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## Child Soldiers in Myanmar: Role of Myanmar Government and Limitations of International Law

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**CHILD SOLDIERS IN MYANMAR: ROLE  
OF MYANMAR GOVERNMENT AND  
LIMITATIONS OF INTERNATIONAL LAW**

*Prajakta Gupte\**

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## I. INTRODUCTION

Myanmar is the only Asian country that comes up in almost every list of countries recruiting child soldiers globally.<sup>1</sup> Since the country's independence in 1948, it has been politically unstable and has engaged in civil conflict. As a result, the Myanmar National Army (*Tatmadaw*) and almost all of the Burmese ethnic groups have systematically recruited child soldiers.<sup>2</sup> Besides the government forces, ethnic militias like the Karen National Liberation Army, the Kachin Independence Army (KIA), the Shan State Army (SSA), and the Ta'ang National Liberation Army in the Burmese states of Kachin, Kayin, and Shan are major recruiters of child soldiers.<sup>3</sup>

In 2002, Human Rights Watch released a report, *My Gun was as Tall as Me: Child Soldiers in Burma*, that put forth some shocking statistics, calling Myanmar the largest country in the world that recruited child soldiers.<sup>4</sup> According to the report, Myanmar had 70,000 child soldiers under the age of 18.<sup>5</sup> Those 70,000 child soldiers make up 20% of the total active-duty soldiers in the country.<sup>6</sup> Among the ethnic-based militias, the United Wa State Army (UWSA) is the biggest recruiter with approximately 2,000 soldiers under 18 and 600-800 of them under 15.<sup>7</sup> The Kachin Independence Army is the only

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<sup>1</sup> Jared Ferric, *Five countries where child soldiers are still recruited*, IRIN NEWS (May 17, 2016), <http://www.irinnews.org/news/2016/05/17/five-countries-where-child-soldiers-are-still-recruited>; Meghan Werft, *7 countries using child soldiers*, GLOBAL CITIZEN (February 12, 2016), <https://www.globalcitizen.org/en/content/7-countries-that-still-use-child-soldiers/>.

<sup>2</sup> IMAGE ASIA, *NO CHILDHOOD AT ALL A REPORT ABOUT CHILD SOLDIERS IN BURMA* [8] (Thailand Images Asia 1997).

<sup>3</sup> U.N. Secretary-General, *Children and Armed Conflict*, U.N. Doc. A/70/836-S/2016/360 (Apr. 20, 2016).

<sup>4</sup> Pau Khan Kau Hangzo, *Resolving Internal Conflict in Myanmar: A Human Security Approach*, CENTRE FOR NON-TRADITIONAL SECURITY STUDIES (May 2009), <http://www3.ntu.edu.sg/rsis/nts/resources/nts-insight/NTS%20Insight%20May%202009.1.pdf>.

<sup>5</sup> Kevin Heppner, *My Gun was Tall as me: Child Soldiers in Burma* 106, 226, HUMAN RIGHTS WATCH (2002), <https://www.hrw.org/reports/2002/burma/Burma0902.pdf>.

<sup>6</sup> Hangzo, *supra* note 4, at 3.

<sup>7</sup> Heppner, *supra* note 5, at 7.

group that recruits girl soldiers under 18, mostly forcefully.<sup>8</sup> Both the government and ethnic militias have policies against recruiting children yet they continue to recruit using special procedures.<sup>9</sup> There is a gap between their commitments and actual practices.

Despite understanding the causes, effects, and rationality behind the use of child soldiers, the situation in Myanmar has remained unchanged. This comment argues that, in order to end child-soldiering, the government must solve the socio-economic and political issues of the country, which are the causes behind it. Political measures include bringing the regions, governed by differing ethnic groups, under the purview of the central government, so that the child soldiers in their armies can be rescued. Second, bringing the military under the government command, to ensure that malpractices by the military leaders do not go unpunished.

This comment begins with a brief introduction of the issue of child soldiers in Myanmar. Section two of the comment is a discussion of the political actors in the country and the definitions of a child soldier. Different governments and treaties have used different definitions and this comment provides an overview of these definitions. This section also explores the development of Myanmar's society. It delves into how civil conflict and political instability have been a major cause of child soldiering. Section three begins with a discussion on what can be done to solve the issue of political instability. This is followed by an analysis of the unrestrained power of the Burmese military and its connection to the proliferation of child soldiering. Again, the section identifies the options available to the new government to bring its military under civilian control. Section four deals with the development of the international law applicable to child soldiering and why it has proved to be unsuccessful in the case of Myanmar has been examined. It will explore the limitations of international law on the prohibition of underage recruitment, and the subsequent criminal charges against those military officials involved in that recruitment.

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<sup>8</sup> *Id.*

<sup>9</sup> *Burma: World's Highest Number of Child Soldiers*, HUMAN RIGHTS WATCH (Oct. 16, 2002), <https://www.hrw.org/news/2002/10/16/burma-worlds-highest-number-child-soldiers>.

## II. BACKGROUND AND HISTORY

### A. Major Political Actors

The national military came to power after the coup of 1962. It replaced the civilian government and imposed martial law<sup>10</sup> that was in effect till 1974.<sup>11</sup> This period saw significant expansion in the role of military in the national economy, politics, and state bureaucracy. In 1988, another coup brought the military back to power which formed a government called the State Law and Order Restoration Council (SLORC).<sup>12</sup> SLORC remained in power till 2011 when it was dissolved.<sup>13</sup> The military became a very powerful institution in the country after being in power for almost 50 years since independence.<sup>14</sup> In 2011, it transferred the power to the Union Solidarity and Development Party (USDP).

The USDP was formed in 2010 and was primarily used as a political platform for many of the country's former military leaders. It was headed by former president, Thein Sein and won more than 75% of the votes in the 2010 elections, which were largely considered to be flawed.<sup>15</sup> The party only won 8% of the votes in the 2015 elections

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<sup>10</sup> Martial law is defined as military control over all of a country's activities, usually during wartime or due to an emergency or widespread disaster.

<sup>11</sup> In 1974, the military transferred the power to an elected government, formed by a single party – the Burma Socialist Programme Party. This was a hybrid government between the military and the civilians. *See generally*, Konsam Shakila Devi, *Myanmar under the Military Rule 1962-1988*, INT'L RES. J. OF SOC. SCI. (Oct. 2014), <http://www.isca.in/IJSS/Archive/v3/i10/8.ISCA-IRJSS-2014-173.pdf>.

<sup>12</sup> Nehginpao Kipgen, *Burma's 8888: A Movement That Lives on*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/nehginpao-kipgen/burmas-8888\\_b\\_3723013.html](http://www.huffingtonpost.com/nehginpao-kipgen/burmas-8888_b_3723013.html) (last visited Oct.3, 2016).

<sup>13</sup> Associated Press in Naypyitaw, *Burma junta disbanded as 'civilian' government sworn in*, THE GUARDIAN (Mar. 30, 2011), <https://www.theguardian.com/world/2011/mar/30/burma-civilian-governmnet-junta-disbanded>.

<sup>14</sup> During its rule, the military has done more bad than good for the country. Scott Mathieson, *Burma's Military Milestone*, HUMAN RIGHTS WATCH (Mar. 30, 2015), <https://www.hrw.org/news/2015/03/30/burmas-military-milestone>.

<sup>15</sup> The United States and the European Union criticized the military leaders and dismissed the elections for not being free or fair. According to these western powers, the elections did not meet the internationally accepted standards. The voters complained that they were not allowed to vote in private and many state

and is said to be undergoing major changes before the 2020 elections.<sup>16</sup>

The National League for Democracy (NLD) was formed in 1988 under the leadership of Aung San Suu Kyi. The Party won 59% of the votes in the 1990 elections but the military regime did not allow the Party to form the government, repressed it instead, and placed Suu Kyi under house arrest. Further, the Party boycotted the 2010 elections because some of its prominent leaders were not allowed to contest the elections. NLD re-registered and ran for the 2015 elections, which it won by a landslide victory.

The six major ethnic groups in Myanmar are the Arakanese, Chin, Kachin, Shan, Karenni, Karen, and Mon. Each of these groups have their share of grievances against *Tatmadaw*. In addition, these groups also have their own states and armed groups.<sup>17</sup> These groups have been fighting the military government since 1962 for not implementing the Panglong Agreement of 1947, which guaranteed the groups: regional autonomy under a federal governing structure,

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employees had been forced to vote for the military in advance. Similarly, the United Nations claimed that the citizens do not have the freedom of expression or associations. It doubted the legitimacy of these elections. Trevor Wilson, *The Significance of Myanmar's 2010 elections*, NEW MANDALA (Dec. 15, 2010), <http://www.newmandala.org/the-significance-of-myanmar%E2%80%99s-2010-election/>.

<sup>16</sup> Ei Ei Toe Lwin, *USDP looks to rebound from 2015 election drubbing*, THE MYANMAR TIMES (Aug. 22, 2016), <http://www.mmmtimes.com/index.php/national-news/nay-pyi-taw/22075-usdp-looks-to-rebound-from-2015-election-drubbing.html>.

<sup>17</sup> Arakan (aka Rahkine) State: Arakan Liberation Army (ALA) and the Arakan Army (AA). Chin State: Chin National Army (CNA). Kachin State: Kachin Independence Army (KIA) Shan State: Kachin Independence Army (KIA), United Wa State Army (UWSA), National Democratic Alliance Army (NDAA Mongla), Shan State Army - South (SSA - S), Shan State Army - North (SSA - N), Wa National Army (WNA), Myanmar National Democratic Alliance Army (MNDAA), Lahu Democratic Front (LDF), Palaung State Liberation Front (PSLF), and the Pa'O Peoples Liberation Army (PPLA). Karenni (aka Kayah) State: Karenni Army (KnA) and the Kayan New Land Party (KNLP). Karen (aka Kayin) State: Karen National Defense Organization/Karen National Liberation Army (KNDO/KNLA) and the Democratic Karen Buddhist Army (DKBA). Mon State: Mon National Liberation Army (MNLA).

right to self-determination, religious freedom, and ethnic minority rights.<sup>18</sup>

*Tatmadaw*, the two major political parties (USDP and NLD) and the armed ethnic groups are the major political players in the politics of Myanmar. They have dominated the political scene for decades and the continuous quandary between them has been the origin of internal conflict in the country.

## B. Definitions

The Paris Principles on the Involvement of Children in Armed Conflict 2007<sup>19</sup> defines a child soldier as “any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.”<sup>20</sup>

Definitions by scholars differ based on whether they consider child soldiering to be voluntary or involuntary. Voluntary child soldiering is defined when “children, particularly those orphaned or disconnected from civil society, may volunteer to join any group if they believe that this is the only way to guarantee regular meals, clothing or medical attention.”<sup>21</sup> However, Ingunn Bjorkhaug, a researcher with the Fafo Foundation, argues that child soldiering is never voluntary in a real sense i.e. it is “voluntarily forced” as

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<sup>18</sup> *Panglong Agreement of 1947*, UNITED NATIONS PEACEMAKER (Feb. 12, 1947), [http://peacemaker.un.org/sites/peacemaker.un.org/files/MM\\_470212\\_Panglon%20Agreement.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/MM_470212_Panglon%20Agreement.pdf).

<sup>19</sup> The Paris Principles were adopted in Paris in February 2007 demonstrate the strengthened international resolve to prevent the recruitment and abuse of children. It also highlights the actions governments should take to protect the children affected by conflict. The Paris Principles are the operational guidelines regarding the sustainable reintegration of children formerly associated with the armed groups.

<sup>20</sup> UN Children’s Fund (UNICEF), *The Paris Principles*, (Feb. 2007), <http://www.refworld.org/docid/465198442.html>.

<sup>21</sup> PETER W. SINGER, *CHILDREN AT WAR 62* (Pantheon Books, 1st ed. 2005).

children may not have any other option but to join armed groups.<sup>22</sup> In the case of Myanmar, both voluntary<sup>23</sup> and involuntary<sup>24</sup> soldiering is evident. However, regardless of the way the children are recruited, they are abused and become victims of violence. A few scholars argue that the child soldiers sometimes kill or torture members of their own community. In doing so, they can even become perpetrators themselves.<sup>25</sup>

### C. Development of Myanmar's Society

Over the years, researchers have established that the primary causes of the increase in recruitment and use of child soldiers can be attributed to the following factors: the presence of civil conflict/war, political instability, and strong indoctrination by army and insurgent groups.<sup>26</sup> In the case of Myanmar, the two major causes of child soldiering are ongoing ethnic conflicts and political instability.<sup>27</sup> These factors create an environment in which businesses and schools cannot function causing other factors such as poverty, illiteracy, unemployment, ideological influences, and culture to be the secondary causes of child soldiering.

The ethnic-based groups have been at loggerheads with each other and the government since independence in 1948. The civil

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<sup>22</sup> KAI CHEN, *COMPARATIVE STUDY OF CHILD SOLDIERING ON MYANMAR-CHINA BORDER* 18 (Springer 2014).

<sup>23</sup> Human Rights Watch, *Sold to be Soldiers* 16, 136, HUMAN RIGHTS WATCH (Oct. 31, 2007), <https://www.hrw.org/reports/2007/burma1007/burma1007webcover.pdf>.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> Vaha argues in her paper *Victims or Perpetrators: Child Soldiers and the vacuum of responsibility* that child soldiers between the ages of 15 to 18 years are moral agents with specific responsibilities for their roles as soldiers and so they should be considered morally responsible combatants as well. The child soldier with an armed group is not only a 'child' but also a 'soldier' with combatant duties. This fact should not be ignored when dealing with child soldiers. *See generally* Milla Vaha, *Victims or Perpetrators: Child Soldiers and the vacuum of responsibility*, *ISA's 50th ANNUAL CONVENTION*, New York Marriott Marquis, NEW YORK CITY, NY, 2014, 11-30 from [http://citation.allacademic.com/meta/p312482\\_index.html](http://citation.allacademic.com/meta/p312482_index.html).

<sup>26</sup> *See generally* RACHEL BRETT & IRMA SPECHT, *YOUNG SOLDIERS: WHY THEY CHOOSE TO FIGHT* (Lynne Rienner 2004).

<sup>27</sup> CHEN, *supra* note 22, at 19.



conflict between the government and at least one of the 15 different ethnic groups has been ensuing for 60 years, making it the world's longest running civil war.<sup>28</sup> Some ethnic groups, like the UWSA, signed a ceasefire agreement with the government in 1989, were given autonomy in their region, and allowed to maintain their armed forces.<sup>29</sup> However, other groups like the KIA are still fighting for autonomy under a democratic federal union.<sup>30</sup>

The central government has no control over the political, military, and economic activities undertaken by the ethnic groups in their autonomous regions, especially in the case of UWSA.<sup>31</sup> This has also affected the quality of education and employment opportunities for the children in these regions. They have no option but to go to schools operated by the ethnic militias. Although the ethnic groups like KIA and UWSA fund and operate schools in their regions, the education is highly biased and propagandized. For instance, ethnic nationalism is entrenched in the KIA funded education system.<sup>32</sup> Moreover, these schools also include pre-military training in their curriculum.<sup>33</sup>

According to the interview conducted by Child Soldiers International, most of the children have voluntarily joined the KIA-funded schools and want to work as KIA civil servants. However, there are still many children who would rather join KIA's

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<sup>28</sup> Ivan Watson, Javed Iqbal, & Manny Maung, *Myanmar's hidden war*, CNN (Nov. 11, 2015, 4:25 PM), <http://www.cnn.com/2015/11/11/asia/myanmar-shan-rebels-civil-war/>.

<sup>29</sup> David Brunnstrom, *Myanmar Ethnic Leaders Reject Drug Accusations*, REUTERS (Apr. 28, 1999), <http://www.burmalibrary.org/reg.burma/archives/199904/msg00420.html>; Aung Naing Oo, *Wa Ceasefire Haunts the Burmese Military*, THE NATION (Apr. 30, 1999), <http://www.burmalibrary.org/reg.burma/archives/199904/msg00448.html>.

<sup>30</sup> Nehginpao Kipgen, *Address Kachin Problem Politically*, THE HUFFINGTON POST (Jan. 17, 2013), [http://www.huffingtonpost.com/nehginpao-kipgen/kachin-burma-conflict\\_b\\_2480290.html](http://www.huffingtonpost.com/nehginpao-kipgen/kachin-burma-conflict_b_2480290.html).

<sup>31</sup> Yun Sun, *The UWSA and the Peace Process*, STIMSON CENTER (Aug. 10, 2016), <https://www.stimson.org/content/uwsa-and-peace-process>.

<sup>32</sup> Child Soldiers International, *A Dangerous Refuge: Ongoing child recruitment by the Kachin Independence Army* 14, 38, (2015), <http://www.refworld.org/pdfile/55a4e7194.pdf>.

<sup>33</sup> CHEN, *supra* note 22, at 24; *Id.*

revolutionary movement. This originates from the teachings, by KIA, regarding historical grievances and injustice committed by the Burmese government forces.<sup>34</sup> These grievances have developed from events such as the failure of the Panglong Agreement of 1947,<sup>35</sup> forced to transform KIA's armed groups into Border Guard Force under control of *Tatmadaw*, hostile actions by the government towards KIA in 2010 followed by major assault in 2011 and perpetration of widespread war crimes and crimes against humanity against the Kachin civilian population.<sup>36</sup> Children are taught how the government has committed injustice towards their people and why it is necessary to take arms.<sup>37</sup> Thus, the indoctrination process the children undergo in their schools and society must be stopped for child soldiering to come to an end. However, in order to do this, the central government will have to devise new power-sharing agreements wherein they can supervise the socio-economic systems in the insurgent-controlled areas. Through these systems the government can ensure that the children receive primary education and that the working age population has employment opportunities. If the problems of illiteracy and unemployment are solved in this manner then less children will join KIA.

Wessells, based on his extensive work on impacts of war on children, argues that societal systems that provide food, water,

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<sup>34</sup> Child Soldiers International, *supra* note 32, at 15.

<sup>35</sup> The Panglong Agreement of 1947, was reached at Panglong in the Shan states in Burma between the Shan, Kachin and Chin ethnic minority leaders and Aung San, head of the interim Burmese government. The agreement accepted "Full Autonomy in internal administration for the Frontier Areas" in principle and envisioned the creation of Kachin State by the Constituent Assembly. However, the government failed to fulfill its promise of equitable distribution of resources between Myanmar's dominant Bamar group and the ethnically marginalized communities which has been the root cause of the long, violent civil conflict in the country.

<sup>36</sup> Human Rights violations by the Burmese Army includes attacks against civilian populations, extrajudicial killings, sexual violence, arbitrary arrests and detention, land confiscations, recruitment of child soldiers and forced labor and portending. This has caused large scale internal displacement with entire villages forced to displace. See *Burma's Covered up War: Atrocities Against the Kachin People*, OXFORD BURMA ALLIANCE, <http://www.oxfordburmaalliance.org/uploads/9/1/8/4/9184764/kwat-report-book-1.pdf> (last visited Feb. 14, 2018) at 8.

<sup>37</sup> Child Soldiers International, *supra* note 32, at 12.

education, and healthcare to children are largely affected by war. As a consequence, children consider armed groups to be their only way to access these basic necessities.<sup>38</sup> This is the case with the Burmese children who live with armed groups for food, shelter and protection.<sup>39</sup> Similarly, there were cases of child soldiers joining the *Tatmadaw* only because it provided them two meals a day.<sup>40</sup>

The rise of the military regime in the 1960s and its consolidation of power after the 1988 protests was the beginning of widespread poverty and malnourishment in Myanmar.<sup>41</sup> In 1990, the United States (U.S.) and the European Union (E.U.) imposed sanctions against Myanmar after the military regime refused to transfer the power to the democratic government that won the elections.<sup>42</sup> The political effectiveness of these sanctions is still debated and there is no evidence that it was the sanction that led to Aung San Suu Kyi's victory last year.<sup>43</sup> The negative impact of the sanctions, on the other hand, can clearly be seen from its abysmal performance on the Human Development Index.<sup>44</sup> Take for instance, the garment industry which relied on the exports to the U.S. When the industry was closed after the sanctions, almost 60,000 jobs were

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<sup>38</sup> MICHAEL WESSELLS, *CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION* 44 (Harvard University Press 2006).

<sup>39</sup> Child Soldiers International, *Chance for Change: Ending the recruitment and use of child soldiers in Myanmar* 31, (Jan. 2013), [http://www.burmalibrary.org/docs14/CSI-myanmar\\_chance\\_for\\_change.pdf](http://www.burmalibrary.org/docs14/CSI-myanmar_chance_for_change.pdf).

<sup>40</sup> Heppner, *supra* note 5, at 183.

<sup>41</sup> Alison Vicary & Sean Turnell, *Sanction on Burma have a role to play*, THE SYDNEY MORNING HERALD (AU) (Oct. 6, 2009), <http://www.smh.com.au/federal-politics/political-opinion/sanctions-on-burma-have-a-role-to-play-20091005-gjaz.html>.

<sup>42</sup> European Commission, *The EU's relations with Burma/Myanmar* 2, --, (Apr. 19, 2005), [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/fd/dase20050419\\_003/dase20050419\\_003en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dase20050419_003/dase20050419_003en.pdf); Byron Tau & Carol Lee, *U.S. to End Economic Sanctions against Myanmar*, WALL ST. J. (Sept. 14, 2016), <http://www.wsj.com/articles/u-s-to-end-economic-sanctions-against-myanmar-1473874082>.

<sup>43</sup> Hillary Benn, *Look at the sanctions on Burma*, NETWORK MYANMAR (Feb. 25, 2016), <http://www.networkmyanmar.org/sanctions>.

<sup>44</sup> Paul Vrieze, *UN Ranks Burma among 3 Least Developed Asian Nations*, THE IRRAWADDY (Mar. 15, 2013), <http://www.irrawaddy.com/burma/un-ranks-burma-among-3-least-developed-asian-nations.html>.

lost and poverty and associated social problems increased.<sup>45</sup> Furthermore, as unemployment increased, household income for the majority of the workers declined, and families struggled to meet their nutritional needs. It is estimated that 44% of children in Myanmar suffered from malnourishment nationwide.<sup>46</sup>

At present, 25.6% of the Burmese population lives below the national poverty line, which is the highest among all the Southeast Asian countries.<sup>47</sup> Although Myanmar's growth rate has been about 7% and Foreign Direct Investment (F.D.I.) is expected to increase to \$100 billion in the next two decades, none of this development is reaching the ordinary citizens, especially those living the rural areas.<sup>48</sup>

Poverty is largely concentrated in the rural regions of the country.<sup>49</sup> The main causes of rural poverty include lack of assets (land)<sup>50</sup> and unorganized labor.<sup>51</sup> Revenues from the sale of the natural resources are not directed towards rural development but instead fill the pockets of the military leaders and their crony companies.<sup>52</sup> This can be seen in the case of water, gemstones, oil and gas, and timber. Moreover, due to lack of agricultural land, income generation options are very limited. In addition, government schools in rural areas are mostly closed, leaving the rural children

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<sup>45</sup> Gabriel Andreasson, *Evaluating the effects of economic sanctions against Burma*, LUO STUDENT PAPERS 3, (2008), <https://lup.lub.lu.se/student-papers/search/publication/1335119>.

<sup>46</sup> TED RALL, *WAKE UP, YOU'RE LIBERAL!: HOW WE CAN TAKE AMERICA BACK FROM THE RIGHT* 289 (Soft Skull Press 2004).

<sup>47</sup> *Poverty in Myanmar Basic 2016 Statistics*, ASIAN DEV. BANK (Apr. 2016), <https://www.adb.org/countries/myanmar/poverty#tabs-0-2>.

<sup>48</sup> David Steinberg, *Reexamining Growth and Poverty in Myanmar*, ASIA FOUND. (June 25, 2014), <http://asiafoundation.org/2014/06/25/reexamining-growth-and-poverty-in-myanmar/>.

<sup>49</sup> Nikolas Win Myint, *Growing together: Reducing Rural Poverty in Myanmar*, THE WORLD BANK (May 9, 2016), <http://blogs.worldbank.org/eastasiapacific/growing-together-reducing-rural-poverty-in-myanmar>.

<sup>50</sup> Anu Seth, *Myanmar – The Rural-Urban Divide*, MYANMAR INSIDER (Sept., 2014), <http://www.myanmarinsider.com/myanmar-the-rural-urban-divide/>.

<sup>51</sup> Christina Cho, *Poverty in Myanmar*, THE BORGES PROJECT (Jan. 6, 2015), <http://borgenproject.org/poverty-myanmar/>.

<sup>52</sup> Global Witness, *Jade: Myanmar's "Big State Secret"*, (Oct. 2015), <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/myanmarjade/>.

without education.<sup>53</sup> These children are then forced by the soldiers, or lured by the salary, to join the national army.<sup>54</sup>

### III. ANALYSIS

#### A. Political Stability

Needless to say, the new government needs to develop poverty reduction strategies. One way of doing this is by regulating the sale of the natural resources. Revenue generated from the sale of the resources should be used for the development of the rural population. For instance, 90% of the hydroelectricity generated from the Myitsone dam was to be transferred to China while 84% of Burmese rural population would have lived in dark.<sup>55</sup> The government must reconsider such deals. The partnership between the military leaders, Chinese businesses, and ethnic leaders must be broken or they should be required to pay a certain percentage of their revenues towards local development.

One step in the direction of political stability is to bring all the stakeholders – the government, military, and ethnic groups – together with the aim of stopping all forms of skirmishes between them. In 2015, eight out of the fifteen ethnic groups signed the National Ceasefire Agreement (NCA) with the Government of Myanmar.<sup>56</sup> This was achieved after two years of negotiations.<sup>57</sup> The NCA is a peace-building agreement dealing with ceasefires, their implementation, monitoring, and political dialogues between the

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<sup>53</sup> Heppner, *supra* note 5, at 24.

<sup>54</sup> *Id.* at 37.

<sup>55</sup> Rachel Harvey, *Burma dam: Why Myitsone plan is being halted*, BBC (Sept. 30, 2011), <http://www.bbc.com/news/world-asia-pacific-15123833>; Yu Jincui, *Chinese firms seek to restart suspended projects after Myanmar's transition*, GLOBAL TIMES (Apr. 21, 2016), <http://www.globaltimes.cn/content/979575.shtml>.

<sup>56</sup> Trevor Wilson, *Is Myanmar's Nationwide Ceasefire Agreement good enough?*, EAST ASIA FORUM (Oct. 21, 2015), <http://www.eastasiaforum.org/2015/10/21/is-myanmars-nationwide-ceasefire-agreement-good-enough/>.

<sup>57</sup> *Myanmar signs peace deal with armed groups*, BBC (Oct. 15, 2015), <http://www.bbc.com/news/world-asia-34536002>.

government and the ethnic groups.<sup>58</sup> But the legitimacy of the NCA is being questioned after realizing that the most powerful ethnic groups - UWSA, SSA and KIA - did not sign it.<sup>59</sup>

Myanmar-expert, Bertil Lintner, called the entire peace process by the government of President Thein Sein flawed because it created more problems than it has solved.<sup>60</sup> He argues that the conflict has intensified during President Sein's government against KIA, SSA, and MNDAA in Kokang. In contrast, Jack Myint, Myanmar political and business analyst, believes that "NCA is a step in the right direction" because now peace exists in at least some parts of the country.<sup>61</sup>

For now, signing the NCA can wait. Instead, the military should stop its offensives against KIA and SSA along with its efforts to take back its territories. It should focus on building peace and trust with these ethnic groups which is critical for any political dialogue to take place. These groups have been fighting for their autonomy for almost five decades and took up arms because the government did not fulfill their promise to grant them autonomy.<sup>62</sup> The distrust is deep-rooted and therefore the government needs to accept that these groups will neither surrender their arms nor their autonomy at this point. Therefore, the government should propose that the ethnic groups be given autonomy only if they agree to immediately release all the child soldiers and permit international bodies to conduct

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<sup>58</sup> Inst. for Security & Dev. Policy, *Myanmar's Nationwide Ceasefire Agreement* (Oct. 2015), <http://isdp.eu/content/uploads/publications/2015-isdp-background-er-myanmar-nca.pdf>.

<sup>59</sup> Oliver Holmes, *Myanmar agrees limited ceasefire without most powerful rebel armies*, THE GUARDIAN (Oct. 15, 2015), <https://www.theguardian.com/world/2015/oct/15/myanmar-sign-ceasefire-agreement-eight-armed-groups>.

<sup>60</sup> Bertil Lintner, *New Approach Needed for Genuine Peace in Burma*, THE IRRAWADDY (Jan. 11, 2016), <http://www.irrawaddy.com/commentary/new-approach-needed-for-genuine-peace-in-burma.html>.

<sup>61</sup> Jack Myint, *The Truth About Myanmar's New Ceasefire Agreement*, THE DIPLOMAT (Oct. 30, 2015), <http://thediplomat.com/2015/10/the-truth-about-myanmars-new-ceasefire-agreement/>.

<sup>62</sup> Christina Fink, *An Overview of Burma's Ethnic Politics*, CULTURAL SURVIVAL (2000), <https://www.culturalsurvival.org/ourpublications/csq/article/an-overview-burmas-ethnic-politics>.

annual audits to check that these armies no longer recruit child soldiers. Considering that autonomy is so crucial for these groups, this could influence and persuade them to end the use of child soldiers. Alternatively, with the issue of autonomy on the table, these groups will at least participate in the negotiations.

The next step would be to establish some mechanism wherein the groups can manage their territories but permit the government to overlook certain matters related to social and economic development of its people. This would include the regulation of school curriculums in their regions, implementing poverty and unemployment reduction policies, monitoring the discharge process of child soldiers and their reintegration in the civilian society. However, as recommended by the Human Rights Watch, it needs to be ensured that this education is non-military in nature and unrelated to military service.<sup>63</sup>

The ethnic groups will not likely accept these changes unless the government offers something in return. The government should offer assurance that all ethnic groups will have freedom to practice their religion such as: Islam in Arakan state, and Christianity in Chin and Kachin states. Likewise, their schools will be permitted to teach ethnic languages, which was earlier restricted by the military.<sup>64</sup> Although these may seem like small steps to the world at large, the main goal of these ethnic groups is the preservation of their cultures, traditions, and languages.<sup>65</sup> It is why they have demanded autonomy and taken up arms.<sup>66</sup> Therefore, the government must be willing to reach a compromise with the ethnic groups.

#### B. Military under Civilian Control

After 1988, the Burmese Army pursued a program of rapid expansion to maintain a stronger hold over the country, with the aim

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<sup>63</sup> Human Rights Watch, *supra* note 23, at 16.

<sup>64</sup> Fink, *supra* note 62.

<sup>65</sup> Mae Sot, *Myanmar's ethnic problems*, IRIN NEWS (Mar. 29, 2012), <http://www.irinnews.org/report/95195/briefing-myanmar%E2%80%99s-ethnic-problems>.

<sup>66</sup> *Id.*

of recruiting 7,000 soldiers per month. This was the time when the army began forcefully conscripting children in large numbers to meet their recruitment quota.<sup>67</sup> In 2004, the State Peace and Development Council (SPDC) established the Committee for Prevention of Military Recruitment of Underage Children.<sup>68</sup> Since then, the committee has only focused on proving the claims of child recruitment false.<sup>69</sup>

The culture of impunity is evident in the military for all types of human rights violations.<sup>70</sup> The complaint mechanisms are said to be limited and the military is unwilling to discuss it.<sup>71</sup> The military has also created a fear among the people by harassing them. As a result, people prefer not to report their children's forced conscription. In 2015, it was reported that 277 servicemen, including 50 officers, were punished for recruiting child soldiers.<sup>72</sup> But there is no further details

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<sup>67</sup> Human Rights Watch, *supra* note 23, at 33-4.

<sup>68</sup> The Committee for the Prevention of Military Recruitment of Underage Children is the primary initiative by the Burmese government to prevent conscription of child soldiers. The Committee's Plan of Action aims to explore five areas: the demobilization of child soldiers, the reintegration of former child soldiers, raising public awareness, punishment of persons who violate recruitment laws and procedures and cooperation with international agencies. However, Human Rights Watch claims that the Committee has made little progress in achieving these objectives and keeping military's recruitment under a check. *Id.* at 71-72.

<sup>69</sup> *Id.* at 6.

<sup>70</sup> The Burmese government has been accused of constantly neglecting human rights abuses committed by the Burmese military. The government has maintained its response of not taking responsibility for any injuries. Moreover, the military regime did not permit the aid groups within its country to provide relief to the internally displaced people. The international aid organizations have also failed to provide any assistance. All this only worsened the humanitarian crisis in Myanmar. See *Burma's Covered up War: Atrocities Against the Kachin People*, *supra* note 36.

<sup>71</sup> International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution* 27, 40, (2009), <https://www.ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf>.

<sup>72</sup> 277 servicemen punished for child soldier recruitment, DVB (Apr. 9, 2015), <http://www.dvb.no/news/277-servicemen-punished-for-child-soldier-recruitment-burma-myanmar/49893>.



regarding “what” punishment they received or if there are more such officers awaiting trial.<sup>73</sup>

The military has emerged as and continues to be the most powerful organization in Myanmar’s political arena.<sup>74</sup> In 2015, Aung San Suu Kyi and her party won a landslide victory. It is the first democratic government the country has seen in the last five decades.<sup>75</sup> However, important departments like Home Affairs, Defense, and Border Affairs are still under the control of the military. The 2008 constitution adds to the military’s illegitimate power by allowing the military certain freedoms like to waive habeas corpus for people it considers to be a threat to their national security or to use forced labor.<sup>76</sup>

The military has ensured that it does not completely lose its power to the new civilian government.<sup>77</sup> It is too strong for the government to make any decisions regarding its functioning. The government, as a result, has no means to keep checks-and-balances regarding recruitment of child soldiers. Efforts thus, need to be made

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<sup>73</sup> Nick Baker, *Tatmadaw discharges 68 former child soldiers*, THE MYANMAR TIMES (Sept. 12, 2016), <http://www.mmtimes.com/index.php/national-news/22445-tatmadaw-discharges-68-former-child-soldiers.html>; *US: Return Burma, Iraq to child soldier list*, HUMAN RIGHTS WATCH (June 26, 2017), <https://www.hrw.org/news/2017/06/26/us-return-burma-iraq-child-soldier-list>.

<sup>74</sup> Vinod Anand, *The Role of Myanmar’s Military in Democratic Transition and Implications for India*, VIVEKANANDA INTERNATIONAL FOUNDATION 3, 26, (Dec. 2013), <http://www.vifindia.org/sites/default/files/the-role-of-myanmar-s-military-in-democratic-transition-and-implications-for-india.pdf>.

<sup>75</sup> *50 years of military rule over in Myanmar*, CBS NEWS (Mar. 30, 2016), <http://www.cbsnews.com/news/myanmar-burma-htin-kyaw-first-president-new-democracy/>.

<sup>76</sup> Jon Emont, *Can Myanmar’s new government control its military?*, THE NEW YORKER (Nov. 9, 2015), <http://www.newyorker.com/news/news-desk/can-myanmars-new-government-control-its-military>.

<sup>77</sup> There are many reasons why the military will not cede all its power. The military sees itself as the protector of the country’s security and unity in face of the ongoing ethnic insurgencies. Once out of power, they can face prosecution. The military also has heavy investments in various projects around the country, which can come under jeopardy. Rupakjyoti Borah, *Tough Choices in Myanmar as a new era begins* (Apr. 1, 2016), <http://www.aljazeera.com/indepth/opinion/2016/03/tough-choices-myanmar-era-begins-160331085859440.html>.

to reduce the powers of the military along with bringing it under the control of the democratic civilian government.

In order to bring *Tatmadaw* under the new government command, the 2008 military-created constitution will have to be amended. This is almost impossible because 25% of the seats are reserved for the military and more than 75% of votes in parliament are needed for passing an amendment.<sup>78</sup> But, Aung San Suu Kyi has vowed to amend the constitution to make it more democratic.<sup>79</sup> According to U Ko Ni, a prominent human rights lawyer in Myanmar and NLD party's longtime adviser, who was shot recently, Suu Kyi can hold a national referendum to show the military that people of the country want a new constitution.<sup>80</sup> Amendment to the constitution is therefore, of utmost importance if Suu Kyi hopes to see a change in the attitude of the military and ultimately, the end of the culture of impunity prevalent therein.

### C. International Law for Child Soldiers

International law dealing with child soldiers has developed over the last several decades. Two Additional Protocols to the Geneva Convention of 1949 were adopted in 1977 which dealt with the application of international humanitarian law to the civilians caught up in internal conflict.<sup>81</sup> In 1989, the Convention on the Rights of Children (CRC) was adopted, which guarantees the rights of children during peacetime, as well as in the situation of armed conflict.<sup>82</sup> It came into force in September 1990 and has been ratified

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<sup>78</sup> Jon, *supra* note 76.

<sup>79</sup> *Myanmar's Suu Kyi vows to amend junta-era constitution*, ASSOCIATED PRESS (Apr. 18, 2016), <http://bigstory.ap.org/article/b0e5742a27e44009bc4b22be5f5bc112/myanmars-suu-kyi-vows-amend-junta-era-constitution>.

<sup>80</sup> Ei Ei Toe Lwin, *NLD could draft new constitution*, THE MYANMAR TIMES (Apr. 22, 2016), <http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/19910-nld-could-draft-new-constitution.html>.

<sup>81</sup> Protocols I and II additional to the Geneva Conventions, INT'L COMMITTEE OF THE RED CROSS, <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm> (last visited Feb. 2, 2017).

<sup>82</sup> Wendy Zeldin, *Children's Rights: International Laws*, LIBRARY OF CONGRESS LIBRARY (2007), <https://www.loc.gov/law/help/child-rights/international-law.php>.

by 196 countries.<sup>83</sup> In May 2000, two Optional Protocols to the CRC were adopted by the UN.<sup>84</sup> The First Protocol prohibited the involvement of children under the age of 15 in military conflicts<sup>85</sup> and the Second Protocol disallowed child trafficking, pornography, and prostitution.<sup>86</sup>

The Rome Statute, adopted in 1998, made the practice of conscripting, enlisting, or using children under age of fifteen in hostilities a war crime.<sup>87</sup> This applies to both government-controlled armed forces and non-state armed forces. It is also the treaty that established the International Criminal Court (ICC).<sup>88</sup> At present, there are 139 signatories and 124 ratifications to the statute. However, Myanmar has not acceded to it.<sup>89</sup> This was followed by the International Labor Organization's Worst Forms of Child Labor Convention (Convention 182) in 1999.<sup>90</sup> It prohibits the forced recruitment of children under the age of eighteen for use in armed conflict.<sup>91</sup>

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<sup>83</sup> Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTIONS, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt\\_dsg\\_no=IV11&chapter=4&clang=\\_en#top](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV11&chapter=4&clang=_en#top) (last visited Feb. 2, 2017).

<sup>84</sup> The two Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers, JUSTICE DEP'T, [http://www.justice.gov.il/En/Units/Trafficking/MainDocs/The%20Optional%20Protocols%20to%20the%20UN%20Convention%20on%20theRights%20of%20the%20\(1\).pdf](http://www.justice.gov.il/En/Units/Trafficking/MainDocs/The%20Optional%20Protocols%20to%20the%20UN%20Convention%20on%20theRights%20of%20the%20(1).pdf) (last visited Feb. 2, 2017).

<sup>85</sup> UNICEF, *Optional Protocol on the sale of children, child prostitution and child pornography* (Nov. 30, 2005), [http://www.unicef.org/crc/index\\_30204.html](http://www.unicef.org/crc/index_30204.html).

<sup>86</sup> *Id.*

<sup>87</sup> Rome Statute of the International Criminal Court, INT'L CRIM. CT. 8, --, (July 1998), [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>88</sup> *Id.*

<sup>89</sup> *Ratification of the Rome Statute*, COALITION FOR THE INT'L CRIM. CT. (Mar. 2016), <http://www.iccnw.org/?mod=romeratification>.

<sup>90</sup> Int'l Labor Conf., INT'L LABOR ORG., <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm> (last visited Feb. 2, 2017).

<sup>91</sup> *Convention 182*, INT'L LABOR ORG., (2000), <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>.

In general, international humanitarian law applies to both international conflicts and non-international conflicts. However, these organizations rely on the hierarchical structures of the state and the military command for the implementation of the law. Thus, the success of the implementation depends on the existence of a military chain of command and a strong desire from within the organization to comply with international law obligations.<sup>92</sup> This raises the question of who is responsible when there is breach of international law in a failed state. Thurer, an international law scholar, argues that although the legal capacity of the State continues to exist, it cannot be held responsible for not having prevented offences. This is because the State does not have the necessary power to act.<sup>93</sup>

In such a scenario, where the judiciary has collapsed, international organizations like the United Nations or the ICC can step in to prosecute and punish individuals committing crimes. In recent years, this has been made possible through the establishment of ad hoc tribunals, for instance, in Yugoslavia (1993) and Rwanda (1994).<sup>94</sup> These tribunals are the first international tribunals to hold high-profile leaders like Rwandan Prime Minister, Yugoslav President, and leaders of Bosnian Serbs accountable for their crimes.<sup>95</sup> However, ad hoc tribunals are considered to be inconsistent in their accountability of the violations of international criminal law, are expensive especially for poor countries, which should be utilizing all their monetary resources on national building instead of spending it on tribunals, and these tribunals are also believed to exacerbate tensions rather than promote reconciliation.<sup>96</sup>

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<sup>92</sup> Daniel Thurer, *The "failed State" and international law*, INT'L REV. OF THE RED CROSS (Dec. 31, 1999), <https://www.icrc.org/eng/resources/documents/article/other/57jq6u.htm>.

<sup>93</sup> *Id.*

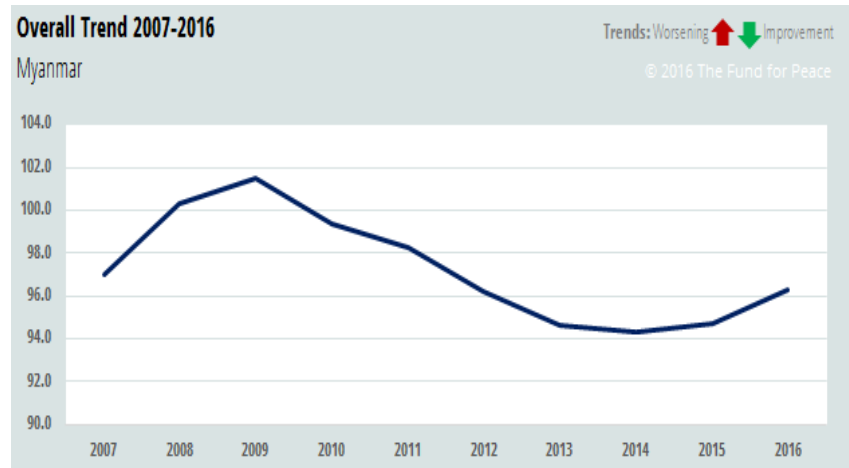
<sup>94</sup> *Ad Hoc Tribunals*, INT'L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>.

<sup>95</sup> Sophie Crockett, *Are International Courts Effective?*, E-INT'L REL. STUDENTS (Nov. 27, 2011), <http://www.e-ir.info/2011/11/27/are-international-courts-effective/>.

<sup>96</sup> *Id.*

### 1. International law and the Case of Myanmar

Myanmar has been on the Fragile State Index<sup>97</sup> (FSI) – previously known as the Failed State Index, from 2006 to 2011. Figure 1, in the proceeding appendix, shows that the level of state-based conflict deteriorated from 2007 to 2009. It began improving in 2010 but



Source: Fund for Peace<sup>98</sup>

beginning in 2015, the ratings have again begun to go up again i.e., the society and institutions are increasingly vulnerable to failure. The FSI is calculated by considering various social, economic, and political indicators.<sup>99</sup> As a result, understanding them is crucial because they illustrate the bigger picture of a society and political system in a country. States that recruit child soldiers are more often

<sup>97</sup> Fragile State Index (previously known as Failed State Index) is an annual report published by Foreign Policy magazine and Fund for Peace, a think tank, since 2005. It analyzes the vulnerability of states to conflict and collapse based on several indicators.

<sup>98</sup> FUND FOR PEACE, <http://fundforpeace.org/fsi/indicators/>.

<sup>99</sup> Social indicators include demographic pressures, refugees and internally displaced persons, group grievance and human flight and brain drain. Economic indicators are uneven economic development and poverty and economic decline. State legitimacy, public services, human rights and rule of law, security apparatus, factionalized elites and external intervention are Political and Military indicators. *See* <http://fundforpeace.org/fsi/indicators/>

than not, categorized failed states.<sup>100</sup> If the Burmese government takes measures to improve its scores on these indicators, it will be able to solve the issue of child soldiering, at least to some extent.

Failed states recruit child soldiers to use them as defense in intra-state counter-insurgency.<sup>101</sup> This is evident in the case of *Tatmadaw* as well as the ethnic groups. As discussed above, both of these entities have been engaged in conflicts with the ethnic groups and need a strong, large force to maintain their control. Widespread unemployment and poverty has pushed many children be a part of the ethnic militia; many others are kidnapped and forced to serve in the army.<sup>102</sup>

Moreover, failed states do not have access to the free global economy, they fund their wars through illegal means.<sup>103</sup> For instance, the ethnic groups are engaged in large-scale illegal drug trade to fund their operations and buy weaponry. The *Tatmadaw* on the other hand, engages in shoddy deals with Chinese and Thai companies to earn their revenues because international sanctions have stopped the international businesses from investing in the country.<sup>104</sup>

The FSI highlights one of international law's major limitation: implementation. Ad hoc tribunals and the Joint Action Plan are examples of how international law is dealing with the child soldiers in Myanmar but are producing limited effects. Since international legislations and moral arguments do not have an impact on rebel groups and failed states,<sup>105</sup> ad hoc tribunals can be a way of

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<sup>100</sup> Robert Bates defines a failed state as the “implosion of the state”, where the state transforms “into an instrument of predation” and the state effectively loses its monopoly on the means of force. Robert Bates, *State Failure*, ANN. REV. OF POL. SCI. 2, (June 2008), <http://www.annualreviews.org/doi/pdf/10.1146/annurev.polisci.11.060606.132017>

<sup>101</sup> *Id.*

<sup>102</sup> Human Rights Watch, *supra* note 23, at 33-34.

<sup>103</sup> *Id.*

<sup>104</sup> Global Witness, *supra* note 52; Pavin Chachavalpungpun, *Between Democracy and Dictatorship*, THE IRRAWADDY (Apr. 2010), [http://www2.irrawaddy.com/article.php?art\\_id=18224](http://www2.irrawaddy.com/article.php?art_id=18224).

<sup>105</sup> Alexandre Vautravers, *Why Child Soldiers are such a Complex Issue*, 27 REFUGEE SURVEY Q. 96, 106 (2008).

investigating the crimes committed by Burmese warlords and military officials for recruiting child soldiers. Although the effectiveness of these tribunals is highly debated, it is still better than no activity on the part of the international community.<sup>106</sup> The objective behind setting-up a tribunal is crucial in a country like Myanmar where no crime related to child soldiering or violence (in general) has been punished. Even if a single warlord is punished or only a few military officials are charged, it will set a precedent of how recruiting child soldiers is unacceptable. Similarly, these cases can act as deterrence if the international community and the citizens believe that these criminal proceedings are fair.<sup>107</sup>

The Joint Action Plan is another attempt to deal with child soldiers but has shown limited results. The Government of Myanmar and the United Nations signed it in 2012 “to prevent the recruitment and use of children by its armed forces”.<sup>108</sup> Under the Action Plan, the government will have to work towards the discharge of children and their rehabilitation and reintegration into civilian life.<sup>109</sup> As per the implementation plan, all the under-age recruits were supposed to be released over a period of 18 months and Country Task Force on Monitoring and Reporting (CTFMR) was to ensure that there was no more recruiting. In addition, the government and CTFMR had planned to establish monitoring mechanisms to allow access to bases, personnel, and documentation verification.<sup>110</sup> Since then, 745 children have been released by the army and the government has implemented

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<sup>106</sup> See Lilian Barria & Steven Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 THE INT’L J. OF HUMAN RIGHTS 349-368, -- (2005).

<sup>107</sup> Kathryn Rich, *Multi-faceted Solution to End Impunity for perpetrators of Children in Armed Conflict* 16, --, <https://www.elizabethburleson.com/enbweb/ChildrenInArmedConflictKathrynRich.doc>.

<sup>108</sup> *UN and Myanmar sign plan to prevent child recruitment in armed forces*, UN NEWS CENTRE (June 27, 2012), [http://www.un.org/apps/news/story.asp?NewsID=42333#.V\\_pDzeArLIU](http://www.un.org/apps/news/story.asp?NewsID=42333#.V_pDzeArLIU).

<sup>109</sup> *Child protection Factsheet*, WORLD VISION (Apr. 10, 2013), <http://www.wvi.org/myanmar/publication/child-protection-factsheet-children-affected-armed-conflict>.

<sup>110</sup> Ye Lwin Oo, *Government of Myanmar and the United Nations sign landmark Plan of Action to release children from armed forces*, UNICEF (June 27, 2012), [http://www.unicef.org/myanmar/reallives\\_19257.html](http://www.unicef.org/myanmar/reallives_19257.html).

steps to reinforce age assessment procedures within the centralized military recruitment process.<sup>111</sup> However, there are problems with the identification of the recruited children, especially the ones with armed groups which are outside the purview of the governing bodies.

Although the *Tatmadaw* and the armed groups have official policies prohibiting underage recruitment, lack of safeguards, and accountability are the loopholes through which the recruitment continues.<sup>112</sup> According to the report by Child Soldiers International, children continue to be recruited unlawfully by *Tatmadaw* and the armed groups. This is attributed to the failure to address accountability, continued falsification of age documents and coercing the children. Additionally, the legal procedures for investigation to prosecute military officials using and abetting recruitment of child soldiers are still unclear.<sup>113</sup>

## 2. International Criminal Court

The ICC declared child soldiering to be a war crime and has taken action to prosecute the recruiters in the past. Hence, examining its role in Myanmar's context is crucial. The ICC is impartial and independent in its proceedings and has international jurisdiction over internal conflicts. However, in order to maintain state sovereignty, the ICC can only function where the State itself is unwilling or unable to carry out the prosecution.<sup>114</sup> In 2014, the ICC convicted former Congolese militia leader, Thomas Lubanga Dyilo for "conscripting and enlisting children under the age of 15 into his militia."<sup>115</sup> Through

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<sup>111</sup> *Forty-six (46) children released by Myanmar army*, RELIEF (Mar. 12, 2016), <http://reliefweb.int/report/myanmar/forty-six-46-children-released-myanmar-army-enmy>.

<sup>112</sup> Jake Scobey-Thal, *Burmese Army and Armed Groups Still Recruiting Children*, THE HUFFINGTON POST (June 2, 2013), [http://www.huffingtonpost.com/jake-scobeythal/burmese-army-and-armed-gr\\_b\\_2630491.html](http://www.huffingtonpost.com/jake-scobeythal/burmese-army-and-armed-gr_b_2630491.html).

<sup>113</sup> Child Soldiers International, *Ongoing Underage Recruitment and Use by the Myanmar Military and Non-State Armed groups*, REF WORLD (June 2015), <http://www.refworld.org/pdfid/55a4ebb04.pdf>.

<sup>114</sup> Thurer, *supra* note 92.

<sup>115</sup> *Children in Armed Conflict: A War Crime We Have the Responsibility to Prevent*, INT'L COALITION FOR THE RESP. TO PROTECT (Mar. 26, 2015),



his conviction, the ICC sent a message to the international community that such crimes would not go unpunished. Similarly, in 2012, the Special Court for Sierra Leone convicted former Liberian president, Charles Taylor for 11 war crimes including recruiting children under the age of 15 for combat. These two convictions are significant steps taken by the international justice system but, it also shows how judicial systems at the national level are failing to prosecute those involved in such crimes.

In the case of Myanmar, will the military junta or the warlords of the ethnic armies ever be tried in such a tribunal? Likely not. This is because firstly, Myanmar is not a signatory to the Rome Statute.<sup>116</sup> And, as per Article 12 of the Rome Statute, the ICC cannot prosecute from the states that have never joined the court. The Security Council (UNSC) would have to give the ICC jurisdiction over these cases. Secondly, the ICC can open an investigation only when the issue is referred to them by the State party or the UN Security Council, or if it is authorized by the Pre-Trial chamber based on the information provided to them by individuals or NGOs.<sup>117</sup> Even if the Security Council plans to do so, permanent members of the UNSC and close allies of the military junta – China and Russia – can veto this decision.<sup>118</sup>

China and Russia's actions on similar UNSC resolutions illustrates their likelihood to use their veto power. In January 2004, a resolution on Burma was put forward by the U.S., United Kingdom, and Northern Ireland. However, China and Russia vetoed it citing the following reasons: it was an internal matter of a sovereign state, situation was not a threat to international peace, and security and other bodies of the UN like the Human Rights Council should deal

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<https://icrtopblog.org/2015/03/26/children-in-armed-conflict-a-war-crime-we-have-the-responsibility-to-prevent/>.

<sup>116</sup> Regina Paulose, *The ICC: Protection for the Rohingya?*, A CONTRARIO ICL (Jan. 6, 2013), <https://acontrarioicl.com/2013/01/06/the-icc-protection-for-the-rohingya/>.

<sup>117</sup> Bertil Lintner, *Putting the Boot in*, THE IRRAWADDY (Nov. 2007), [http://www2.irrawaddy.com/article.php?art\\_id=9172&page=2](http://www2.irrawaddy.com/article.php?art_id=9172&page=2).

<sup>118</sup> *Id.*

with it.<sup>119</sup> China and Russia would likely use the same explanation for a veto of a UNSC resolution, referring jurisdiction of Myanmar cases to the ICC.

The ICC is considered to be the last resort for victims who no longer believe their national judicial system will give them justice.<sup>120</sup> The international community likely still hopes that the Myanmar government and judiciary can prosecute the leaders of the military junta and warlords at the national level. The national legislations are required to give their domestic court jurisdiction over crimes listed in the Rome Statute if they do not want the ICC to interfere in their internal matters. Suu Kyi will have to work towards making this happen.

Most importantly, child soldiering has been an issue in Burma for more than two decades.<sup>121</sup> But the Rome Statute came into force only in 2002.<sup>122</sup> As a result, it can look into crimes that are committed only after 2002. In order to prosecute the perpetrators of pre-2002 crimes, ad hoc tribunals will have to be created.<sup>123</sup> Aung San Suu Kyi should not forget that the major reason for her popularity and widespread support is that the Burmese people believe she will ensure that justice prevails in the country. Therefore, Suu Kyi will have to take measures in that direction. This should include submitting to the jurisdiction of international law governing bodies.

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<sup>119</sup> Global Justice Center, *Frequently Asked Questions About Burma and The International Criminal Court*, BURMA LIBRARY 7, --, (DATE), <http://www.burmalibrary.org/docs6/BLC-ICC-FAQ.pdf>.

<sup>120</sup> Kenneth Roth, *Africa Attacks the International Criminal Court*, HUMAN RIGHTS WATCH (Jan. 14, 2014), <https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court>.

<sup>121</sup> *Myanmar*, CHILD SOLDIERS INT'L, <https://www.child-soldiers.org/myanmar> (last visited Feb. 2, 2017).

<sup>122</sup> Rome Statute of the International Criminal Court, UNITED NATIONS, <http://www.un.org/law/icc/index.html> (last visited Feb. 2, 2017).

<sup>123</sup> Global Justice Center, *supra* note 118.

## IV. CONCLUSION

Child soldiering in Myanmar should not be seen as an isolated problem. It is an outcome of the larger socio-economic and political problems that the country faces. Hence, the government and the international organizations need to focus on solving the problems of poverty, unemployment, and political instability as discussed in the comment before child soldiering can be eliminated.

The government should begin with fostering domestic peace. This begins first by ending the offensive against the rebel groups. The government should adopt a middle approach that maintains the regional autonomy of the ethnic groups and, at the same time, ensures that the central government is able to implement policies for the social and economic development of its citizens. Secondly, the government must reduce the powers of the military. The military has vested interests in the economic and political aspects of the country and after tremendous efforts has become the powerful institution that it is today. The military will not allow the government to undertake any measures that are detrimental to their interests and undermine their authority. Only after bringing the military under government oversight, can Suu Kyi work towards discharging the child soldiers.

Finally, for international law to be successfully applicable to the children of the country, the Myanmar government must take measures to bring itself under the jurisdiction of the ICC. Similarly, the government can also request its allies, China and Russia, to support the UNSC resolution of giving the ICC jurisdiction over Myanmar cases. Although this may seem unlikely to happen, given the fact that both China and Russia themselves commit human rights violations, the new government should make an attempt to negotiate. International courts and treaties have been created to provide justice

to the victims of unspeakable crimes.<sup>124</sup> It is thus, the responsibility of the national government to ensure that its citizens get that justice.

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<sup>124</sup> *Statement of ICC-Prosecutor at the Commencement of Trial in the case against Messrs. Laurent Gbagbo and Charles Blé Goudé*, ICC-CPI (Jan. 28, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-29-01-2016>.