

Democratic Forces in Myanmar at the Mercy of International Justice

By Rohit Gupta

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1. The 2021 Coup and the Formation of the National Unity Government

In November 2020, amidst the nation's first Covid-19 wave, the Burmese democratically elected the National League of Democracy ('NLD') with an 83 percent majority.¹ This policy brief is an account of how democratic forces in Myanmar may have ended up being undermined, locally and internationally, by international justice institutions that derive their legitimacy from the cause of democracy.

On 1 February 2021, the Tatmadaw, the Burmese military, launched a coup, arresting State Counsellor Aung San Suu Kyi, President U Win Myint, and numerous ministers and politicians, while declaring a state of emergency.² In the aftermath of the constitutional upheaval caused by the coup, the international community condemned the takeover, demanding a restoration of those democratically-elected.³ Immediately thereafter, the Committee Representing the Pyidaungsu Hluttaw ('CRPH'), comprising of the non-detained parliamentarians who had been elected in the November 2020 election, formed the National Unity Government ('NUG'). The NUG comprises of a group of NLD politicians, activists and representatives from ethnic minority groups. On the ground, the NUG and the People's Defense Force ('PDF'), its military arm, represent one side of the internal armed conflict and national civil disobedience movement in Myanmar.

The Tatmadaw's systematic commission of atrocities, potentially amounting to crimes against humanity, is well-documented.⁴ In June 2022, Thomas Andrews, United Nations ('UN') Special Rapporteur on the Situation of Human Rights in Myanmar, reported that 142 minors had been tortured and killed since the coup by the Tatmadaw.⁵ A death toll of 1,900 has been estimated, with an additional 10,500 arbitrary detentions, and over 1,144 imprisonments and 74 death sentences (a large percentage of which are civilians).⁶ The July 2022 executions of four pro-democracy activists invited harsh criticisms from the UN Security Council ('UNSC'), the Association of Southeast Asian Nations ('ASE-

AN') and several other states, including India.⁷ Currently, over 500,000 men, women and children have been displaced since the coup and more than 40,000 have crossed borders into unwelcoming and insecure neighbouring lands.⁸ Owing to a 'scorched-earth' policy, the Tatmadaw has reportedly burnt down over 22,000 homes and buildings, residential and religious.⁹ The horrors that took place in Rakhine in 2017 are being repeated now in other states such as Chin, Sagaing, Karen and Bago, often in the name of so-called 'clearance operations'.¹⁰

These are not mere statistical figures, but numerical representations of the debilitating angst of peoples in, or wrongfully displaced from, their homeland. One question remains: if the sharp debasement of the principles and values of modern international law and human rights is so painfully apparent, why has international diplomacy and governance failed in providing a solution?

2. Recognition before the United Nations and Specialised Agencies

On 26 February 2021, Ambassador U Kyaw Moe Tun registered his three-finger salute and condemned the coup, urging states to not recognize or co-operate with the military regime and to deploy "any means necessary to [...] restore democracy".¹¹ He asserted his right to represent Myanmar before the UN as a representative of the NUG. Elsewhere in the UN, confusion ensued.

In March 2021, the Tatmadaw participated in two sessions of the UN Human Rights Council ('HRC'), without any points of order being raised. In April, the Tatmadaw represented Myanmar at the UN Economic and Social Commission for Asia and the Pacific, again without any objections. In May, the seventy-fourth World Health Assembly was the first to disallow the Tatmadaw's participation. However, the Assembly also rejected the credentials of the NUG representative, "pending guidance from the United Nations General Assembly".¹² Since then the International Labour Organization, the Conference of the Food and Agriculture Organization, and eventually the HRC, among others, have followed suit. In November 2021, the UN Educational, Scientific and Cultural Organization, too, deferred a decision on Myanmar's credentials, but allowed NUG-backed Ambassador U Kyaw Zeya to retain his seat.

¹ "Myanmar: Aung San Suu Kyi's party wins majority in election", *BBC News*, 13 November 2020.

² Republic of the Union of Myanmar, Office of the President, Order No. 1/2021, 1 February 2021 (<https://www.legal-tools.org/doc/m15at2/>).

³ For example, see UNSC Press Release, "Security Council Press Statement on Situation in Myanmar", SC/14430, 4 February 2021; The situation in Myanmar, UN Doc. A/RES/75/287 (2021), 25 June 2021 (<https://www.legal-tools.org/doc/dr3bwo/>).

⁴ UNHCHR, Situation of Human Rights in Myanmar since 1 February 2021, UN Doc. A/HRC/49/72, 15 March 2022 ('UNHCHR Report').

⁵ Thomas Andrews, Special Rapporteur on the Situation of Human Rights in Myanmar, Losing a Generation: How the Military Junta is Devastating Myanmar's Children and Undermining Myanmar's Future, UN Doc. A/HRC/50/CRP.1, 14 June 2022.

⁶ UNHCHR Report, 2022, see above note 4.

⁷ Sebastian Strangio, "India, UN Security Council Join Condemnation of Myanmar Executions", *The Diplomat*, 29 July 2022.

⁸ Thomas Andrews, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Thomas H. Andrews, UN Doc. A/HRC/49/76, 16 March 2022.

⁹ *Ibid.*

¹⁰ UNHCHR Report, 2022, see above note 4.

¹¹ Michelle Nichols, "Myanmar's U.N. envoy makes emotional appeal for action to stop coup", *Reuters*, 26 February 2021.

¹² World Health Assembly, Committee on Credentials, Report, UN Doc. A/74/56, 26 May 2021.

Recognition of credentials of state representatives constitutes a prerequisite to the exercise of the right to represent that state before the UN. The Credentials Committee of the UN General Assembly ('UNGA') is tasked with verifying credentials according to the UNGA's Rules of Procedure and submitting recommendations to the UNGA. While this process was created to ensure procedural compliance, the absence of a collective status-checking mechanism for governments, coupled with few states publicly recognizing governments, has meant the inadvertent assumption of the credentials process as a gap-filler.¹³ The UNGA may approve, reject or defer the Credential Committee's recommendation, but practice has evolved in favour of mechanical acceptance.¹⁴ Since no rules or guidance apart from the Rules of Procedure exist to inform these decisions, the UNGA, in 1950, adopted Resolution 396(V), stating that competing claims of governmental representation shall be "considered by the General Assembly" and that its "attitude [...] should be taken into account in other organs of the United Nations and in the specialized agencies".¹⁵

On 1 December 2021, amidst anticipation and specific calls for a final resolution to the representation question, the Credentials Committee recommended that the UNGA defer making a decision on the rival credentials submitted with respect to Myanmar.¹⁶ This departed from precedents set in 1991,¹⁷ 1997¹⁸ and 2009¹⁹ when the credentials of deposed democratically-elected governments were specifically recognized over the credentials submitted by coup-born military regimes. In fact, since the 1990s, the emergence of a democratic norm has meant the absence of cases where a regime which has forcefully ejected a democratically-elected government has had its credentials accepted, over those of the democratic government.²⁰ Thus, this delay in the inevitable recognition of the credentials of the NUG's representative was disappointing.

A recommendation for deferral, however, is not uncommon. While Rule 29 of the UNGA's Rules of Procedure allows representatives to be seated provisionally until a decision is made on their contested representation, the Credentials Committee usually defers a decision with the express "understanding that the current representative will remain in place with all the same rights and privileges of other representative".²¹ In its December 2021 recommendation, however, the Credentials Committee omitted any such implication. Some reports credit high-level brokerage between the United States and China for specifically designing this deferral in order to maintain Ambassador Moe Tun's recognition.²² From the perspectives of countless afflicted Burmese, however, the obviousness of accepting the NUG precludes them from viewing such concessions as cause for celebration.

Neither can justification for the lack of wider UNGA action, without tangled concerns of credentials, be discerned. In previous instances, the UNGA has "affirm[ed] as unacceptable any entity resulting from

¹³ Rebecca Barber, "The Role of the General Assembly in Determining the Legitimacy of Governments", in *International and Comparative Law Quarterly*, 2022, vol. 71, no. 3, p. 644.

¹⁴ *Ibid.*, p. 640.

¹⁵ Recognition by the United Nations of the representation of a Member State, UN Doc. A/RES/396(V), 14 December 1950.

¹⁶ UNGA, Report of the Credentials Committee, UN Doc. A/76/550, 1 December 2021.

¹⁷ On Haiti, see UNGA, Reports of the Credentials Committee, UN Doc. A/46/563/Add.1, 16 December 1991.

¹⁸ On Sierra Leone, see UNGA, Report of the Credentials Committee, UN Doc. A/52/719, 11 December 1997.

¹⁹ On Honduras, see UNGA, Report of the Credentials Committee, UN Doc. A/64/571, 17 December 2009.

²⁰ With respect to the credentials of Cambodia (1997), Guinea (2009) and Guinea Bissau (2012), the Credential Committee refused to accept the credentials of unconstitutional military regimes, irrespective of their effective control over the relevant state territory.

²¹ On Madagascar, see UNGA, Report of the Credentials Committee, UN Doc. A/64/571, 17 December 2009.

²² Colum Lynch, Robbie Gramer and Jack Detsch, "U.S. and China Reach Deal to Block Myanmar's Junta From U.N.", *Foreign Policy*, 13 September 2021.

the illegal situation and demand[ed] the immediate restoration of the legitimate Government".²³ For Myanmar, while both the UNGA and the UNSC have pledged their support for the "the country's democratic transition", "expressed deep concerns" and called for a "cessation of violence", the UN has done little else than to shift onus onto the ASEAN. Why has the fear of a veto stopped states like the United States and India from forcing a vote in the UNSC, when such fears were inconsequential during crises in Syria and the Ukraine, now that the UNGA has demanded a mandatory explanation for each exercise of veto?²⁴

The UNGA's acceptance of the NUG's credentials may not itself change the political situation in Myanmar, but could inject requisite momentum and international support into the re-democratization of Myanmar. More importantly, formal engagement of states and international organizations such as the World Food Program or the UN International Children's Emergency Fund with the NUG could release food supply and humanitarian aid, much of which has been blocked, burned or siphoned to unauthorized recipients.²⁵

It is clear that the plight of the Burmese people is visible to some, if not most.²⁶ If states are willing to voice their condemnation for undemocratic takeovers in the press, they must also do so in the UNGA, actively, and not only when questioned.²⁷ This will distinguish them as genuine light-bearers of human and universal rights from states which hijack humanitarian narratives for political convenience.

3. Using the Backdoor of the International Court of Justice

The NUG's uphill battle also featured an extensive letter to the Registrar of the International Court of Justice ('ICJ') dated 8 January 2022 on the question of representation of Myanmar before the Court.²⁸ In November 2019, The Gambia initiated proceedings against Myanmar, alleging violations under the Convention on the Prevention and Punishment of the Crime of Genocide for atrocities committed against Rohingyas in 2017.²⁹ With reference to these proceedings, UN Ambassador U Kyaw Moe Tun asserted his position as additional Alternate Agent of Myanmar, in light of the inability of both Aung Sang Suu Kyi (designated Agent) and U Kyaw Tint Swe (designated Alternate Agent) to appear due to their detention by the Tatmadaw. In an earlier communication to the Registrar dated 30 March 2021, Acting Vice President U Mahn Win Khaing Than had communicated the appointment of Ambassador U Kyaw Moe Tun by the CRPH to represent Myanmar before the Court.³⁰

The ICJ responded with its acknowledgement of receipt on 13 January 2022.³¹ However, since no change in action was observed, Amba-

²³ The situation of democracy and human rights in Haiti, UN Doc. A/RES/46/7, 11 October 1991; Situation in Honduras: democracy breakdown, UN Doc. A/RES/63/301, 1 July 2009.

²⁴ United Nations Press Release, "General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council Members Accountable for Use of Veto", 26 April 2022.

²⁵ See "Myanmar: Junta Blocks Lifesaving Aid", *Human Rights Watch*, 13 December 2021.

²⁶ See United States of America, National Defense Authorization Act for Fiscal Year 2022, 12 December 2021 (ordering humanitarian, economic and democratic assistance to Myanmar). See also the Turkish (on alleged torture committed post-coup) exercise of universal jurisdiction, "The fight against the military heats up in the courtroom", *Frontier Myanmar*, 21 July 2022.

²⁷ Dr. Michael Maret-Crosby, "Hate Speech: A Christian Perspective and a Reflections on Myanmar", CILRAP Film, 9 April 2022 (<https://www.cilrap.org/cilrap-film/220409-marett-crosby/>) (powerfully reiterating that "the people of Myanmar are waiting for others to tell the truth").

²⁸ Letter by Ambassador U Kyaw Moe Tun to the ICJ Registrar, 8 January 2022 (on file with the author).

²⁹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures, 11 November 2019 ('*The Gambia v. Myanmar*') (<https://www.legal-tools.org/doc/69p376/>).

³⁰ Letter by Acting Vice President U Mahn Win Khaing Than to the ICJ Registrar, 30 March 2021 (on file with the author).

³¹ Letter by the ICJ Registrar to Ambassador U Kyaw Moe Tun, 13 January

sador U Kyaw Moe Tun deposited another letter dated 19 February 2022 to the ICJ Registrar delineating that, according to UNGA Resolution 396(V), the ICJ should refuse acknowledgement of the representative appointed by the Tatmadaw, attaching the resolution adopting the recommendations of the Credentials Committee (dated 1 December 2021).³² The ICJ, however, conducted public hearings from 21 to 28 February 2022, allowing the Tatmadaw to present on the preliminary objections on behalf of Myanmar,³³ even though the NUG had announced their withdrawal on the 1 February 2022 anniversary of the coup.³⁴ In the announcement renouncing preliminary objections, NUG's Acting President Duwa Lashi La foreshadowed this development, noting that the ICJ had been communicating with the Tatmadaw owing to "bureaucratic idiosyncrasies". This referred to the ICJ's decision to continue communication with the Myanmar mission in Brussels, which has fallen under the control of the Tatmadaw. This sets a precedent of implicitly according recognition to whichever side of the internal conflict is able to establish control of the relevant embassy. Especially after the NUG's repeated attempts to communicate with the ICJ, and the latter's acknowledgement of receipt, the ICJ arguably knew, was negligent of, or recklessly disregarded the effect of its engagement with the Tatmadaw.³⁵

Rather than problematizing the issue, the ICJ concealed its relevance by delaying a response to the NUG, while confirming the new Agent and Alternate Agent appointed by the same Tatmadaw which prevented the original Agent and Alternate Agent from appearing before the Court by detaining them. Adjudicative bodies may exercise implied powers necessary for the performance of their functions,³⁶ and in the specific context of the representation issue, growing practice indicates that courts and tribunals may resolve this question "for the only purpose of assuring the proper conduct of the proceedings and protecting the rights of defence of the parties, which may also depend on criteria such as procedural fairness and efficiency different from those relevant to the recognition of [...] governments".³⁷ Instead, there is no record of the ICJ calling for the current issue to be briefed, drawing on input from The Gambia, the UNGA or the UN Office of Legal Affairs. By responding to and engaging with one side over the other, the ICJ has made a decision without making a decision, seemingly hiding behind the Registrar, relying on the backdoor of the Court. Conducting proceedings over preliminary objections without any record showing that the judges actually considered their withdrawal by the NUG was widely perceived by the military government as a victory, at the expense of those pitted against it in the internal armed conflict in Myanmar.

While no guidelines exist regarding such *sui generis* circumstances, the ICJ's silence should not be excused as 'neutrality'. Even if the ICJ has not deemed it fit to require adequate discussion and reflection before making such a decision, knowledge of its consequences should not escape the conscientious halls of the Peace Palace or the Court's persistent proponents.

2022 (on file with the author).

³² Letter by Ambassador U Kyaw Moe Tun to the ICJ Registrar, 19 February 2022 (on file with the author).

³³ *The Gambia v. Myanmar*, Verbatim Record, 21 February 2022, p. 13, see above note 33.

³⁴ NUG, "Myanmar withdraws all preliminary objections to the International Court of Justice hearing on the genocide case", 1 February 2022 (<https://www.legal-tools.org/doc/qjskpa/>).

³⁵ Marc Weller, "Is the ICJ at Risk of Providing Cover for the Alleged Genocide in Myanmar?", in *Opinio Juris*, 11 February 2022 (Weller sharply criticizes the ICJ's 'letter-box approach' of blindly continuing communication with whichever postal address it has on file for creating inconsistencies in the UN system and allowing the Tatmadaw to benefit from grave violations of international law).

³⁶ ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, I.C.J. Rep. 1949, p. 182 (<https://www.legal-tools.org/doc/f263d7/>).

³⁷ International Centre for Settlement of Investment Disputes (ICSID), *Mobil Corporation v. Bolivarian Republic of Venezuela*, Decision on the Respondent's Representation in this Proceeding, 1 March 2021, ICSID Case No. ARB/07/27, para. 45.

4. Untying the International Criminal Court's Deterrence

On 17 July 2021, the NUG transmitted to the Registrar of the International Criminal Court ('ICC') a declaration under Article 12(3) of the ICC Statute ('Declaration'), signed by its Acting President Duwa Lashi La.³⁸ The Declaration clears the way for the exercise of the ICC's jurisdiction over all international crimes, otherwise falling under the ICC's jurisdiction, that have been committed on the territory of Myanmar, solely or partly, since 1 July 2002. After receiving no formal response from the Office of the Prosecutor of the ICC ('OTP'), NUG's Acting President wrote another letter dated 8 January 2022, requesting the transmission of the Declaration to the Prosecutor.³⁹ Not receiving a response, a further letter dated 17 January 2022 (signed by Ambassador U Kyaw Moe Tun) was transmitted to the ICC Registrar reaffirming the acceptance of jurisdiction and requesting a formal response from the latter.⁴⁰ Finally, on 24 January 2022, the Registrar of the ICC released an acknowledgement of receipt of the Declaration to the NUG, stating that each of the previous communications had been transmitted to the Prosecutor.⁴¹

The Court should avoid creating an impression that it ignored the NUG's Declaration. In February 2022, more than six months after the NUG filed its Declaration, ICC Prosecutor Karim A.A. Khan QC visited Dhaka and Cox's Bazar, emphasizing that the investigation into the international crimes allegedly committed against the Rohingya would be "a priority" during his tenure.⁴² When Prosecutor Khan QC was delivering this message directly to survivors and affected communities, were they made aware of the NUG's Declaration which the Court had been sitting on for over six months? Even if we presume that the Registrar did not internally and informally communicate receipt of the Declaration, the Prosecution knew of the Declaration's existence a month before the visit. Has the Court underestimated its deterrent power *vis-à-vis* actors in Myanmar if it publicly acknowledged the Declaration and stated that it raises legal and factual questions that are being analysed? If the Court does not confidently affirm and project the ICC's deterrent power, how are victims and the Court's supporters around the world to believe in the Court's deterrence? Additionally, what is the legal analysis underpinning the Registrar's decision to play a filtering role by not transmitting the Declaration to the OTP until six months after it was filed?

It is hard to see how the Court – unlike the above-mentioned UN agencies – could voluntarily subject its decision-making to the UNGA on a question that concerns its ability to give effect to the Statute.⁴³ In doing so, it would challenge the precedent set in 2014 when it determined whether Mohamed Morsi's leadership possessed the political authority to represent the State of Egypt in rendering an Article 12(3) declaration.⁴⁴ If such an apparent challenge is intentional, reasons should be made public.

In devising a course of action, inspiration could perhaps be derived from the recent practice of the ICC itself. At the time of writing, the Pre-Trial Chamber is seized, *of its own accord*, of questions as to the legitimacy of the Taliban government to represent Afghanistan in identifying willingness and ability to prosecute crimes falling within the Court's jurisdiction. While the Prosecution, on 27 September 2021, stated the inability of the Taliban government to reasonably lay claim

³⁸ Letter by Acting President Duwa Lashi La to the ICC Registrar, 17 July 2021 (on file with the author).

³⁹ Letter by Acting President Duwa Lashi La to the ICC Registrar, 8 January 2022 (on file with the author).

⁴⁰ Letter by Ambassador U Kyaw Moe Tun to the ICC Registrar, 17 January 2022 (on file with the author).

⁴¹ Letter by the ICC Registrar to Ambassador U Kyaw Moe Tun, 24 January 2022 (on file with the author).

⁴² ICC, "ICC Prosecutor, Karim A.A. Khan QC, concludes first visit to Bangladesh, underlines commitment to advance investigations into alleged atrocity crimes against the Rohingya", Press Release, 1 March 2022 (<https://www.legal-tools.org/doc/mp1blf/>).

⁴³ Since it is not a UN organ, the OTP is not bound by Resolution 396(V).

⁴⁴ ICC, "The determination of the Office of the Prosecutor on the communication received in relation to Egypt", ICC-OTP-20140508-PR1003, 8 May 2014.

to the principle of complementarity, it continued communication with the Embassy of the Islamic Republic of Afghanistan in the Netherlands regarding its intention to file a request to resume investigation in Afghanistan.⁴⁵ On 24 February 2022, the Pre-Trial Chamber requested submissions from the Taliban government on the Prosecution's request for resumption of investigation. Here, the Pre-trial Chamber observed that (i) the lack of a conclusive determination as to the representation of Afghanistan cannot result in preventing the Chamber from exercising its powers, (ii) even though the Taliban government had not been formally recognized, multiple states, the UN and other international organizations had engaged with them and referred to them as the 'de facto government', and most importantly, (iii) that "the observations are sought in order to ensure the continuity of judicial proceedings in the most rigorous way".⁴⁶

One may argue that the Pre-Trial Chamber eventually landed on the same node the Prosecution had hastened to arrive at. Such an argument would be myopic about the significant value of the Chamber's observations regarding the need, proper standard, and method of discourse, carefully drafted justifications for inclusion of an otherwise illegitimate governing entity, and abundantly emphasized limitations on any attempts to instrumentalize engagement with the Court as a certificate of recognition. Juxtaposed with the ICJ's mechanical continuance of habitual communications – its backdoor recognition of the military government – we can appreciate Judge *ad hoc* Claus Kreß' labelling of the ICJ's method as "less than satisfactory".⁴⁷

5. The Gambia's International Catwalk

My questions are not limited to the response of the ICJ and the ICC to the NUG. The Gambia, acting on behalf of the Organization of Islamic Cooperation ('OIC'), has championed the cause of justice for the Rohingyas before the ICJ, standing up to the generational abuse and mistreatment that culminated in the events of 2017. Why then has The Gambia – and its OIC allies – failed to raise issue with the ICJ's engagement with the Tatmadaw, especially when an unconditional removal of preliminary objections was at stake? In fact, the NUG has also raised the prospect of an out-of-court settlement, agreeing to reparations and other means of accountability and assistance with respect to the Rohingyas. Similarly, being an ICC State Party (alongside other OIC States), why has The Gambia not demanded attention to the NUG's Declaration and referred the Myanmar situation to the Prosecutor for investigation under Article 14 of the ICC Statute? Such referrals were pivotal in reinforcing ICC investigation into the Ukraine situation.

By failing to engage in good faith with the NUG, The Gambia's omissions generate suspicion that her lawyers desire to prolong the ICJ proceedings. Are The Gambia and her backers concerned that a straight-forward solution would not attenuate the visible potency of in-

⁴⁵ ICC, *Situation in the Islamic Republic of Afghanistan*, Office of the Prosecutor, Request to authorise resumption of investigation under article 18(2) of the Statute, 27 September 2021, ICC-02/17-161, para. 5 (<https://www.legal-tools.org/doc/pzfuq9/>).

⁴⁶ ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Order setting the schedule for the filing of submissions in the proceedings pursuant to article 18(2) of the Rome Statute and rule 55(2) of the Rules of Procedure and Evidence, 24 February 2022, ICC-02/17-182, paras. 14–18 (<https://www.legal-tools.org/doc/nt8t1a/>).

⁴⁷ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Declaration of Judge *ad hoc* Kreß, 22 July 2022, para. 5 (<https://www.legal-tools.org/doc/oqgr9v/>).

ternational justice and their role in it?

6. Need for Democratic Forces to Self-Reflect and Not Be Undermined

In seeking echoes in the international community, the NUG should probably also introspect its own speech. On 3 June 2021, it published its 'Policy Position on the Rohingyas in Rakhine State', promising safe repatriation, justice and societal and governmental involvement to the Rohingyas. In a later press statement highlighting the paramount role of the ICJ, NUG's Union Minister for Foreign Affairs Zin Mar Aung noted that this "new Myanmar will include a special place for Rohingya communities".⁴⁸ Yet, the NUG, a conglomerate of representatives from several Burmese ethnicities, houses none from the Rohingya community. Sudden assurances of sympathy within Burmese communities and among elected officials should not be hollow. Forms of propaganda – such as the promise to abolish National Verification Cards (a scheme of national identification listing Rohingyas as 'foreigners')⁴⁹ – are often perceived as carrying temporary fervour, especially to a rightfully disbelieving community with decades-long grievances.

At this juncture, the NUG should display the highest standards of honesty and transparency to embody a sustainable democratic republic. Reflecting on its own role in perpetrating – or observing complacency during – past atrocities may well be an initial step. The NUG needs to plea for legitimacy not only before the international community, but also before the Rohingyas and the countless scattered ethnic communities that constitute Myanmar. Legitimacy will then flow from the acceptance by the true subjects of international law: people, not states.

Similarly, international justice cannot afford to be seen as undermining democratic forces in a conflict State. As alluded to by Marc Weller, such allowances cast doubt on the credibility of international law, especially its underlying presumption of good faith.⁵⁰ The deterrence of international justice, however modest, has also not been properly unleashed in Myanmar during 18 months of civilian killings, torture and hardships since the coup in February 2021. The reluctance of The Hague demotivates and discourages the countless young Burmese students, activists and lawyers attempting to reverse Myanmar's metamorphosis into a failed democratic state. Cynicism towards international justice and diplomacy may not only befall the Burmese, but all those spectating, be they forces of democracy or otherwise.

Rohit Gupta, West Bengal National University of Juridical Sciences, Kolkata, India. The author thanks the Burma experts who assisted with the preparation of this policy brief.

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⁴⁸ "Union Minister for Foreign Affairs Zin Mar Aung – Press statement on ICJ", 21 February 2022 (<https://www.legal-tools.org/doc/yknac4/>).

⁴⁹ Fortify Rights, "'Tools of Genocide': National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar", September 2019.

⁵⁰ Weller, 2022, see above note 35.



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