

NEWS FROM

LAWYERS' RIGHTS WATCH CANADA

By Catherine Morris*

MANIPULATING THE "RULE OF LAW": HOW POWERFUL ACTORS UNDERMINE ACCOUNTABILITY FOR ATROCITY CRIMES IN MYANMAR

Accusations of crimes against humanity, war crimes and genocide in Myanmar have made headlines since 2017. Less attention has been paid to states and corporate actors that have abetted the perpetrators' atrocity crimes¹ through silence, propaganda, manipulation of laws, duplicitous diplomacy or outright collusion. Lots of words have appealed to the "rule of law" or "human rights", but the people of Myanmar have needed more than words as they have pleaded for international help.

On February 1, 2021, Myanmar's military (known as the Tatmadaw) began a military coup to overthrow the government duly elected in November 2020. Millions of people throughout Myanmar have risen up in nonviolent protest against the junta.² There is mounting evidence of atrocity crimes during the severe military crackdown against all resistance.

The Tatmadaw is known for its decades of committing, with impunity, ruthless human rights violations against political opponents, journalists, human rights advocates and Myanmar's ethnic minorities and Indigenous peoples.³ There are well-grounded allegations of genocide committed against Rohingya people and crimes against humanity committed against other peoples.

At the time of writing, the situation in Myanmar remains dangerously dynamic. Thousands⁴ have been arbitrarily detained, including elected members of parliament, nonviolent protestors, journalists, human rights defenders, lawyers⁵ and children.⁶ Incommunicado detention is common. Reports of torture are widespread. Systematic and brutal violence and

* Catherine Morris is the pro bono executive director of Lawyers' Rights Watch Canada ("LRWC"). She has been a volunteer with LRWC for two decades and serves as its main representative to the UN Human Rights Council.

shootings of protestors by police and military personnel have resulted in hundreds of extrajudicial killings of women, men and children⁷ plus thousands of injuries⁸ from attacks and beatings, including attacks on hospitals, ambulance workers and medics caring for injured persons.⁹

Abuse of the Law to Cover Atrocity Crimes and Human Rights Violations

The Tatmadaw wielded complete control during decades of military dictatorship from 1962 to 2010.¹⁰ When the Tatmadaw began to open up to democratic reform—and international business—it drafted a law, the 2008 Constitution,¹¹ to maintain ongoing control of parliament.¹²

Aung San Suu Kyi's National League for Democracy ("NLD") won Myanmar's 2015 election. Her longstanding talk of establishing the rule of law created hope for dramatic change. Movement towards democracy proved to be sluggish.

The NLD government failed to address serious human rights issues, including armed conflict in several ethnic minority states and decades of persecution of Rohingya people. A 1982 citizenship law has been utilized to exclude most Rohingya from citizenship despite historic roots in Myanmar.¹³ Waves of Tatmadaw expulsions of Rohingya, including more than 600,000 driven out in 2017, have resulted in more than a million people living in massive refugee camps in neighbouring Bangladesh.¹⁴ Hate propaganda secured the Burmese majority's support for the campaign against the Rohingya.¹⁵

Aung San Suu Kyi notoriously defended the Tatmadaw's 2017 violence against the Rohingya. Her office claimed legitimate "clearance operations" against "extremist Bengali insurgents".¹⁶ She appealed to the "rule of law",¹⁷ but human rights groups and UN mechanisms characterized the horrific realities for the Rohingya as suspected genocide and crimes against humanity.¹⁸

In November 2020, Myanmar held another national election. The NLD won in a landslide. The Tatmadaw made unsubstantiated claims of election fraud and on February 1, 2021 unlawfully proclaimed a state of emergency, making specious references to the Constitution.¹⁹

The February 1 coup extended the Tatmadaw's crimes against humanity to attack the majority Burmese population. The coup has also increased the risk of ongoing genocide against Rohingya people remaining in Myanmar as well as crimes against humanity against Chin, Shan, Kachin, Karen and other minority peoples.²⁰

The Tatmadaw has used the state of emergency decree to take control of all branches of government, including the judiciary. Myanmar's justice system was already weak.²¹ Arbitrary arrests have been legitimized through orders suspending habeas corpus and other human rights protections.²²

Myanmar's colonial Penal Code²³ and other laws have been abused to fabricate charges against opponents, including Aung San Suu Kyi.²⁴

The Tatmadaw has used telecommunications regulations to order companies to shut down social media and the internet.²⁵ There are now daily overnight shutdowns, which violate rights to freedom of information and expression protected under the *Universal Declaration of Human Rights*²⁶ and endanger communications for emergency and humanitarian purposes.

Telenor, one of Myanmar's largest telecommunications companies, has complied, albeit under protest, saying: "Telenor has protested this development to the telecom regulator in Myanmar, and maintains that the network should be kept open at all times so that people can stay connected, and to ensure people's basic rights of freedom of expression and opinion."²⁷ Norway's government holds a majority interest in Telenor. While Norway has frozen bilateral aid to Myanmar,²⁸ it has (at the time of writing) been silent about Telenor's obedience to the unlawful junta.²⁹

To create further legal cover for violation of rights to freedoms of information and expression, the Tatmadaw is drafting a new cybersecurity law that Human Rights Watch says would give it "sweeping powers to access user data, block websites, order internet shutdowns, and imprison critics and officials at noncomplying companies".³⁰

The Limits of International Law: Lots of Words but Little Action

China and Russia, both permanent members of the UN Security Council, have been the main obstacles to effective international action to reverse the coup and hold the Tatmadaw accountable for atrocity crimes. China and Russia's economic interests in Myanmar include arms sales.³¹

Despite global advocacy for a binding global arms embargo, effective targeted sanctions and referral of the Myanmar situation to the International Criminal Court ("ICC"), China and Russia have used the threat of veto to limit Security Council action to statements of concern, condemning violence against protestors and calling for release of those arbitrarily detained.³² Consensus Security Council statements are toothless. The Tatmadaw has ignored them.

Two international courts are engaged in the situation of Myanmar. One is a dispute against Myanmar under the Genocide Convention, filed by The Gambia in the International Court of Justice ("ICJ").³³ Myanmar's defence at the ICJ has appealed to "the rule of law" as well as a narrow legal definition of the crime of genocide.³⁴ Aung San Suu Kyi acknowledged that some military crimes were committed but denied genocidal intent against the Rohingya. She asserted that Myanmar should be allowed to hold the perpetrators accountable on its own³⁵ despite lack of evidence of Myanmar's polit-

ical will or capability to conduct fair or effective investigations or prosecutions of atrocity crimes.

Canada and the Netherlands (jointly)³⁶ and the Maldives³⁷ have announced plans to intervene in the ICJ case against Myanmar, but specific forms of intervention have not been announced. A joint statement by Canada and the Netherlands stated their intention to “pay special attention to crimes related to sexual and gender-based violence, including rape”.³⁸

The ICC is investigating the international crimes of deportation and persecution alleged to have taken place partly on the territory of Bangladesh, which has ratified the Rome Statute of the ICC. However, Myanmar has not ratified the Rome Statute, so the ICC has no jurisdiction to investigate atrocity crimes taking place exclusively in Myanmar unless the UN Security Council makes a referral. To date, the threat of veto by China and Russia has precluded this option from being used.

Even with strong resolve, international courts take years to determine cases. These limitations of international law and the lack of political will are contributing to ongoing impunity for the Tatmadaw. The people of Myanmar have called for more than words. They want action to ensure their rights.

States Must Take Urgent Steps: Not Mere Words but Actions

States have the capacity to act rapidly with unilateral arms embargos and targeted economic sanctions. Several countries have adopted or are considering targeted economic sanctions against the Tatmadaw, including Canada, the United States and the European Union.

Canada has been applauded for its February 18 updated targeted sanctions against Tatmadaw leaders.³⁹ However, at the time of writing, Canada had not added the Myanmar Oil and Gas Enterprise to the list of sanctioned companies, as urged in March 2021 by the UN Special Rapporteur on the situation of human rights in Myanmar. The Special Rapporteur implored states and corporations to:

Stop the flow of revenue into the illegal junta's coffers. This can happen now. Multilateral sanctions should be imposed on both senior junta leaders and their major sources of revenue, including military owned and controlled enterprises and the Myanmar Oil and Gas Enterprise.

One and a half years ago, the [UN] Independent International Fact Finding Mission on Myanmar concluded that no business “should enter into an economic or financial relationship with the security forces of Myanmar, in particular the military, or any enterprise owned or controlled by them or their individual members, until and unless they are restructured and transformed...”

Since the coup, some businesses stepped forward and cut ties with the junta However, many continue to engage in business with military

owned enterprises. If companies won't willingly disengage, member states should compel them through sanctions.⁴⁰

The United States, too, has received applause for imposing targeted sanctions, but some view the sanctions as mainly symbolic with little likely impact on the Tatmadaw's economic power, since they do not "target the most lucrative state-owned enterprises".⁴¹

Atrocity Crimes Require Universal Action

One often hears that "the UN" has failed to take action to bring justice in cases of atrocity crimes. While UN bodies like the Security Council and the Human Rights Council have often failed victims of atrocity crimes, it is often forgotten that the failure of these bodies is the result of failures by states that comprise them. Every state has the international law responsibility *erga omnes* (towards everyone) to ensure remedies for atrocity crimes wherever they occur.⁴²

In addition, the *Universal Declaration of Human Rights*⁴³ affirms that:

[E]very individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

In short, everyone bears responsibility to promote the rights of all people everywhere.

CONCLUSION

The situation of Myanmar shows how laws are abused by perpetrators to avoid accountability and illustrates the limitations of international law to bring effective justice when there is a lack of unified international political will to intervene beyond symbolic rhetoric about "human rights" and the "rule of law".

The term "rule of law" has been used by perpetrators of atrocity crimes, and those that abet crimes, to mean "rule by law" or "rule by decree". These uses are at odds with the UN definition of the rule of law used by human rights advocates, including LRWC, namely:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, partici-

pation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.⁴⁴

Despite the limitations discussed in this case study, the interventions of international human rights advocates can (and do) make a positive difference. Reports of advocacy, including international human rights legal analysis, demonstrate solidarity with people suffering human rights violations. Joint advocacy by human rights groups assists in persuading some states⁴⁵ and key corporations⁴⁶ to improve their own human rights performance or cut economic ties with human rights violators. Finally, reports of advocacy, including international human rights legal analysis, call attention to the gaps between law, rhetoric and action. Human rights research and advocacy reports clarify the obligations and remedies required of states, corporations and individuals under international law and limit the rhetorical power of lies and propaganda to mask human rights abuses and atrocity crimes.

ENDNOTES

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