

The Governance Crisis in Myanmar: An International Law Perspective and International Society Response Towards Myanmar 2021 *Coup D'Etat*.

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A. Introduction

1. Background

The result of Myanmar election in November 8, 2020 which won by the National League for Democracy (NLD) have been accused by the Union Solidarity and Development Party (USDP) as a fraud-manipulated election, resulting into a systematic and well-planned *coup d'état* attempt orchestrated by *Tatmadaw* (Myanmar's military) in the morning of February 1, 2021. This event results into two actions: a successful *coup d'état* seen through the *Tatmadaw* dethroning Myanmar's de facto leader, Aung San Suu Kyi by detainment; and declaring Myanmar in a state of emergency until re-election is performed.¹

Vox populi, vox dei which literally interpreted as “the voice of people is the voice of god” becomes a suitable adage to represent the current moment that can be observed through the aftermath of this *coup d'état* which escalates the rage of civil society to return the throne to the legitimate government and restoring the democracy, emerging the “civil disobedience movement” initiated by civilians in Myanmar which leads to labor strike in government institutions and hospitals, and resulting into a massive killing of protestors by the military.²

The military *coup d'état* has given a signature color to the prolonged history of Myanmar's era of governance from 1948-1962 parliamentary democracy, 1962-1988 military socialist, and 1988 transitional military rule till now.³ The endless contestation between NLD and military regime begins from the landslide victory of NLD in 1990 Myanmar election resulting into the detainment of NLD leader, Aung San Suu Kyi, and the obtainment of military power in Myanmar. It continued to the 2007 Saffron revolution noted as a mass protest to the impunity of military regime,⁴

¹ Sebastian Strangio. ‘Protests, Anger Spreading Rapidly in the Wake of Myanmar Coup’ February 8, 2021. <https://thediplomat.com/2021/02/protests-anger-spreading-rapidly-in-the-wake-of-myanmar-coup/>. Accessed in March 4, 2021.

² Milko, Victoria. “EXPLAINER: How Are the Myanmar Protests Being Organized?” AP NEWS. Associated Press, February 9, 2021. <https://apnews.com/article/technology-aung-san-suu-kyi-myanmar-yangon-asia-pacific-026ad5eb9ad6920f0d0d5446e17e27c2>. Accessed in March 4, 2021.

³ Mohamad Faisol Keling, Mohamad Nasir Saludin, Otto F. Von Eigenblatt, and Shukri Shuib. ‘A Historical Approach to Myanmar's Democratic Process.’ (2010) 1 Journal of Asia Pacific Studies 132, 148.

⁴ Junhan. Lee. ‘Primary Causes of Asian Democratization, Dispelling Conventional Myths’ (2002) 22 Asian Survey 821, 837.

2015 general election won by NLD holding the majority percentage in parliament escalates tension from the military regime, which results into a protracted contestation between both parties till the current *coup d'etat* phenomenon is triggered.

Certain battle of arguments has occurred between the Junta military and the law observers on whether this *coup d'etat* considered a legal, or an illegal act based on the Myanmar's deeply flawed constitution which shaped from the old military power that preserves the *Tatmadaw* in the center of Myanmar's politics. The Junta military argues that the purpose of the coup is pursuant to the article 417 of the constitution⁵ which requires a sufficient reason for a state of emergency to arise that have been declared by the *Tatmadaw*.⁶ However, the Junta military fails to provide any evidence on the "sufficient reason" which is the data on the voter fraud that become the major reason of such coup attempt, and to prove evidence that such election has qualified the "circumstances which may cause loss of sovereignty or disintegration of national solidarity" that two of these phrases is essential to be proven in the article 417 of the constitution. If the Junta military cannot provide evidence and proofs to both phrases, it can be declared that this coup is illegal and illegitimate according to the constitution of Myanmar.

Apart from the legal issue in the domestic boundaries, the current situation has been prejudiced as a serious breach of international law. Specifically pertaining humanitarian law in protection of civil society as non-combatant, and international human rights law on the protection of civil society and refugee's rights. The *status quo* that lets Junta Military to perpetrate massive killings of civilians that violates the Geneva Conventions, infringing the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) by omitting hundreds Burmese refugees which forced to flee to nearest countries to escape crisis which simultaneously violates the 1951 Convention Relating to the Status of Refugees and jeopardizing Myanmar's diplomatic relations with destination countries, abandoning principles incorporated in the Charter of the Association of South East Asian Nations, and triggering international community

⁵ *Vide* Constitution of the Socialist Republic of the Union of Burma, 2008. Art. 417

⁶ Reuters Staff, "Statement from Myanmar Military on State of Emergency" Reuters, February 1, 2021. <https://www.reuters.com/article/us-myanmar-politics-military-text-idUSKBN2A11A2>. Accessed in April 16 2021.

to enforce the principles as mandated in the Charter of United Nations. Which then become the major reason to derogate the non-intervention principle and to urge the international community on obtaining humanitarian intervention for the sake of Myanmar's civil society safeness.

Nevertheless, there are several quintessential questions that needs to be prevailed. First, do this Myanmar *coup d'etat* considered as an international law issue? second, what are the plausible acts the international community can do pertaining this phenomenon? the answer will be emphasized in this legal review.

2. Problems

1. How does the Myanmar 2021 *Coup d'etat* be analyzed in accordance to the perspective of international Law?
2. How does the Myanmar 2021 *Coup d'etat* impacts the response of international community?

B. Analysis

1. Myanmar 2021 *Coup d'Etat* in International Law Perspective

To ensure that this issue can be qualified as an international law issue, there are several information needs to be disclosed for a thorough consideration. First, it is widely known that hundreds of civilians have killed by the oppression of the Junta military. The exact number is still unquantifiable, some association said 701 dead civilians verified, while the military junta reported much lower number, 248.⁷ Nevertheless, the focal point needs to be highlighted is the serious violation of the Geneva Convention series recognized as "grave breaches" which is willful killing⁸ act of civilians qualified as non-combatant or protected person by the international humanitarian law, specifically protected under the Geneva Convention IV in 1949 containing rules limiting the barbarity of war and protecting non-combatants (civilians, medics aid workers, wounded, sick and shipwrecked troops, prisoners of war) which also corroborates the international humanitarian law rule 89. violence

⁷ Agence France-Presse, Reuters. "Myanmar Civilian Death Toll Tops 700 Protests Mount". The Straits Times. April 12, 2021. <https://www.straitstimes.com/asia/se-asia/myanmar-civilian-death-toll-tops-700-as-protests-mount>. Accessed in April 1, 2021

⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (signed in August 12, 1949, entered into force in August 12, 1949) 75 UNTS 287. Art 147

to life that have been established as a norm of customary international law applicable in all armed conflicts.⁹

Second, the fact that hundreds of Burmese refugees are forced to flee to neighboring countries to seek safe haven represents the Junta Military disobedience to protect refugees settled in Myanmar as mandated in the 1951 Convention Relating to the Status of Refugees and simultaneously violates the UDHR and ICCPR as its complementary legal basis. Furthermore, the fact that India and Thailand have become the primary destination which the Thailand government have tried to push back Myanmar civilians and Burmese refugees to its border to halt a mass migration into its territory can proliferate an unstable diplomatic relation by and between Myanmar to other country.¹⁰

Third, the current *coup d'etat* is against to the democratic standard and hindering the civilian's rights. Stated in the democratic entitlement theory of Thomas Franck that “a revolutionary transformation of the full array of international norms, from norms governing recognition of States and governments to those governing the use of force” asserts that the legitimacy of the government is to be measured by international law standards.¹¹ Article 21 of the UDHR reaffirms the fundamental principles of democracy: the will of the people should be the basis of government authority, and everyone has the right to take part in the government “directly or through freely chosen representatives.” It calls for periodic, genuine elections with universal suffrage and secret ballot, and also establishes that “everyone has the right to equal access to public service.”. Through this basis, it can be concluded that a coup against a democratically elected government *inter alia*, Myanmar coup is not acceptable. As the legitimacy of governments who have seized power through the coup cannot be reconciled with any democratic standard, and have infringed the norms in the UDHR. The ICCPR have obligated nations to organize a free and fair elections.¹² Once a *coup d'etat* is established in purpose to

⁹ Jean-Marie Henckaerts and Louise Doswald-Beck. *Customary International Humanitarian Law*. (ed 1, Cambridge University Press, 2005) 311

¹⁰ Amrit Dhillon, ‘Desperate Burmese Refugees Flee to Thailand and India to Escape Crisis’. *The Guardian*, April 3, 2021. <https://www.theguardian.com/world/2021/apr/03/desperate-burmese-refugees-flee-to-thailand-and-india-to-escape-crisis>. Accessed in April 1, 2021.

¹¹ Jean d'Aspremont. ‘Responsibility for Coups d'Etat in International Law’. (2010) 18 *Tulane Journal of International & Comparative Law* 451, 454.

¹² *Vide* International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force March 23, 1976) 999 UNTS 171 (ICCPR) art. 25

rebel the democratically elected government such as what currently happened to the military coup in purpose to dethrone the legitimate elected party in Myanmar, it is reasonable to hold that such *coup d'etat* constitute a violation to the rules of international law pertaining democracy.

Fourth, the existence of Myanmar *coup d'etat* in 2021 have given a sign as the abandonment in terms of upholding the purpose of Charter of the ASEAN, specified in its preamble which mentions "*Adhering to the principles of democracy, rule of law and good governance.*" And in the article 1 "*strengthening democracy, enhancing good governance and the rule of law as among ASEAN's main purposes*"¹³ which required to be upheld by Myanmar as the member of this charter since 1977.

The series of events occurring in Myanmar during the *coup d'etat*, starting from the serious breach to the humanitarian law instruments as customary international law norms, the act of omission by the Military Junta to the forced flee refugees which ascertain the situation of unprotected refugees that simultaneously jeopardizes the relation between Myanmar and destination countries, the violation of democratic rights of civilians which also abandons the mandate of ASEAN charter have established the pathway to firmly consider that this Myanmar *coup d'etat* is qualified as an international issue based on the four aforementioned arguments. Which not only based on the violation of the democratic standards, but the pivotal point is located on the serious international humanitarian law breaches.

2. Response of International Community as the Impact of Myanmar 2021 Coup d'Etat

In response to the portrayal of aggressive serious breach of the international humanitarian law occurring in Myanmar, the international community needs to be urged to find a stringent, unified, and resolute international response as the urgent solution to this crisis. Thus, human rights and the humanitarian protections began an essential justification in ascendance that went beyond territorial borders and sovereign abuses therein to stop the macabre tragedy.¹⁴

¹³ *Vide* Charter of the Association of Southeast Asian Nations, (entered into force 15 December 2008) Preamble, art. 1

¹⁴ Yvonne C. Lidico, 'The Justification for Humanitarian Intervention: Will the Continent Matter'. (2001) 35 The International Lawyer 1027, 1050.

The existence of the United Nations Security Council (UNSC) have enable its function to approve humanitarian interventions which defined as the use of military force against another state, with publicly stating its goal is to end human rights violations in such state the principle is already accepted whereby a threat to peace can be constituted by violations of human rights and of humanitarian law committed within a country. However, the idea of humanitarian intervention in a state is always debated into two primary concerns; whether to not deploy it to respect the international norms of national sovereignty, or to derogate such concern to fulfill the humanitarian needs of the population in such state. Nevertheless, it shall be remembered that the Responsibility to Protect (R2P) framework which was approved by the United Nations General Assembly 2005¹⁵ that embraced by the international community is exist. This framework also corroborates the idea and the importance of humanitarian intervention.

The most relevant example to take a look is the humanitarian intervention launched by the UNSC to Myanmar in 2019 on purpose to neutralize the Rohingya humanitarian issue which based on several reasons: ethnic cleansing attempt; indication on genocide; border instability between neighboring countries such as Bangladesh, Laos and Thailand due to mass migration of refugees who forced to flee to escape massacre. Which is clear enough to launch humanitarian intervention to fulfill the humanitarian needs of the population suffering within the state which then can derogate the non-intervention principle.¹⁶

Based on aforementioned arguments, it can be observed that there is a major moral justification to launch humanitarian intervention as a global response from international community pertaining the Myanmar *coup d'etat*. First, the citizens of Myanmas have been subjected to extreme human rights violations for a long period which the Junta Military does not seem to have great interest in alleviating their suffering; since there is a huge indication that the Junta Military is the own perpetrator. Second, the unprotection of non-combatant poses a humanitarian crisis which presents obstacles and inability to access public services and equality before the law, since there is no exact authority to rely on; except to the international

¹⁵ Melinda Negron Gonzales and Michael Contarino, 'Local Norms Matter: Understanding National Responses to the Responsibility to Protect'. (2014) 20 Global Governance 255, 276.

¹⁶ Imran Syed, 'To Intervene or Not to Intervene: Ethics of Humanitarian Intervention in Myanmar' (2019) 19 IPRI Journal 111, 127.

community. This can be seen through the effort of Myanmar citizen to create an alliance recognized as the “Milk Tea Alliance” on rallying international support on resolving Myanmar crisis.¹⁷

In terms of ASEAN as a regional community response which constitutes Myanmar as its member countries, the ASEAN chairman have stated that “ASEAN member states have been closely following the current developments in the Republic of the Union of Myanmar” that can be observed through the effort of Indonesian government along with Malaysia and Singapore pushing ASEAN to get more involved in resolving political situation in Myanmar.¹⁸ ASEAN shall recall the purposes and principles enshrined in the ASEAN charter, and the political stability in ASEAN member is essential in achieving a peaceful, stable and a prosperous ASEAN community. This goal can only be accomplished through the pursuance of a dialogue, reconciliation and return to normalcy in compliance with the will and interests of the people of Myanmar.¹⁹

Furthermore, the international society shall take a collective measure in compliance to the Charter of the United Nations which mandated the purpose of the United Nations itself which specified in article 1 paragraph (1) that:

*“To maintain international peace and security, and to that end: to take effective **collective measures** for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law.”²⁰*

have affirmed that the United Nations consisting member state as an integral part of the international society is required to pursue an immediate action in response to the Myanmar political crisis.

¹⁷ Karen Lee, ‘The #MilkTeaAlliance in Southeast Asia: Digital Revolution and Repression in Myanmar and Thailand’ April 1 2021. <https://www.csis.org/blogs/new-perspectives-asia/milkteaalliance-southeast-asia-digital-revolution-and-repression-myanmar>. Accessed in April 25, 2021.

¹⁸ Sebastian Strangio, ‘Indonesia Leading ASEAN Push on Myanmar Coup’. February 18, 2021. <https://thediplomat.com/2021/02/indonesia-leading-asean-push-on-myanmar-coup/>. Accessed in March 5, 2021

¹⁹ Association of South East Asian Nations, ‘ASEAN Chairman’s Statement on The Developments in The Republic of The Union of Myanmar. February 1, 2021. <https://asean.org/asean-chairmans-statement-developments-republic-union-myanmar/>. Accessed in March 5, 2021

²⁰ *Vide* Charter of the United Nations (Signed on June 26, 1945, entered into force on September 24, 1973) 1 UNTS XVI. Art. 1 paragraph 1

C. Conclusion

1. Summary

The current phenomenon of Myanmar *coup d'etat* have been firmly considered as an international issue based on several arguments which are; the failure to protect the non-combatant as mandated in the Geneva Convention IV; the neglection of forced-flee refugees to neighboring country have established an unstable relation by and between Myanmar; the violation of international norms on democratic standard; and the abandonment of upholding and respecting the mandate of countries in ASEAN charter. This reasoning is not stressed on the violation of the democratic standards, but on the serious international humanitarian law breaches as its pivotal point.

The form of international responses to this phenomenon are expected coming into two forms; global community, and the regional community (ASEAN). In terms of global community response, it is highly possible for the UNSC which holds the global authority to launch humanitarian intervention in purpose of stopping the extreme human rights violations, humanitarian crisis, and to fulfill the humanitarian needs of the population in such state. At the regional community, it is the responsibility for ASEAN to safeguarding the human rights and humanitarian fulfillments in ASEAN countries through a collective measure by recalling the purposes and principles enshrined in the ASEAN charter, and the political stability in ASEAN member is essential in achieving a peaceful, stable and a prosperous ASEAN community which can only be accomplished through a dialogue, reconciliation, and a stringent action by the ASEAN countries in resolving Myanmar's *coup d'etat* issue.

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