATIONAL LAW AND ITS ROLE IN PREVENTING MASS ATROCITIES." *Padjadjaran Journal of International Law*, 55-80.

⁸⁴ Article 2(4) of the UN Charter. *Ibid*.

⁸⁵ Wippman, J. The Nine Lives of Article 2(4). *Minnesota Journal of International Law*, 1-21, 2007

⁸⁶ *Ibid*.

⁸⁷ UN General Assembly Resolution A/RES/60, entered into force on 16 September 2005

This means that, again, the United Nations Security Council has the responsibility to use the referral system to protect the people of Myanmar from the various crimes against humanity that have been done.

C. CONCLUSION

Thus, the author views the fact that the issue of bringing the case to the international court is indeed viable, although further trickiness can be seen in regards to what basis. The probability of bringing the case towards the court itself is in regards to the basis of the Crimes Against Humanity, which is a very punishable act. However, at the same time, the action to do so is very limited.

UNSC can also bring and refer the case to the international criminal court, but it is tricky. Even in the best-case scenario that indeed the case would be successfully brought to the court, the question of implementation can also be very tough and questionable, especially if the junta's government refuses to agree to acknowledge the court's jurisdiction. Thus, the best way is to bring the case to the court while also ensuring that there would be a recognition of the legal government.

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