

International Law on Minorities' Right to Self-Identify



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Destination Justice is a social change organisation, as such we believe we are changemakers and together, we can end injustice. To that end, we set ideas in motion, we provide tools and we take action if necessary.

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List of Terms

Accede/Accession - 'Accession' is an act by which a State signifies its agreement to be legally bound by the terms of a particular treaty. It has the same legal effect as ratification, but is not preceded by an act of signature. The formal procedure for accession varies according to the national legislative requirements of the State. To accede to a human rights treaty, the appropriate national organ of a State—Parliament, Senate, the Crown, Head of State or Government, or a combination of these—follows its domestic approval procedures and makes a formal decision to be a party to the treaty. Then, the instrument of accession, a formal sealed letter referring to the decision and signed by the State's responsible authority, is prepared and deposited with the United Nations Secretary-General in New York.

Adoption - 'Adoption' is the formal act by which the form and content of a proposed treaty text are established. Treaties negotiated within an international organisation like the United Nations are usually adopted by a resolution of a representative organ of the organisation whose membership more or less corresponds to the potential participation in the treaty in question (the United Nations General Assembly, for example).

Charter - The term 'charter' is used for particularly formal and solemn instruments, such as the treaty founding an international organisation like the United Nations ('The Charter of the United Nations').

Convention - A 'convention' is a formal agreement between States. The generic term 'convention' is thus synonymous with the generic term 'treaty'. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually the instruments negotiated under the auspices of an international organisation are entitled conventions

Declaration - The term 'declaration' is used for various international instruments. International human rights declarations are not legally binding; the term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. However, while the 1948 Universal Declaration of Human Rights for example was not originally intended to have binding force, its provisions have since gained binding character as customary law.

Entry into Force - A treaty does not enter into force when it is adopted. Typically, the provisions of the treaty determine the date on which the treaty enters into force, often at a specified time following its ratification or accession by a fixed number of states.

Optional Protocol - The term 'protocol' is used for an additional legal instrument that complements and adds to a treaty. A protocol may be on any topic relevant to the original treaty and is used either to further address something in the original treaty, address a new or emerging concern or add a procedure for the operation and enforcement of the treaty—such as adding an individual complaints procedure. A protocol is 'optional' because it is not automatically binding on States that have already ratified the original treaty; States must independently ratify or accede to a protocol.



Ratify/Ratification - 'Ratification' is an act by which a State signifies an agreement to be legally bound by the terms of a particular treaty. To ratify a treaty, the State first signs it and then fulfils its own national legislative requirements. Once the appropriate national organ of the country—Parliament, Senate, the Crown, Head of State or Government, or a combination of these—follows domestic constitutional procedures and makes a formal decision to be a party to the treaty. The instrument of ratification, a formal sealed letter referring to the decision and signed by the State's responsible authority, is then prepared and deposited with the United Nations Secretary-General in New York.

Signature - 'Signature' of a treaty is an act by which a State provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose.

State Party - A 'State Party' to a treaty is a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument.

Treaty - A 'treaty' is a formally concluded and ratified agreement between States. The term is used generically to refer to instruments binding at international law, concluded between international entities (States or organisations). Under the Vienna Conventions on the Law of Treaties, a treaty must be (1) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organisations with treaty-making power; (3) governed by international law and (4) in writing.

These definitions are taken from UNICEF's 'Introduction to the Rights of the Child'
(<http://www.unicef.org/french/crc/files/Definitions.pdf>).



Abbreviations

CEDAW - Convention on the Elimination of all Forms of Discrimination Against Women

CAT - Convention Against Torture

CRC - Convention on the Rights of the Child

HRC - Human Rights Council

ICCPR - International Covenant on Civil and Political Rights

ICERD - International Covenant on the Elimination of All Forms of Racial Discrimination

ICESCR - International Covenant on Economic, Social and Cultural Rights

NGO - Non-governmental Organisation

OHCHR - Office of the High Commissioner for Human Rights

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNICEF - UN Children's Fund



Introduction

The Rohingya are a predominantly Muslim minority concentrated in Rakhine State (also known as Arkan State) in Myanmar. According to the late Gordon Luce and Than Tun, leading historians of pre-colonial Burma, stone inscriptions dating back to 1400 AD establish the historical presence of the Rohingya people in what is today western Burma.¹ This presence was also confirmed by an early ethno-linguistic survey published by a British East India Company employee in 1795.² During the British colonial period, however, official census records grouped different ethnic communities under broad categories. As a result, the Rohingya were grouped together with other ethnic groups of the Islamic faith, a fact that anti-Rohingya nationalists have used as evidence that the Rohingya are colonial era additions: seasonal and/or migrant labourers who arrived in the State during British colonial rule, from 1825 to 1947, and remained behind after the British left. In the immediate post-independence period, the Rohingya ethnic identity resurfaced as the successive Burmese governments, both the civilian and military governments of Prime Minister U Nu and General Ne Win, extended official recognition to the Rohingya as one of the integral ethnic communities of the Union of Burma.

Despite this recognition, and in the face of the irrefutable official and historical evidence supporting the Rohingya's claim to being centuries-long residents of western Burma (what is today the border state of Rakhine), the current government of Myanmar and Buddhist nationalists continue to deny the validity of the Rohingya identity. Instead, they have dubbed the Rohingya illegal Bengali immigrants,³ promoting the view that Rohingya illegally migrated to Burma during British colonial rule in order to deny the Rohingya identity recognition and full citizenship rights.⁴ Under Myanmar's 1974 Constitution, the Rohingya do not qualify as indigenous peoples, and the Citizenship Act of 1982 restricts citizenship to those who either belong to one of 135 'national races' (of which the Rohingya are not one), or to those who settled in the country before 1823, something that is difficult to prove due to lack of documentation. As a result, the Rohingya have been rendered stateless and face significant discrimination. Just four years after the outbreak of sectarian violence in 2012, around 120,000 Rohingya are internally displaced,⁵ and thousands more have fled the country.⁶ Meanwhile, the climate of intolerance increases, with continued

¹ G. H. Luce, *Phases of Pre-Pagan Burma: Languages and History, Volume I* (1985), p. x, 95.

² Dr. Azeem Ibrahim, *The Rohingyas: Inside Myanmar's Hidden Genocide* (Hurst Publishers, 2016), p 24-25.

³ Roseanne Gerin, 'Aung San Suu Kyi, John Kerry Discuss Myanmar's Rohingya Issue and Sanctions' (Radio Free Asia, 23 May 2016)

<http://www.rfa.org/english/news/myanmar/aung-san-suu-kyi-john-kerry-discuss-myanmars-rohingya-is-sue-and-sanctions-05232016162223.html> accessed 25 July 2016.

⁴ 'Malaysia/Burma: Living in Limbo: Burmese Rohingyas in Malaysia' (Human Rights Watch, August 2000) https://www.hrw.org/reports/2000/malaysia/maybro08-01.htm#P244_39095 accessed 3 August 2016.

⁵ 'Zeid urges action to address serious rights violations against Rohingya and other minorities in Myanmar' (OHCHR, 20 June 2016)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20137&LangID=E> accessed 25 July 2016.

⁶ David Scott Mathieson, 'Dispatches: Burma's Rohingya Muslims in Desperate Straits' (Human Rights Watch, 26 April 2016)

<https://www.hrw.org/news/2016/04/26/dispatches-burmas-rohingya-muslims-desperate-straits> accessed 25 July 2016.



impunity for growing grassroots ultra-nationalist movements that spread messages of hate and encourage violence against Rohingya.⁷

There has been very little government action to address these human rights violations,⁸ and Aung San Suu Kyi's government continues to avoid recognising the Rohingya minority identity.⁹ In 2013, the UN Special Rapporteur on the human rights situation in Myanmar, Tomás Ojea Quintana, indicated that State actors may have been directly involved in acts of violence against the Rohingya or at least implicitly supported the violence.¹⁰

UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein issued a statement on 20 July 2016 calling for the government of Myanmar to address the discrimination and human rights violations against the Rohingya.¹¹ He also released a new report, as requested by the UN HRC in July 2015, which documents human rights violations against the Rohingya. The report notes that Rohingya suffer from arbitrary deprivation of nationality, severe restrictions on freedom of movement, threats to life and security, denial of rights to health and education, forced labour, sexual violence, and limitations on political rights, among other violations.¹²

The report also indicates that the pattern of human rights violations against the Rohingya could amount to crimes against humanity.¹³ Prince Zeid remarked:

The new Government has inherited a situation where laws and policies are in place that are designed to deny fundamental rights to minorities, and where impunity for serious violations against such communities has encouraged further violence against them. [...] It will not be easy to reverse such entrenched discrimination. This will be a challenging process that requires resolve, resources and time. But it must be a top priority to halt ongoing violations and prevent further ones taking place against Myanmar's ethnic and religious minorities.¹⁴

⁷ See 'Sticks and Stones: Speech Narratives and Facilitators in Myanmar' (C4ADS, 5 February 2016) <<http://www.burmalibrary.org/docs22/Sticks+and+Stones.pdf>> accessed 25 July 2016.

⁸ Jonah Fisher, 'Aung San Suu Kyi: Where are you?' (BBC, 2 June 2015) <<http://www.bbc.com/news/world-asia-32974061>> accessed 25 July 2016.

⁹ Reuters, 'Aung San Suu Kyi tells UN that the term "Rohingya" will be avoided' (The Guardian, 21 June 2016) <<https://www.theguardian.com/world/2016/jun/21/aung-san-suu-kyi-tells-un-that-the-term-rohingya-will-be-avoided>> accessed 25 July 2016.

¹⁰ 'Religious violence in Myanmar, the consequences of Government inaction in tackling prejudice and discrimination – UN expert' (OHCHR, 28 March 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13205&LangID=E%27LangID=E#sthash.qcqh1F8l.dpuf>> accessed 25 July 2016.

¹¹ 'Zeid urges action to address serious rights violations against Rohingya and other minorities in Myanmar' (OHCHR, 20 June 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20137&LangID=E>> accessed 25 July 2016.

¹² UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, 20 June 2016, A/HRC/32/18 <<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Pages/ListReports.aspx#sthash.2UYwMqBJ.dpuf>> accessed 25 July 2016.

¹³ UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, 20 June 2016, A/HRC/32/18, para 55 <<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Pages/ListReports.aspx#sthash.2UYwMqBJ.dpuf>> accessed 25 July 2016.

¹⁴ 'Zeid urges action to address serious rights violations against Rohingya and other minorities in Myanmar' (OHCHR, 20 June 2016)



Indeed, many of the reported violations contravene Myanmar's international obligations as determined by core international human rights treaties that will be discussed in this brief. Currently, as a party to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and other key international treaties,¹⁵ Myanmar is under an obligation to guarantee such protections as are enshrined within these treaties. Myanmar is also a signatory to the International Covenant on Economic, Social and Cultural Rights, and is therefore obliged to refrain from actions contrary to its object or purpose. The obligations under these treaties are strengthened and complemented by customary international law on human rights, which is reflected in the Universal Declaration of Human Rights. While Myanmar is not legally bound by some of the other core human rights treaties mentioned in this brief, most notably the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture, they still offer persuasive power in terms of how they embody the growing consensus within the international community regarding State's human rights obligations.

The ICCPR in particular, with 168 parties and 74 signatories, carries strong international acceptance. Further, several of its rights reflect customary international law. As such, the HRC has stated that States may not reserve any of the following rights:

[...] to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.¹⁶

Any State interference with corresponding individual rights, such as the right of minorities to enjoy their own culture, should be deemed suspect.

The following Briefing Paper will first set out a framework on international human rights law, looking specifically at the core human rights treaties most directly related to minority rights protection. It will then address the question of how the right of minorities' to self-identify on the basis of their national, ethnic, religious and linguistic characteristics relates to the obligation of States to ensure non-discrimination against individuals and groups. It will also address how this obligation operates for individuals who, like the Rohingya, are denied citizenship rights.

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20137&LangID=E> accessed 25 July 2016.

¹⁵ Including the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Rights of Persons with Disabilities, the Optional Protocol of the CRC on the sale of children, and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children.

¹⁶ HRC, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant* (1994), para 8.



A Framework on International Human Rights Law

After the Second World War, the international community resolved to prevent the occurrence of such large-scale atrocities as the Holocaust by establishing international protections for individual rights. In particular, the ability of national governments to target specific minority groups proved that further protection was needed. The UDHR, adopted by the UN General Assembly in December 1948, was the first step toward this goal of international-level protection. In its first article it held, 'All human beings are born free and equal in dignity and rights.' However, more was needed for this statement to have binding force. It was not until 1976 that the ICCPR and the ICESCR came into force, providing a mechanism for practical implementation and monitoring of human rights responsibilities.

Today there are six core, legally binding international human rights treaties within the UN system that have particular significance for protecting minority rights. In addition to the ICCPR and the ICESCR there are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention Against Torture (CAT). The ability to invoke these treaties to redress rights is limited to those countries who have become States Parties. To learn the status of ratification for a country, visit the OHCHR website (<http://indicators.ohchr.org>). If your country is not a party to a relevant treaty, it is not possible to formally invoke the treaty's procedures. However, there are other avenues for seeking redress, including Charter-based procedures created by the UN Commission on Human Rights and other bodies, which can be reviewed in Pamphlet No. 3 of the UN Guide for Minorities (<http://www.ohchr.org/Documents/Publications/GuideMinorities3en.pdf>).

Each of the core human rights treaties established a committee to monitor the implementation of treaty provisions by States Parties. These committees are composed of international human rights experts who serve four-year terms. The members are elected by the States Parties but serve in a personal capacity, not as representatives of their governments, and they generally do not participate in reviews of their own nations' governments.

The committees monitor States Parties' treaty obligations through national reports and individual complaints. The former are submitted periodically (every two to five years) and are a legal obligation for States Parties. The reports detail what steps a State Party has taken to meet its treaty obligations. Individual complaints, known as 'communications,' offer a way for individuals to seek redress if their rights under a particular treaty are violated. The ICCPR, the ICERD, the CEDAW and the CAT all have mechanisms that enable individuals to send a formal complaint, but again, States Parties must allow for this optional provision.

At the end of a review period, each Committee issues an evaluation in the form of public observations that recognise points of progress, but also highlight areas of concern and provide relevant recommendations. These observations and recommendations are not legally binding but carry significant weight. In the case of individual complaints, if the HRC upholds the allegations then the State Party is obliged to take action to remedy the situation.



The reporting system does face a few obstacles that prevent an optimal dialogue and enforcement of rights. Some States Parties do not submit adequate information to allow for a full and accurate review, other times there can be delays in the review process, and sometimes States Parties fail to follow through on a committee's recommendations or concerns. Some of these issues could be improved with greater publicity around the treaty reporting process. Concerned parties may also be able to submit additional reports or seek to participate in the drafting of the national report. Both the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights allow for more active NGO participation.¹⁷

Universal Declaration of Human Rights (UDHR)

Today, the UDHR is the most important international statement defining human rights. Containing 30 articles, it sets out 28 different rights that apply to everyone, in all countries around the world. These rights include the right not to be discriminated against for reasons such as race or religion, the right to have a nationality and to not have one's nationality taken away, the right to vote and to participate in politics (for example, by serving as an elected official or representative), the right to freedom of movement within one's country, and to leave and return freely to one's country, the right to asylum in other countries, the right to enjoy freedom of religion, the right to work and to free choice of employment, the right to marry without limitations based on race, nationality, or religion, the right to education, and the right to an adequate standard of living (which includes food, medical care, and housing).

While the UDHR is only a declaration, and therefore technically only a statement of belief or intent, it has become international law because it has taken on the status of customary international law. This is to say that the UDHR's principles have been adopted by a sufficient number of countries who treat these principles as legal obligations, rendering these principles as binding regardless of whether a nation has officially recognised the UDHR as a binding obligation.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR protects traditional human rights, often referred to as civil rights, which include the right to life, freedom of speech, religion and voting.

The ICCPR also specifically addresses minority rights. Article 27 recognises an individual right for members of ethnic, religious or linguistic minorities to engage in the cultural activities characteristic of their minority cultures. This right does not include any political rights, such as political autonomy, in an effort to preserve the integrity and sovereignty of States. This distinction sets minority rights apart from the right to self-determination (article 1).

Article 1 establishes the right of 'all peoples to self-determination. This right includes the right to determine political status and to freely pursue economic, social and cultural development. 'Peoples' may also freely dispose of their natural wealth and resources.

¹⁷ See, <www.defence-for-children.org> for the CRC Committee details and <www.cohre.org> for CESCR Committee information.



Pamphlet No.4 of the UN Guide for Minorities outlines other rights enshrined in the ICCPR that are relevant to minority rights protection.¹⁸

Article 2.1 guarantees that the rights protected by the Covenant apply to all individuals, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This entitlement applies to all individuals within the territory or under the jurisdiction of a State (see also General Comment No. 18).

Article 3 provides for the equal enjoyment of all rights for men and women (see also General Comment No. 28).

Article 12 guarantees free movement and choice of residence for everyone lawfully within the territory of a State, as well as the right to leave any country and to enter one's own country (see also General Comment No. 27).

Article 17 protects against interference with a person's privacy, family, home, or correspondence, as well as against attacks on honor and reputation.

Article 18 is essential to minorities and protects freedom of thought, conscience, and religion. Minorities may manifest their religion in public or private through worship, observance, practice, and teaching, and parents are free to ensure that the religious and moral education of their children conforms to their own convictions (see also General Comment No. 22).

Article 19 protects freedom of opinion and expression. This is basic to the ability of minorities to communicate in their own language and includes 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.' As is true for many other rights, freedom of expression may be legitimately restricted by law, but only where such restrictions are necessary to protect the rights of others or to protect national security, public order, public health, or public morality.

Article 20 requires governments to prohibit by law any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence (see also General Comment No. 11).

Article 22 guarantees freedom of association. While most of its provisions concern trade unions, this article also protects the right to form and participate in minority educational, cultural, political, and other organisations.

Article 25 sets forth the rights and opportunities of citizens to participate in the conduct of public affairs, to vote and be elected and to have access to public service (see also General Comment No. 25).

Article 26 is a general non-discrimination clause that guarantees equality before the law and equal protection for all. This right does not preclude the State from making

¹⁸ 'Minorities and the United Nations: Human Rights Treaty Bodies and Complaint Mechanisms' (OHCHR) <<http://www.ohchr.org/Documents/Publications/GuideMinorities4en.pdf>> accessed 25 July 2016.



reasonable distinctions among categories of people, such as the need to speak the official language under certain circumstances, but it prohibits any unreasonable distinction based on one's status as a member of a minority group (see also General Comment No. 18).

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR focuses on food, education, health and shelter, among other basic rights. While the ICESCR allows States Parties a certain measure of flexibility in how to protect these rights, acknowledging differences in resource capacity, it nonetheless imposes a binding obligation to yield results within a reasonable timeframe. Article 2(1) of the Covenant acknowledges that different countries have different capacities to provide services, but holds that each State Party must 'take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, including particularly the adoption of legislative measures.'

The breadth of meaning allowed under 'progressive realization' does not include total inaction. Concrete steps must be taken,¹⁹ and any deliberately retrogressive measures must have sufficient justification.²⁰ At a minimum, States Parties are obliged to ensure that essential foodstuffs, essential primary health care, basic shelter and housing, and the most basic forms of education are available.²¹

Article 2(2) of the ICESCR affirms that rights must be exercised without discrimination of any kind. This non-discrimination provision must be applied immediately, not progressively.²²

Pamphlet No.4 of the UN Guide for Minorities outlines rights enshrined in the ICESCR that are relevant to minority rights protection:²³

Article 3 requires States to ensure the equal enjoyment of all rights for men and women.

Articles 6 and 7 concern the right to work, including the opportunity to gain one's living by work freely chosen, as well as the right to enjoy just and favorable conditions of work.

Article 11 sets forth the right to an adequate standard of living, including adequate food, clothing, housing, and the continuous improvement of living conditions.

Article 12 requires States to ensure the highest attainable standard of physical and mental health, including an obligation to reduce infant mortality and to promote the healthy development of the child.

Articles 13 and 14 set forth the right of everyone to education, including a provision that primary education must be compulsory and free for all. Of particular interest to minorities is the liberty of 'individuals and bodies' to establish and direct educational institutions, as

¹⁹ CESCR, *General Comment 3: The Nature of States Parties' Obligations* (1990), para 2.

²⁰ CESCR, *General Comment 3: The Nature of States Parties' Obligations* (1990), para 9.

²¹ CESCR, *General Comment 3: The Nature of States Parties' Obligations* (1990), para 10.

²² CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (2009), paras 7 and 8.

²³ 'Minorities and the United Nations: Human Rights Treaty Bodies and Complaint Mechanisms' (OHCHR) <<http://www.ohchr.org/Documents/Publications/GuideMinorities4en.pdf>> accessed 25 July 2016.



long as these institutions conform to whatever minimum standards may be established by the State.

Article 15 states that everyone has the right to take part in cultural life and to have his/her intellectual property protected.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD specifies a number of rights that must be guaranteed without racial discrimination. These rights parallel those listed in other international human rights treaties. They include equal treatment before judicial bodies, the right to participate in public affairs and have equal access to public service, freedom of movement and residence, freedom of opinion and expression, and the right of access to any place or service intended for general public use.

Racial discrimination, according to article 1 of the Convention, is 'any distinction, exclusion, restriction or preference based on race, color, descent, or national origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedom in the political, economic, social, cultural or any other field of public life.'

Convention on the Rights of the Child (CRC)

The CRC is focused on protecting the rights of those under the age of 18. Pamphlet No.4 of the UN Guide for Minorities outlines the rights enshrined in the CRC that are relevant to minority rights protection:²⁴

Article 2 provides that the rights in the Convention must be guaranteed without discrimination on the basis of, among other qualities, race, colour, language, religion, or national or ethnic origin.

Article 3 sets forth the basic principle of the Convention, which is that the best interests of the child should be the primary consideration in all actions concerning children.

Article 6 recognises the child's right to life, survival and development.

Article 7 requires that children be registered immediately after birth and have the right to a name and nationality.

Article 12 recognises respect for the views of the child.

Article 17 encourages the mass media to cooperate in producing and disseminating material from diverse cultural sources and 'to have particular regard to the linguistic needs of the child who belongs to a minority group'.

Article 20 provides that due regard should be paid to a child's ethnic, religious, cultural, and linguistic background, when it is necessary to place the child in a home other than that of his/her family.

Article 24 recognises the child's right to health.

²⁴ 'Minorities and the United Nations: Human Rights Treaty Bodies and Complaint Mechanisms' (OHCHR) <<http://www.ohchr.org/Documents/Publications/GuideMinorities4en.pdf>> accessed 25 July 2016.



Article 28 provides for the child's right to education, including access to primary education.

Article 29 reflects the fundamental purpose of education, and states, among other things, that a child's education shall be directed to developing respect for: human rights and fundamental freedoms; his/her own cultural identity, language, and values; the national values of the country in which the child lives and from which he or she may have originated; and the values of other civilizations (see also General Comment 1).

Article 30 essentially extends to children the provisions of article 27 of the ICCPR regarding the right to enjoy one's culture, practice one's religion, and use one's own language.

Article 31 calls upon States to respect and promote a child's right to participate in cultural and artistic life.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW emphasises women's rights to equal treatment under the law; equality in education, political participation, employment, health, and the economy; and freedom from sexual exploitation.

In addition to agreeing to eliminate discrimination against women by 'any person, organisation or enterprise', States Parties agree to take appropriate measures 'to modify or abolish existing laws, regulations, customs and practices' that discriminate against women.²⁵

The Committee that monitors the CEDAW has also brought particular attention to the issues women face during times of conflict, and the Committee has expressed concern for the multiple levels of discrimination that minority women face.²⁶

Pamphlet No.4 of the UN Guide for Minorities outlines rights enshrined in the CEDAW that are relevant to minority rights protection:²⁷

Article 5 obliges States to take 'all appropriate measures [...] [t]o modify the social and cultural patterns of conduct of men and women' in order to eliminate 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

Article 7 concerns the right of women to participate in public life and to hold public office (see also General Recommendation No.23).

Article 10 requires that educational programmes eliminate stereotyped concepts of the roles of men and women.

Article 12 requires the elimination of discrimination against women with respect to access to health care services (see also General Recommendation No.24).

²⁵ CEDAW, articles 2(e) and 2(f).

²⁶ See CEDAW, *General Recommendation, No. 30 on women in conflict prevention, conflict and post-conflict situations* (2013).

²⁷ 'Minorities and the United Nations: Human Rights Treaty Bodies and Complaint Mechanisms' (OHCHR) <<http://www.ohchr.org/Documents/Publications/GuideMinorities4en.pdf>> accessed 25 July 2016.



Article 14 concerns the particular problems faced by rural women, many of whom may be members of minorities.

Article 16 reiterates that women and men shall be equal in all matters related to marriage and family, including the right to marry freely and only with full and free consent. It also provides that no legal effect may be given to the betrothal or marriage of a child (see also General Recommendation No.21).

Convention Against Torture (CAT)

Minority individuals, like all people, have the right to be protected against torture and other cruel, inhuman, or degrading treatment or punishment.

Of particular note to stateless individuals, article 3, paragraph 1 of the CAT holds, 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture,' where 'the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'²⁸

ASEAN Human Rights Declaration

Drafted by the ASEAN Intergovernmental Commission on Human Rights in 2012, the Declaration was unanimously adopted by ASEAN members (including Myanmar) at the November 2012 meeting in Phnom Penh. It affirms all the civil, political, economic, social and cultural rights laid out in the UDHR. Additionally, the Declaration sets out general principles (articles 1-9) that emphasise equality before the law and non-discrimination based on race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status, as well as the right to an effective and enforceable remedy. Article 4 particularly emphasises that the 'rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.'

The ASEAN Human Rights Declaration has no binding legal ramifications and imposes no additional enforcement mechanisms. It is merely a statement of belief or intent. The Declaration also contains several caveats that limit the scope of the rights it affirms. Article 6 sets out that '[t]he enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties,' and article 7 holds that 'the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.' Article 8 further holds that

²⁸ CAT, article 1(1).



human rights are subject to limitations based on the 'just requirements of national security, public morality, as well as the general welfare of the peoples in a democratic society.'

Nevertheless the Declaration emphasises that the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation should be upheld (article 9).



Question Presented

Is the right of minorities' to self-identify on the basis of their national, ethnic, religious and linguistic characteristics related to the obligation of States to ensure non-discrimination against individuals and groups? How might such an obligation operate for members of the Rohingya community in Myanmar who are denied citizenship rights?

Brief Answer

Yes, the right of minorities' to self-identify on the basis of their national, ethnic, religious and linguistic characteristics is related to the obligation of States to ensure non-discrimination against individuals and groups. While minority rights to non-discrimination do not truly overlap with the right to self-determination, the nature of minority identity requires the active protection and facilitation of minority group identity, and international human rights law imposes positive obligations on States parties accordingly. These right apply to all, regardless of legal status.

Discussion

1. The Right to Non-Discrimination

The right to non-discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is enshrined in Articles 1 and 2 of the UDHR, in addition to Articles 2(1) and 26 of the ICCPR, and Article 2(2) of the ICESCR for all persons within a State Party's territory and subject to its jurisdiction.

The HRC has stated 'that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'²⁹

However, as noted by the Committee, 'the enjoyment of rights and freedoms on an equal footing [...] does not mean identical treatment in every instance.'³⁰ When dealing with alleged violations of article 26 in communications submitted under the Optional Protocol, the Committee has confirmed that the 'right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.'³¹ Differentiations are lawful provided they pursue a legitimate aim (like affirmative action), and are reasonable in light of this aim.'³²

²⁹ HRC, *General Comment 18, Non-discrimination* (1989), para 7.

³⁰ HRC, *General Comment 18, Non-discrimination* (1989), para 8.

³¹ Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. GAOR, A/42/40, p. 150, para 13.

³² See e.g. I-A Court HR, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4, pp. 104-106, paras. 55-57; and Eur. Court



Additionally, it should be noted that the right to non-discrimination based on gender has added protections that are only briefly noted in this memo (See above, 'Convention on the Elimination of Discrimination Against Women'). A gendered perspective could provide an additional avenue to address human rights abuses that have a specific impact on women in particular.

2. The Right to Self-Determination of Peoples

The right to self-determination of peoples, a fundamental principle of international law, is enshrined in article 1 of the ICESCR and article 1 of the ICCPR. The ICCPR provides for the rights of peoples to self-determination in addition to the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion or to use their own language.³³

The definition of 'peoples' remains ambiguous, but minorities groups are generally not considered to properly fit within this term. In the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, any mention of 'self-determination' is noticeably avoided.

Nevertheless, article 1 imposes an obligations on States Parties to facilitate the realisation of and respect for the right to self-determination, 'not only in relation to their own peoples but also vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination.'³⁴ In this way, self-determination can still be viewed as a tool of last resort for minorities subject to significant oppression and lack of representation. Such an interpretation is echoed in the Vienna Declaration of 1993:

[The right to self-determination] shall not be constructed as authorising or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*³⁵

This language may imply a remedial right of self-determination for oppressed peoples

Recent decisions in cases brought against Canada, Colombia, Italy, New Zealand, Namibia and France have consolidated the Committee's position that no claim for self-determination may be brought under the Optional Protocol.³⁶ But it has been noted that article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.³⁷

HR, Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (Merits), judgment of 23 July 1968, Series A, No. 6, p. 33, para. 9.

³³ CERD, *General Recommendation No. 21: Right to self-determination* (1996), para 2.

³⁴ CCPR, *General Comment No. 12: Article 1: Right to Self-determination* (1984), para 6.

³⁵ Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993) (emphasis added).

³⁶ Vid. Marshall et al. v. Canada, Communication No. 205/1986, Views adopted on 4 November 2006; E.P. et al. v. Colombia, Communication No. 318/1988, Views adopted on 25 July 1990; A.B. et al. v. Italy, Communication No. 413/1990, Views adopted on 5 November 1991; R.L. et al. v. Canada, Communication No. 358/1989, Views adopted on 2 November 1991.

³⁷ Diergaardt et al. v. Namibia, Communication No. 760/1997, Views adopted on 25 July 2000; and Gillot et al. v. France, Communication No. 932/2000, Views adopted on 15 July 2002; Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, Views adopted on 20 October 2000.



3. Minority Rights Apply to Non-Citizens, with the Exception of Political Rights.

States Parties have an obligation to protect the rights of all those subject to their jurisdictions, including stateless individuals, under both the ICCPR³⁸ and the ICESCR,³⁹ although express exceptions are noted with regard to political rights under the ICERD.⁴⁰ Regardless of this exception, under the ICERD 'differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'⁴¹

It is worth noting that the deprivation of citizenship because of national, ethnic, religious or linguistic characteristics is contrary to international law. Article 9 of the 1961 Convention on the Reduction of Statelessness states that 'a Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.' In this way, discrimination against a person based on one of these grounds resulting in the arbitrary deprivation of nationality may help establish refugee status.⁴² See the Convention on the Reduction of Statelessness for norms pertaining to statelessness.

It should also be noted that there are additional protections for individuals expelled from their country other than the prohibition against refoulement in CAT. According to the HRC, the ICCPR's prohibition against torture in article 7 must be read to mean that States may not expose individuals to the danger of torture or cruel, inhuman or degrading treatment by returning them to another country via extradition, expulsion or refoulement.⁴³ This position is also echoed by the CERD Committee with regard specifically to non-citizens in General Comment No. 30, which obliges States Parties to ensure non-citizens are not removed in a discriminatory manner on the basis of race, colour or ethnic or national origin, to ensure that non-citizens are not subject to collective expulsion, and to ensure that non-citizens are not removed to a country or territory where there is a risk they will be subject to serious human rights abuses.⁴⁴

4. Protection for the Existence of Minorities Includes and Requires Respect and Protection for their Religions, Cultural, and Linguistic Characters

The only obligatory norm regarding the preservation of minorities is Article 27 of the ICCPR, which holds: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

According to the HRC, the rights enjoyed under Article 27 of the Covenant are not to be confused with the right of self-determination enshrined in Article 1 of the Covenant.⁴⁵ Nevertheless, the

³⁸ HRC, *General Comment No. 15: The Position of Aliens Under the Covenant* (1986), para 1.

³⁹ CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (2009), para 30.

⁴⁰ CERD, *General Recommendation XXX on Discrimination Against Non-Citizens* (2002), para 3.

⁴¹ CERD, *General Recommendation XXX on Discrimination Against Non-Citizens* (2002), para 4.

⁴² See, 'Minority Rights: International Standards and Guidance for Implementation' (UN, 2010), p 5.

⁴³ HRC, *General Comment No. 20: Article 7* (1992), para 9.

⁴⁴ CERD, *General Recommendation XXX on Discrimination Against Non-Citizens* (2002), paras 25-27.

⁴⁵ HRC, *General Comment No 23: Article 27* (1994), para 2.



individual rights protected under article 27 'depend [...] on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.'⁴⁶ It should be noted that the rights enshrined in article 27 are conferred to individuals (i.e. persons belonging to minority groups) and so are cognizable under the Optional Protocol to the ICCPR.⁴⁷

The HRC has interpreted the scope of article 27 generously. According to their General Comment No. 23, article 27 recognises a right, 'which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.'⁴⁸ Further, economic activity, as an essential element of the culture of an ethnic group, can fall within the scope of cultural rights protected by article 27.⁴⁹ The HRC also stated that the terms used in article 27 indicate that persons who share a common religion, culture or language are to benefit from this protection and need not be citizens or permanent residents of the State Party.⁵⁰ Thus, a States Parties may not restrict the rights under article 27 to just citizens.⁵¹

More recently, the 2001 Durban Declaration affirms that 'the ethnic, cultural, linguistic and religious identity of minorities, where they exist, must be protected and that persons belonging to such minorities should be treated equally and enjoy their human rights and fundamental freedoms without discrimination of any kind.'⁵²

The Committee on Economic, Social and Cultural Rights' General Comment No. 21 highlights the applicability of article 15.1(a) of the ICESCR on the right of everyone to take part in cultural life for minority groups. It holds that States Parties are obliged to recognise, respect and protect minority cultures as an essential component of the identity of the States themselves.⁵³

It is also worth noting that article 30 of the CRC provides that 'in those States in which ethnic, religious or linguistic minorities [...] exist, a child belonging to such a minority [...] shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.'

5. Racial Discrimination and the Rights of Minorities to Self-Identify

Article 1 of the ICERD defines discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of

⁴⁶ HRC, *General Comment No. 23: Article 27* (1994), para 6.2.

⁴⁷ HRC, *General Comment No. 23: Article 27* (1994), para 3.1.

⁴⁸ HRC, *General Comment No. 23: Article 27* (1994), para 1.

⁴⁹ HRC, *General Comment No. 23: Article 27* (1994), para 7; among others see *Lubicon Lake Band v Canada*, Communication No. 167/1984, Views adopted on 26 March 1990, para. 32.2; *Kitok v Sweden*, Communication No. 197/1985, Views adopted on 27 July 1988, para. 9.2; and *Länsman et al v Finland*, Communication No. 511/1992, Views adopted on 26 October 1994, para. 9.2.

⁵⁰ HRC, *General Comment No. 23: Article 27* (1994), paras 5.1 and 5.2.

⁵¹ HRC, *General Comment No. 23: Article 27* (1994), para 5.1

⁵² Durban Declaration (2001), para 66.

⁵³ CESCR, *General comment No. 21, Right of everyone to take part in cultural life* (2009), para 32.



nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' Article 1(2) excludes actions by States Parties that differentiate between citizens and non-citizens from this definition. Article 1(3) qualifies this exception, holding that, concerning nationality, citizenship or naturalization, States Parties may not discriminate against any particular nationality.⁵⁴ The Committee notes that article 1(2) should not be read in such a way as to detract from rights and freedoms recognised in other instruments, such as the UDHR, the ICESCR and the ICCPR.⁵⁵ In its General Recommendation No. 32, the Committee on the Elimination of Racial Discrimination specified that 'the list of human rights to which the principle [of non-discrimination] applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party [...] to address racial discrimination "by any persons, group or organization".'⁵⁶

⁵⁴ CERD, *General Recommendation XXX on Discrimination Against Non-Citizens* (2002), para 1.

⁵⁵ See, CERD, *General Recommendation XXX on Discrimination Against Non-Citizens* (2002), para 2.

⁵⁶ CERD, *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), para 9.



Further Information

Minority Rights

UN, 'Guide for Minorities'

<<http://www.ohchr.org/EN/Issues/Minorities/Pages/MinoritiesGuide.aspx>>.

UN, 'Minority Rights: International Standards and Guidance for Implementation' (2010)

<http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf>.

Rohingya Rights

C4ADS, 'Sticks and Stones: Hate Speech Narratives and Facilitators in Myanmar' (2016)

<<http://www.burmalibrary.org/docs22/Sticks+and+Stones.pdf>>.

Penny Green, Thomas MacManus and Alicia de la Cour Venning, 'Countdown to Annihilation: Genocide in Myanmar' (International State Crime Initiative, 2015)

<<http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf>>.

Human Rights Watch, "'All You Can Do is Pray"; Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State' (2013)

<<https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>>.



Annex: International Jurisprudence

Non-Discrimination

CASE	KEY TERMS
'Belgian Linguistic' case , European Court of Human Rights, 1968	Determining when discrimination has occurred.
L. k. v. The Netherlands , Committee on the Elimination of Racial Discrimination, 1993	Incitement to racial discrimination and acts of violence; obligation to investigate threats of racial violence.
Waldman v. Canada , Human Rights Committee, 1999	Violation of Article 26; public school funding; non-discrimination of state services.
Amnesty International v. Zambia , Human Rights Committee, 1999	NGO standing not questioned.
Habassi v. Denmark , Committee on the Elimination of Racial Discrimination, 1999	Private party discrimination; obligation to investigate; racial discrimination; denial of effective remedy.
Thlimmenos v. Greece , European Court of Human Rights, 2000	Right to freedom from discrimination; obligation to treat different situations differently.
Koptova v. Slovakia , Committee on the Elimination of Racial Discrimination, 2000	Violation of article 5(d)(i) of ICERD; restricting right to shelter, discrimination against Roma.
Kashif Ahmad v. Denmark , Committee on the Elimination of Racial Discrimination, 2000	Hate speech, obligation to investigate; denial of effective remedy.
Dahlab v. Switzerland , European Court of Human Rights, 2001	Justified restriction of right to manifest religion; proportionate measure to protect the freedom of others.
Juridical Condition and Rights of Undocumented Migrants , Advisory Opinion, Inter-American Court of Human Rights, 2003	Positive obligations to respect rights of undocumented; cannot subordinate or condition equality before the law or non-discrimination to achieve public policy goals.
Leyla Sahin v. Turkey , European Court of Human Rights, 2005	Freedom to manifest religion can be restricted on public-order grounds.
The Jewish Community of Oslo et al. v. Norway , Committee on the	Hate speech; incitement to racial discrimination; denial of effective remedy and protection.



Elimination of Racial Discrimination, 2005	
D. H. and others v. The Czech Republic , European Court of Human Rights, 2007	Alleged de facto segregation; no violation of article 14.

Self-Determination

CASE	KEY TERMS
Lubicon Lake Band v Canada (Ominayak case), Human Rights Committee, 1990	ICCPR Optional Protocol for claims of individual rights breaches, HRC can't determine whether a group constitutes a 'people.'
E. P. v Colombia , Human Rights Committee, 1990	Cannot claim under the Optional Protocol to be victims of a violation of the right of self-determination.
A. B. et al. v Italy , Human Rights Committee, 1990	Optional Protocol only for violations of individual rights; no claim for self-determination may be brought under the Optional Protocol 1.
Mahuika et al. (New Zealand) , Human Rights Committee, 1993	No violation for legislation that interfered with indigenous fishing; consultation with indigenous representatives.
Diergaardt et al v Namibia , Human Rights Committee, 2000	Violation of Article 26; language rights; no violation of article 27, defining cultural practices.
Äärelä and Näkkäläjärvi v. Finland , Human Rights Committee, 2001	Interference with traditional cultural practice; no violation of article 27; proportion of interference; consultation with minority representatives.
Gillot et al. (New Caledonia) , Human Rights Committee, 2000	No violation, residency-based cut off for independence referendum; objective grounds for differentiation.

