

Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible

A Legal Briefing

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This legal briefing was researched and drafted by Sean Bain. Research support and translation review was provided by Ja Seng Ing and Hnin Win Aung. Legal review was provided by Livio Zilli. Others provided valuable inputs that helped inform the report.

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International Commission of Jurists
P.O. Box 91
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"Citizenship" is a legal concept describing an individual's relationship to the State. In contrast, "statelessness" is when somebody does not have citizenship of any State. Terms such as "nationality," "race" or "ethnicity" are generally culturally embedded concepts, understood differently by different people and in different contexts. These terms are often, but not uniformly, conflated or used interchangeably. In many countries, particularly those with diverse populations, the right to citizenship is defined broadly to include persons with different ethnicities and even nationalities. In post-independence Myanmar, the concept of being a "national" or "indigenous"¹ had a generally broad definition, allowing persons of different backgrounds to become citizens, including but not limited to the descendants of persons who immigrated to Myanmar. In 1982, the current narrow definition of citizenship was introduced, which generally links citizenship acquisition to membership of a prescribed "national race." (See further on these terms in this briefing, particularly in sections 3 and 4).

1. Overview and recommendations

Myanmar's legal framework for citizenship is incompatible with bedrock rule of law and democratic principles. In particular, the 1982 Citizenship Law is highly discriminatory and arbitrary, and manifestly fails to satisfy the State's obligations under international human rights law. The result is a system that enables widespread discrimination throughout the country and undermines the rule of law.

The Government of Myanmar can and should enact reforms to citizenship law necessary to build an inclusive pluralist democratic society inline with human rights and the rule of law, primarily through initiating constitutional and legislative reforms.

Core principles of international law and the rule of law include non-discrimination, non-arbitrariness, the universality of human rights, and the right to equality before the law and to equal protection of the law without discrimination. All States are obliged to respect, protect and fulfill the human rights of every person on their territory or otherwise within their jurisdiction, without discrimination, including discrimination on the grounds of citizenship, nationality or migration status. International human rights law intentionally does not limit rights protections to citizens. States' obligations towards individuals do not depend on their particular legal status, except for a limited number of provisions explicitly applicable to special categories, which are generally limited to the right to vote, and to hold public office.²

The 1982 Law, enacted by an unelected and xenophobic military government, embedded in legislation the concept of "national races" (Burmese: တိုင်းရင်းသားလူမျိုးများ / *taingyintha lumyo mya*). Previously, the concept of "indigenous races" had existed in national law, since 1948.³ Section 3 of the 1982 Law attributes the "national races" to eight specific ethnic groups. The Law introduced a corresponding hierarchy of citizenship categories that effectively prescribes first-class and second-class citizens based on this framework. Members of "national races" are considered as (full) "citizens", while others, including individuals with mixed ancestry, may be eligible for "associate citizenship" or "naturalized citizenship" (for a discussion of these concepts, see the above text box). Under this law, the legal rights of associate and naturalized citizens are inferior, are subject to restrictions, and may also be subject to revocation. The 1982 Law, and three related bylaws enacted in 1983, contain an unwieldy total of 26 chapters, with 251 sections and 51 forms.

The intentionally discriminatory character of the 1982 Law, and its equally discriminatory implementation in practice, partly explains why many residents lack a legal identity (more than 25 percent, according to the 2014 Census).⁴ Under this system, many life-long residents of Myanmar have effectively been rendered stateless,⁵ including members of entire ethnic groups, and children of mixed ancestry. While section 347 of the 2008 Constitution states "The Union shall guarantee *any person* [emphasis added] to enjoy equal rights before the law," other constitutional provisions conflict with this, and with principles of international human rights law, by narrowly defining rights as being limited only to citizens. The State generally does not recognize its obligations to respect and to protect the rights of those who do not qualify for citizenship under domestic law, due to its discriminatory provisions and or application.

The resulting system institutionalizes discrimination on the basis of race or ethnicity. Second-class citizens, including persons colloquially labeled as "mixed blood," experience varying types and degrees of discrimination, particularly in their dealings with the State, affecting nearly every aspect of life, from freedom of movement to registering marriages to accessing education. Discrimination and its effects are more acute for persons who are not recognized as citizens at all, based on their race or ethnicity. In addition, certain constitutional provisions restrict the rights of citizens who have an immediate relative (parent, spouse or child) who is not a citizen, including the right to stand for parliament or to become President.

This situation is compounded by a lack of access to justice in Myanmar, including the rights to judicial review, remedies and redress.⁶ This system severely undermines the ability to develop an inclusive democracy in line with the rule of law.

In this 14-page legal briefing (17 pages in Burmese), the International Commission of Jurists (ICJ) identifies key provisions of international law and national law related to citizenship in Myanmar, and assesses these in relation to rule of law principles and international human rights law. This assessment, primarily focused on the 2008 Constitution and the 1982 Citizenship Law, informs recommendations on how the Government can ensure laws comply with international human rights law and rule of law principles. This paper does not add to the extensive existing documentation of people's experiences under these laws;⁷ instead, the ICJ analyses how the legal framework itself constitutes and contributes to violations of human rights, and why it can and should be reformed.

The Government of Myanmar could pursue a number of key opportunities and take meaningful and tangible steps now to align the country's citizenship legal framework and its application with rule of law principles and the State's international human rights law obligations, including:

1. Legislative reform to laws related to citizenship in Myanmar:
 - a. Promptly initiate a review of the 1982 Law, as recommended in 2017 by the Government's own Commission chaired by the late United Nations (UN) Secretary-General Mr Kofi Annan;⁸
 - b. Develop a new citizenship law to replace the 1982 law and its bylaws, in order to conform to rule of law and democratic principles, including of non-discrimination, and to implement the State's obligations under international human rights law, particularly under treaties binding upon Myanmar, such as the Convention on the Rights of the Child (the CRC). Any new law needs to be developed inline with international best practice, and to ensure consistency with constitutional protections, including equality and equal protection before the law (section 347) and the right to due process (section 381).
 - c. Review and revise the draft Child Rights Bill, currently under consideration by the Union Parliament and the Union President, to ensure full compliance with its stated objective of implementing the CRC, particularly the right of a child to acquire a nationality, and the State's obligation to avoid statelessness, in article 7 of the CRC, thereby enabling the reduction of statelessness and the acquisition of Myanmar citizenship for children.
2. Constitutional reform, through opportunities arising from the establishment of a Constitutional Amendment Committee early this year,⁹ specifically to:
 - a. Expand the narrow definition of "fundamental rights" to constitutionally protect the rights of all persons in Myanmar, without discrimination (with limited exceptions restricted to specific political rights). To give this effect in line with section 347 of the Constitution, the term "citizens" should be replaced with "any persons," at least in the following constitutional provisions: sections 21 (right to equality, liberty and justice); 34 (freedom of religion or belief); 348 (non-discrimination), 349 (equal opportunity); 354 and its subsections (freedom of assembly, expression and association); 356 (property); 357 (privacy); 366 (education); 357 (health); 370 (livelihoods). None of these amendments overrides the Government's authority to enforce existing related legislation, and adopt further legislative provisions as it sees fit, for so long as they align with the Constitution, and international human rights law obligations binding on the country.
 - b. Protect the rights of all citizens to fully participate in democratic processes, in line with international law, by amending the following constitutional provisions which place restrictions on those with a family member who is not a citizen: section 59(f); 120(b) and 152(b).
3. By instituting interim measures to address discrimination on the basis of race or ethnicity, including:
 - a. By instructing the relevant authorities to: (i) accept and duly process citizenship applications by any person, inline with a non-arbitrary and non-discriminatory application of section 6 of the 1982 Citizenship

- Law; and (ii) provide reasoned written decisions that can be subject to administrative and judicial review.
- b. By instructing the relevant authorities to review existing policies and procedures (including the 2014 Immigration Department Handbook) with a view to aligning these with section 347 of the Constitution, rule of law principles and the State's international human rights law obligations.
- c. By considering further options, such as transparency and anti-corruption measures, to improve the authorities' accountability.

Development partners, including UN Member States as well as International Finance Institutions, and UN agencies, must also ensure that assistance to the Government enables necessary reforms and does not in any way entrench the existing discriminatory system, inline with recommendations of the Government's advisory commission and with UN resolutions. This is particularly important with respect to the repatriation of refugees from Bangladesh, Malaysia, Thailand and other countries; and in relation to the Government's plans to update national documentation systems, including by digitalizing identity cards issued by State authorities.

2. Background

During five-odd decades of military rule in Myanmar, unelected military governments enacted the key instruments establishing the legal framework for citizenship in the country. The Burma Socialist Program Party, chaired by General Ne Win, introduced the 1982 Law and its three 1983 procedures,¹⁰ repealing two earlier laws related to citizenship.¹¹ At the time, General Ne Win framed the law in xenophobic terms, purportedly, as a necessary response to inward migration into then-Burma dating back to 1824, including by the so-called "camp followers" of the British colonial government, in apparent reference to persons with South Asian descent.¹² In 1997, Senior General Than Shwe, chairperson of the State Peace and Development Council, introduced limited amendments to the 1982 Law.¹³ The 2008 Constitution, developed in the period of governments led by Senior General Than Shwe, reaffirmed existing restrictions on political participation by persons whose parent or parents the State does not recognize as citizens, and also introduced other restrictions, including section 59(f), which denies a citizen the right to be elected to the highest political office,¹⁴ by barring them from becoming the President of the Union if a member of their immediate family is not a citizen.

While the Union Solidarity and Development Party (USDP) led the government from March 2011 to March 2016, Daw Aung San Suu Kyi, the National League for Democracy (NLD) party leader, called for the 1982 Law to be revised.¹⁵ Using existing laws, the USDP-led Government introduced significant albeit limited initiatives to provide identity cards to members of recognized "national races" in conflict areas, whose lack of documentation was associated with Myanmar's long-running civil wars.¹⁶ Yet the USDP broadly opposed any changes to the law,¹⁷ instead redoubling its resort to complicated processes for citizenship "scrutiny" and "verification".¹⁸ In the process of its Universal Periodic Review at the UN Human Rights Council in 2015, Myanmar accepted only one of 17 recommendations specifically related to citizenship.¹⁹

Soon after the NLD-led government took office in April 2016, a Presidential Notification was issued in October to establish an inter-ministerial group to review the status of former citizens, who had acquired citizenship of other countries and now sought to return to Myanmar.²⁰ Albeit limited in scope, this was significant as the first change to the legal framework for citizenship since 1997. It further indicated that the NLD recognized the existence of problems associated with the 1982 Law, and constituted a nod to the need for reforms as highlighted by Myanmar legal scholars.²¹

In August 2017, the government's own Advisory Commission on Rakhine recommended a review of the 1982 Law.²² Publicly, the government broadly accepted its recommendations, and a committee to implement these was established.²³ However, the Government has sent mixed messages about its commitment to

implementing this and related recommendations to address discrimination.²⁴ To date, there has been no demonstrable progress to initiate a review, or reform, of the Law.²⁵

The UN Security Council, General Assembly and Human Rights Council continue to call upon Myanmar to address discrimination, including through reviewing the 1982 Law.²⁶ In 2014, Tomás Ojea Quintana, the then Special Rapporteur on the human rights situation in Myanmar,²⁷ noted that “For more than 20 years, holders of the special procedures mandate on the situation of human rights in Myanmar have been advocating reform of the 1982 Citizenship Act.”²⁸

Human rights concerns arising from the discriminatory citizenship arrangements extend across the country. Many actors – including the ICJ – have rightly highlighted the situation of Rohingya Muslims, who the State generally does not recognize as citizens, and whose situation, as a result, is an egregious example of the damaging impact of the 1982 Law and particularly of its discriminatory application.²⁹ At the same time, numerous other ethnic and religious groups – including but not limited to persons of Indian, Chinese, Nepali and Pashtu descent – are also not considered as “nationals,” and as a result typically do not enjoy rights otherwise afforded under the Constitution and international human rights law to citizens.

Changes to political and economic arrangements in Myanmar since 2011 have further illuminated problematic outcomes linked to the legal framework for citizenship. More than 25 percent of persons enumerated in the nationwide 2014 Census lack a documented legal identity.³⁰ The status of those returning to Myanmar after periods abroad as refugees or migrants is so far unresolved. The number of marriages between citizens and non-citizens, and between citizens of different ethnicities, raises complex questions, including for the children of these unions. The high prevalence of persons with an unclear or insecure legal status poses challenges for businesses considering investments in employment-generating industries. Proposals for an electronic population registry, linked to the issuance of “smart ID cards”, are under consideration: this may provide an opportunity to institute reforms to address discrimination; yet without requisite legal reforms, this initiative may entrench the current system, and there is not yet any indication that associated law reform is being considered.³¹

Despite the widespread harmful impacts of the highly discriminatory and arbitrary legal framework for citizenship in Myanmar, law reform remains highly contentious. Studies suggest significant differences between the perceptions of Buddhist and non-Buddhist residents toward the relationship between religion and citizenship.³² And while many civil society actors and members of think tanks and legal scholars have told the ICJ that there is a need to reform both concepts and laws related to citizenship, many are reluctant to speak out publicly on the issue for fear of backlash, and so far no significant political or social movement has taken this on as an issue.³³

3. Applicable international human rights law and standards

3.1 Myanmar’s international human rights law obligations

Like all States, Myanmar has duties under international human rights law to respect, protect and fulfill the human rights of all persons in its territory or otherwise within its jurisdiction, without discrimination on any grounds, including citizenship or migration status.

Myanmar is party to four of the principal international human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties enshrine international law obligations binding on Myanmar, and the treaty bodies monitoring implementation of each of these treaties interpret and provide guidance on their provisions, including through the adopting of concluding observations and general comments.

Many of the rights reflected in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) form part of general

international law and customary international law, and are therefore also applicable in Myanmar. General rule of law principles, including the principle of non-arbitrariness and the principle of non-discrimination, are also fully binding on Myanmar.

3.2 The right to citizenship/nationality

The right to citizenship/nationality is clearly recognized in international law. International jurisprudence has consistently reaffirmed that the regulation of citizenship under domestic law is subject to States' human rights obligations under international law, including with respect to the right to nationality, and the prohibition on arbitrary deprivation of nationality.³⁴ Under national law, being a national of one's State generally entitles the individual concerned to citizenship of that State.

Article 15 of the UDHR affirms that: "(1) Everyone has the right to a nationality; and (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 15 of the UDHR entails the right of everyone to acquire, change and retain a nationality.³⁵ While under international law States may determine criteria to establish who their nationals are, such discretion is not absolute. Several provisions of the UDHR, for example, affirm the principle of non-discrimination, including article 7, which codifies the equality of all before the law and their entitlement, without any discrimination, to equal protection of the law.

Under the CRC, the right to nationality is provided for in articles 7 and 8, while article 3(1) of the Convention require States parties to take the best interests of the child as a primary consideration in all actions concerning children.³⁶ Article 7 states that: "(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents; and (2) States Parties shall ensure the implementation of these rights... in particular where the child would otherwise be stateless." There is no hierarchy of rights within article 7; all are fully applicable to States parties to the CRC. States must respect the rights in the Convention "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."³⁷ General comments of the Committee on the Rights of the Child further define State obligations with respect to the right to nationality and the principle of making the best interests of the child a primary consideration.³⁸

Under international human rights law, States have obligations regarding the acquisition, renunciation and loss of nationality, including, in particular, obligations arising from the principle of non-discrimination, the right to equality before the law and equal protection of the law without discrimination on the grounds of race, color, religion, citizenship, nationality or migration status, national, social or ethnic origin, descent, language, political or other opinion, sexual orientation or gender identity, age, gender, health, disability, property, socio-economic, birth or other status.³⁹

States do have some scope in prescribing under their domestic legal framework how nationality may be acquired. States' laws and practice typically recognize three ways in which individuals acquire nationality. The first is through the operation of the *jus soli* doctrine, that is, by virtue of being born on a State's territory. The second is through the *jus sanguinis* doctrine, namely, by virtue of being a descendant (e.g., through parentage) of a State's own national; and the third is through naturalization. Each State determines through their legal framework whether it recognizes and applies *jus soli* or *jus sanguinis* or both, as well as setting out the legal criteria for naturalization. The latter are ordinarily premised on factors such as having an established relationship with the State, through, for example, long-term residence.

In addition to the UDHR, three of the international human rights treaties by which Myanmar is bound, namely, the CEDAW, the CRC and the CRPD, are among the international instruments recognizing and guaranteeing the right to a nationality.

3.3 The rights of non-citizens

Human rights treaties intentionally do not limit human rights protection to citizens. The obligations of States towards individuals do not depend on the particular status or recognition of the status of such persons under domestic or international law, except for a limited number of provisions explicitly applicable to special categories. The exceptions are generally limited to the right to vote, and to hold public office. For instance, all the rights recognized and guaranteed by the UDHR apply to everyone, with the sole exception of the rights under Article 21 (participation in public life, voting and election, access to serve in the public service), which the UDHR expressly guarantees only to citizens. Treaty bodies, including: the Committee on the Rights of the Child;⁴⁰ the Committee on the Elimination of All Forms of Discrimination Against Women;⁴¹ and the Human Rights Committee, which monitors implementation of the ICCPR,⁴² have published various commentaries further elaborating on the rights of non-citizens, and on corresponding obligations upon States Parties.

4. Applicable Myanmar law

Myanmar law regulating citizenship is primarily sourced from the 2008 Constitution and the 1982 Citizenship Law (amended in 1997). These intersect with other laws, such as the 1993 Child Law, and directives and memoranda guiding their implementation, such as the Immigration Department Handbook (17 July 2014) and a “list” of ethnic groups recognized by the State. These directives and memoranda typically have an unclear legal basis, are generally not publicly available, and are often subject to arbitrary implementation.⁴³

4.1 The 2008 Constitution

A variety of rights are constitutionally guaranteed in Myanmar, although many of these are explicitly limited to citizens. These include the right to freedom of religion and belief,⁴⁴ the right to education, to health care and to business and livelihood activities.⁴⁵ Non-discrimination is also explicitly defined as a State obligation toward citizens.⁴⁶ Citizenship status is therefore an important determinant of the human rights guaranteed to individuals in Myanmar under the Constitution, even though section 347 of the Constitution states that “The Union shall guarantee [emphasis added] *any person* to enjoy equal rights before the law and shall equally provide legal protection.”

Many of the rights included in Chapter 8 of the Constitution, on the “Fundamental Rights and Duties of Citizens”, are paired with a clause designed to enable contravention of these rights, including for “full citizens” as well as “associate” and “naturalized citizens”. For example, several clauses feature restrictions on the political rights of citizens who have an immediate family member (daughter, son, mother, father or spouse) who is not a citizen of Myanmar. These include sections 120(b) and 152(b) which restrict membership of the national parliament to a person “who was born of both parents who are citizens.”⁴⁷ Section 59(f) denies a citizen the right to be elected to the highest political office,⁴⁸ by barring them from becoming the President of the Union if a member of their immediate family is not a citizen. These contravene section 38(a) which permits “every citizen” to be elected to political office. Finally, section 392(e) also contemplates rescinding the right to vote, if prescribed by electoral law, without providing any prescribed criteria for or limitations upon this.⁴⁹

The 2008 Constitution, like constitutions before it, includes the concept of “national races,” however these are not named or defined. Under section 345 of the Constitution, citizenship is guaranteed for persons whose parents are both “nationals” (members of a “national race”), and also for persons who were citizens at the time the Constitution entered into force.⁵⁰ Importantly, this does not explicitly preclude any other particular individuals or members of particular groups from qualifying for citizenship of Myanmar.⁵¹ Section 346 allows such matters to be prescribed by law, thus authorizing the legislature to address any legal process related to citizenship, including eligibility, “scrutiny”,⁵² registration, naturalization, termination and revocation.⁵³ The legislature may thus address the concerns identified above through, among others, legislative amendments, repeals and by adopting new laws.

Section 11 of the Constitution provides for a certain separation of powers, including the independence of the judiciary (although qualified),⁵⁴ and Chapter 6 of the Constitution describes the jurisdiction of Myanmar's courts. The Constitution recognizes the right to redress in accordance with principles of judicial independence and due process,⁵⁵ including the right to appeal judicial decisions,⁵⁶ and to seek judicial review of administrative decisions by executive powers, including those of ministers, civil servants and statutory bodies.⁵⁷ Procedures established to implement legislation must be in conformity with the Constitution.⁵⁸ Where constitutional provisions appear to conflict with one another, the Constitutional Tribunal may, under certain conditions, provide an authoritative interpretation;⁵⁹ alternatively, constitutional reforms can clarify the law.

Myanmar's Constitution recognizes obligations arising out of international treaties, including human rights instruments binding on the country, so violations of the State's international human rights law obligations are also unconstitutional.⁶⁰

4.2 The 1982 Citizenship Law

The 1982 Law is read together with three separate bylaws, the 1983 Citizenship Procedures, that guide implementation of the law: Notification 13/83 (with respect to full citizenship), Notification 14/83 (with respect to "associate" citizenship) and Notification 15/83 (with respect to "naturalized" citizenship). Together these four legal instruments contain an unwieldy total of 26 chapters, with 251 sections and 51 forms.

Governance

The 1982 Law authorizes the establishment of a ministerial-level "Central Body," with broad determinative powers, including for revocation and termination of citizenship.⁶¹ Its four members are the ministers of Defence, of Home Affairs, of Immigration and Population and of Foreign Affairs (two of whom are military appointees).⁶² While the Ministry of Immigration and Population is a key authority with respect to citizenship, the Law and its procedures list a range of other State actors and authorities with responsibilities, from Village Tract or Ward officials all the way up to the Union level.⁶³

The President or Union Government (formerly "Council of State")⁶⁴ has a range of powers, including: "to decide whether any ethnic group is national or not" (section 4); to confer or revoke citizenship of an individual (section 8); to set out procedures (section 75); and to review decisions of the Central Body (section 70).⁶⁵ With respect to this, it is worth noting that the four members of the Central Body are also members of the Union Government with relatively powerful portfolios.

Categories of citizenship

The 1982 Law introduced a three-tiered hierarchy of citizenship categories: (full) "citizen," "associate citizen" and "naturalized citizen". Each category is based on different criteria for citizenship and involves different legal privileges, protections and penalties (criminal penalties in the case of "associate" and "naturalized citizens").

Full citizenship is conferred under section 3 of the 1982 Law to persons considered to be "nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan" groups, which the 2008 Constitution broadly refers to as "national races".⁶⁶ Full citizens enjoy legal rights and protections to the extent prescribed in Myanmar law. Members of groups falling outside "national races", but who are descendants of families permanently living in Myanmar since before the first Anglo-Burmese War of 1824, may also qualify for full citizenship.⁶⁷ Those who are not members of an officially designated ethnic group may also be full citizens, provided they were citizens when the 1982 Law entered into force,⁶⁸ or by meeting criteria listed in section 7.⁶⁹

"Associate" and "naturalized citizenship" categories generally apply to persons who are not considered to be a member of a "national race" group, and/or who do not have two parents who are citizens, and who therefore do not qualify as "citizens by birth."⁷⁰ The key distinction between these two categories is whether or not the applicant, or their parent/s, had applied for citizenship under the 1948 Union Citizenship Act prior to the enactment of the 1982 Law.⁷¹ Chapters 3 and 4 of the 1982 Law list ancestral scenarios that qualify or disqualify persons from these

citizenship categories. Laws existing before 1982 are relevant to determining if a person or their family members were considered as citizens prior to the enactment of the 1982 Law. The relevant ones include provisions of the 1947 Constitution, the 1948 Citizenship Act and the 1974 Constitution.⁷²

The 1982 Law grants “associate” and “naturalized citizens” the rights of full citizens “with the exception of the rights stipulated from time to time by the (President or Union Government).”⁷³ In addition to this qualification of their rights under the 1982 Law, and the limitations on their rights included in the Constitution, a range of grounds are included for possible revocation of their citizenship. Section 8(b) permits the revocation of “associate” or “naturalized citizenship” “in the interests of the State.” More specific grounds for revocation of citizenship include failure to provide a written pledge of allegiance to the State,⁷⁴ “showing disaffection or disloyalty to the State by any act or speech or otherwise”,⁷⁵ or “committing an offence involving moral turpitude...”⁷⁶ Revocation of citizenship may also accompany sentencing upon conviction for certain criminal offences prescribed in the 1982 Law (see below). In comparison, for persons who have lawfully obtained full citizenship, the only grounds for citizenship revocation are if the person takes citizenship of another country.⁷⁷

Unlike the 2008 Constitution, the 1982 Law explicitly excludes, or contemplates the exclusion of, certain individuals from qualifying for any citizenship. Exclusions are generally, although not uniformly, subject to administrative discretion wielded by authorities at various levels. This can include, in circumstances prescribed in law, the child of a citizen and a non-citizen,⁷⁸ and the adopted child of citizens if the birth parents are non-citizens.⁷⁹ Persons who have been a citizen or would otherwise qualify for citizenship but have taken citizenship of another country have no right to reapply for citizenship.⁸⁰ Marriage to a Myanmar citizen does not qualify a foreigner for citizenship;⁸¹ conceptually, use of the term “naturalization” in Myanmar law is somewhat misleading, as there are limited, if any, pathways for foreigners to gain citizenship, unlike in many other jurisdictions.

Criminal offences and penalties

The 1982 Law and its 1983 procedures define certain criminal offences, and set out severe penalties upon conviction, including, for example, 10 years’ imprisonment and a fine for failure to surrender a cancelled certificate of citizenship,⁸² or 15 years’ imprisonment and a fine for forgery.⁸³ Section 18 of the Law stipulates criminal penalties and revocation of citizenship for persons who are considered to have “acquired citizenship by making a false representation or by concealment.” This can only apply to persons not considered as a “citizen by birth.”⁸⁴ Persons who have lawfully acquired full citizenship are exempt from criminal penalties, except if they abetted a crime.⁸⁵ A range of other criminal penalties may apply only to “associate” and naturalized citizens;⁸⁶ as noted, these can be imposed alongside revocation of citizenship. Non-citizens may also be subject to criminal penalties under the 1982 Law and its procedures, as well as under other applicable laws.⁸⁷ In cases involving an alleged criminal offence, the 1982 Law and its procedures reaffirm the role of the judiciary,⁸⁸ and the applicability of the Code of Criminal Procedure⁸⁹ (note: section 71 of the 1982 Law may affect a prosecution or appeal).⁹⁰

Decision-making and appeals

Chapter 7 of the 1982 Law allows persons to appeal a decision of the Central Body regarding citizenship⁹¹ to the Union Government (formerly “Council of Ministers”).⁹² Various authorities at multiple levels of government also play roles in the appeal process, mainly by exercising procedural functions of an administrative nature, such as by receiving and processing appeal applications.⁹³ Under Chapter 5 of the 1983 procedures, an application to appeal a decision of the Central Body can be lodged with local authorities, who are responsible to transmit this to the Union Government. Section 71 of the 1982 Law states that “no reason need be given by organizations invested with authority under this Law in matters carried out under this Law.” The Law also states that a Union Government’s decision regarding a citizenship matter “is final”, thus notionally exempt from judicial review, according to the common

interpretation of this provision in Myanmar (see analysis in part five).⁹⁴ As noted above, the four members of the Central Body are also part of the Union Government.

4.3 Other applicable laws, rules and regulations

As with most areas of law, the 1982 Law cannot be viewed in isolation, as it closely intersects with constitutional provisions and other legislation, as well as the State's obligations under international human rights law. The law regulating citizenship is particularly important because it can determine or influence the ability of individuals to access a range of rights and services provided for in other laws. In Myanmar, laws with particularly significant reference to citizenship arrangements tend to include implicit or explicit references to the 1982 Law. For example, section 10 of the 1993 Child Law states that "Every child shall have the right to citizenship in accordance with the provisions of the existing law" (drafts of the 2019 Child Rights Bill, seen by the ICJ, contain a similar provision).⁹⁵ Interpretations of this provision, including by government officials, typically privilege the existing law – in this case the 1982 Citizenship Law – over the primary objective of the Child Law, which is to implement Myanmar's obligations under Convention on the Rights of the Child (see below).⁹⁶

Various other instruments exist that are specifically related to citizenship, including procedures and guidance. Their legal basis is generally unclear, and most are not publicly available. These instruments include, inter alia, an oft-cited "list of 135" ethnic groups which appears to have emerged in 1990,⁹⁷ and the 2014 Immigration Department Handbook, which compiles previously issued directives.⁹⁸ Terminologies included within these instruments, such as the so-called "mixed-blood nationals" category of citizens (Burmese: သွေးနွေးနွေးနိုင်ငံသားများ / *thwey naw naing nan tha mya*), are widely applied in practice throughout Myanmar,⁹⁹ and are common vernacular of officials at the highest levels of government.¹⁰⁰ Procedures governing applications for citizenship "scrutiny", registration and the issuance or revocation of documentation, including for National Registration Cards and cards associated with a "citizenship verification process" are also understood to be informed and guided by these other instruments, in addition to laws and bylaws.

5. Findings

5.1 The 2008 Constitution

The narrow framing of "fundamental rights" in Chapter 8 of the Constitution, and the restrictions placed upon these rights, including for citizens, run contrary to principles of non-discrimination, democratic governance and the State's obligations under international human rights law. This necessitates constitutional reforms to introduce a more expansive definition of "fundamental rights" which includes greater protections from discrimination regardless of a person's citizenship status, consistent with international law and standards including the obligations binding on Myanmar.

The Constitution generally limits "fundamental rights" to citizens. This is contrary to the principle of equality before the law and equal protection of the law in section 347 of the same instrument, which states: "The Union shall guarantee *any person* [emphasis added] to enjoy equal rights before the law and shall equally provide legal protection." For example, the rights to health, education and livelihoods, which the Constitution guarantees, are restricted to citizens, in violation of the State's obligations to respect and to protect these rights under the International Covenant on Economic, Social and Cultural Rights. The constitutional right to freedom of religion or belief is also limited to citizens only, contrary to international human rights law, including the UDHR. These illustrative examples demonstrate that restrictions are also incompatible with rule of law principles of non-discrimination and non-arbitrariness. Such restrictions should be removed, to protect and guarantee in law the "fundamental rights" of all persons within Myanmar, regardless of citizenship status, with exceptions limited to specific political rights, consistent with article 21 of the UDHR.¹⁰¹

Constitutional provisions for persons recognized as citizens, that restrict "fundamental rights" of a political nature on the basis of their familial relationship with a non-citizen, are also arbitrary and discriminatory. Perhaps the most glaring example of this is section 59(f), which appears to have been designed specifically to exclude

State Counsellor Daw Aung San Suu Kyi from becoming President of the Union, on the discriminatory and arbitrary basis that her children are foreign nationals. The effects of sections 120(b) and 152(b) are more widespread, by excluding citizens from standing as candidates for the national parliament if they cannot satisfactorily prove to the authorities that both of their parents are/were citizens (and these arrangements are mirrored at lower levels of government).¹⁰² These restrictions are also contrary to section 347 of the Constitution, to rule of law principles and to the State's international human rights law obligations.

The constitutional provision against discrimination is itself discriminatory, as well as being contradictory, because its application is limited based upon citizenship status: "The Union shall not discriminate [sic] any citizen... based on race, birth, religion, official position, *status*, [emphasis added] culture, sex and wealth" (section 348). This violates the rule of law and international human rights law principles that States are duty-bound to respect and protect the rights of all persons within their jurisdiction, irrespective of their legal status, including citizenship status (with exceptions to this rule being narrowly defined and generally limited to specific political rights).

While the Constitution privileges "national races," importantly its provisions do not prescribe what these groups are, nor do they exclude members of other groups from citizenship. Myanmar's national legislature has clear authority to determine matters related to citizenship, such as its issuance and its revocation, including through law reform.¹⁰³ The executive branch, the "Union Government," is also empowered to direct ministries to interpret existing laws inline with the Constitution, including provisions affirming the applicability of the State's international human rights law obligations.¹⁰⁴

Section 347 of the Constitution, which affirms the rule of law and non-discrimination principle that "any person" shall enjoy equal rights and protections, offers a sound legal basis for the interpretation of the Myanmar's Constitution on citizenship matters, as well as to ground the necessary reforms of the Constitution itself, in line with Myanmar's international human rights law obligations and rule of law principles.

5.2 The 1982 Citizenship Law

The 1982 Law is highly discriminatory and arbitrary for its use of race or ethnicity as the basis to assess the rights of people in Myanmar, and the State's obligations toward them. The "associate" and "naturalized" categories of citizenship, described above in part four, are better understood as second-class citizenship. Under the 1982 Law, persons attributed with these categories may be subject to prosecution for a range of criminal offenses that are not applicable to full citizens, which is discriminatory. And unlike full citizens, their rights are qualified in the 1982 Law, with their citizenship subject to revocation on a range of grounds. Many of these grounds – for example "showing disaffection or disloyalty to the State by any act or speech or otherwise" – are vague or overly broad, and so do not conform to the rule of law principle of legality.

"Associate" and "naturalized" categories of citizenship under the 1982 Law are available to persons not recognized as a member of a "national race", but who can nonetheless prove an unbroken ancestral link dating back almost two centuries (to 1824) to the territory of modern-day Myanmar, or who can prove a link that predates the establishment of the State in 1948. Both of these scenarios tend to be difficult to prove to the satisfaction of authorities, particularly if the law is being interpreted in the discriminatory manner for which it appears to have been designed, in a context whereby, to date, more than 25 percent of the population reportedly lacks official documentation, let alone seven decades ago.¹⁰⁵ People are effectively rendered stateless if they cannot meet these criteria to the satisfaction of authorities, even if they and or their family have an established relationship with Myanmar, through, for example, long-term residence. In each of these scenarios, the intent and the effect of the laws violate several of the State's international human rights law obligations, including the right to nationality under article 7 of the CRC, and the principle of the best interests of the child enshrined in that same convention. Compounding these challenges is the reality that most people in Myanmar do not use a family name,

which in other countries is used as a primary means to trace ancestry, which adds to difficulties in reasonably satisfying eligibility requirements for citizenship.

The principle of legality

The principle of legality is a recognized general principle of law, a foundational requirement contained in almost every international human rights instrument,¹⁰⁶ as well as a basic tenet of criminal law.¹⁰⁷ Law needs to be predictable, fairly certain and capable of being respected. Vague and overbroad legal provisions, purporting to prevent intangible social harms, such as “disloyalty to the State”, which can be used to punish a wide range of behaviors enforced in an abusive manner, likely fail to satisfy the principle of legality.¹⁰⁸ As such, the requirement of legality, and more precisely, legal certainty, or *lex certa*, is a general, basic principle of law. Laws must be clearly, precisely and comprehensibly drafted so they can be ordinarily understood, implemented and enforced. Particularly with respect to criminal law provisions, they ought to be formulated sufficiently clearly and precisely to ensure that individuals can regulate their conduct according to the law. Lack of clarity in law also allows selective, arbitrary or discriminatory interpretations by authorities responsible for implementing provisions, a situation that is particularly problematic when combined with the high level of discretion with which the authorities in Myanmar operate, and the lack of access to redress through the courts.

Administrative arrangements to implement the 1982 Law are particularly complex and opaque, to the extent that they are not reasonably possible to effectively follow and implement. As noted above, the 1982 Law and its three 1983 Procedures contain an unwieldy number of provisions and forms. Determinative powers, including to issue and to revoke citizenship, are generally delegated to Union level authorities, but in practice exercised at lower levels, although it is unclear how or what guidance is being used to make such decisions. Under the 1982 Law, two of the Central Body’s four members are direct appointees of the military, and report to its Commander-in-Chief. This means that, as a matter of law, under current legal arrangements, civilian executive authorities do not yield effective control over matters related to citizenship: this is incompatible with rule of law principles.¹⁰⁹

The 1982 Law places significant limits on the right to seek an independent review of administrative decisions related to citizenship, including judicial review. The process for an appeal of the decisions taken by the Central Body is convoluted, with the application to appeal having to pass various departments on its route to the Union Government, and it is unclear if decisions are made at ministerial-level or by delegates, if at all.¹¹⁰ Such decisions cannot reasonably be viewed as independent or impartial, given the Central Body and Union Government share members, and so any scenario would involve members of the Central Body or their delegates considering an appeal to their own decision.

As well as the significant deficiencies in the administrative appeal process, section 70(b) of the 1982 Law declares the Union Government’s decision on appeal to be “final,” in violation of the principle of separation of powers in the constitution, including with respect to the authority of the courts to review executive decisions. Courts must have the power to review decisions taken by the executive that are capable of having an impact on “fundamental rights” guaranteed in the Constitution. Therefore, the finality clause described above, and which is featured in many legislative texts in Myanmar, undermines rule of law and the separation of powers, and is contrary to the judiciary’s constitutional authority of review of executive decisions in matters of “fundamental rights”.¹¹¹ Additionally, section 71 of the 1982 Law, which states that the authorities do not need to provide reasons for their decisions, is also contrary to principles of due process and effective judicial review, since it undermines the right of the affected persons to be provided with reasoned decisions in matters that concern their “fundamental rights”, as well as their ability to bring an effective challenge against the said decisions by appealing them. Section 71 also undermines their right to seek an effective review of the said decisions, including

a judicial review, whenever such decisions are upheld on appeal. This legal arrangement violates the constitutional right of due process (section 381).

5.3 Other laws and instruments

A person's legal status conferred under provisions of the Constitution and the 1982 Law effectively determine many of the rights and obligations, or lack thereof, under a range of other laws. These include provisions of laws such as those regulating marriage, land, property, housing, elections, employment and business activities.¹¹²

Among these, the 1993 Child Law is of particular significance given its relationship with the right to nationality and the State's international human rights law obligations under the CRC – as is the draft Child Rights Bill that has been under consideration by Myanmar's parliament and the President of the Union at the time of writing (see annex 1, below). The 1993 Child Law, and the draft Bill that would replace it if passed, share the primary stated objective of implementing Myanmar's State obligations under the CRC. However, section 10 of the Child Law, which states that "Every child shall have the right to citizenship *in accordance with the provisions of the existing law* [emphasis added],"¹¹³ has been widely interpreted by authorities as meaning that, with respect to the right to nationality, provisions of the 1982 Citizenship Law take precedent over provisions of the 1993 Child Law. Given that the 1982 Law does not enable realization of the right to nationality for many children, the formulation of section 10 of the 1993 Child Law, by deferring to the 1982 Law with respect to citizenship, manifestly undermines the aims of the Child Law, particularly the objective of implementing the CRC (section 3(a) of the Law), and the principle of considering the best interests of the child. This is particularly the case in relation to article 7 of the Convention which, *inter alia*, enshrine the child's rights to registration at birth and to acquire a nationality, and affirms the State's obligations to ensure this right is fulfilled particularly when a child would otherwise be stateless. Making a child's right to acquire a nationality subservient to other pre-existing domestic legal provisions, chiefly those featured in the 1982 Citizenship Law, render child laws discretionary and open to interpretation, likely in violation of human rights. The content and effect of section 10 of the Child Law also violates the section 347 constitutional guarantees of equal rights and equal legal protection, and is therefore unconstitutional.

Drafts of the Child Rights Bill contain similar qualifiers on a child's right to nationality, based on different drafts seen by the ICJ. Regardless of the possible insertion of the term "in accordance with existing laws" (as reflected in the 1993 Child Law), the right of a child to registration at birth and to nationality should nonetheless be interpreted in accordance with the objective of the law itself, which is to implement Myanmar's obligations under the CRC. Given that both the 1982 Citizenship Law and the 1993 Child Law (and the Bill, should it become law) carry equal legal status as pieces of legislation, and in light of the fact that the 1982 Law does not specifically address the topic of a child's right to registration at birth and to acquire nationality, the Child Law should prevail in any interpretation of the legal framework in this respect, inline with legal principles.¹¹⁴ However, to avoid confusion, and to conform to the principle of legality, child laws should not include the adage "according to existing law," at least with respect to the guarantees toward children under the CRC. The current and proposed arrangement does not enable realization of the right to nationality for many children, and therefore violates the State's obligations under the Convention on the Rights of the Child.

With regards to non-legislative legal instruments, such as memoranda, directives and manuals, which guide implementation and application of citizenship arrangements, as noted above in part four, their content is generally opaque and their legal basis unclear. Yet, in practice, these instruments carry significant weight in guiding official determinations related to citizenship, particularly the 2014 Immigration Department Manual and the so-called "list of 135" ethnic groups, a list of "ethnic groups" purportedly officially recognized by the State.¹¹⁵ At their worst, these instruments enable and even encourage human rights violations and abuses, including by limiting people's access to government offices and services as a result of attributing a "mixed-

blood” colloquial term to “associate” and “naturalized” citizens and to other persons of mixed ancestry, and also by effectively rendering entire sectors of the population of the country statelessness status.¹¹⁶ These memoranda, directives and manuals are generally not publicly available or are otherwise unclear; as such they often fail to meet transparency and legal certainty requirements. In addition, their unavailability and/or their lack of clarity make it difficult to assess their content in light of relevant national and international law obligations. A lack of clarity in procedures and lines of responsibility also undermines accountability and redress, because persons potentially adversely affected by determinations on their citizenship may not know to which authorities they need to appeal or challenge a decision, therefore severely undermining the constitutional right to due process.

5.4 Conclusion

Myanmar’s legal framework for citizenship is inconsistent with the country’s own Constitution, as well as being manifestly in violation of the State’s obligations under international human rights law. As this briefing describes, the country’s citizenship law framework effectively undermines human rights and the rule of law throughout the country.

Most of the “fundamental rights” that the 2008 Constitution purportedly guarantees are, in fact, only applicable to an already limited category of “full citizens”, as described above, contrary to the non-discrimination principle under international human rights law according to which human rights are to be guaranteed to all persons, regardless of their citizenship status, bar a few narrow exceptions limited to political rights. Furthermore, constitutional provisions restrict the political rights of citizens to participate in public life, including as a Member of Parliament or as President of the Union, on the basis that an immediate family member/s is not a citizen of Myanmar. In both instances, the formulation of these provisions is discriminatory and arbitrary.

The 1982 Citizenship Law and its procedures are highly discriminatory and arbitrary in both design and application. This violates the Union’s constitutional guarantee to “any persons” of equal rights and legal protection before the law (section 347), as the 2008 Constitution clearly states that existing laws and bylaws are only operative “in so far as they are not contrary to this Constitution” (sections 446 and 447). As a result, for instance, the 1982 Law is largely unconstitutional.¹¹⁷ The discriminatory provisions and effects of the 1982 Law also violate Myanmar’s obligations under international human rights law, including but not limited to its obligations under the CRC, CEDAW and the ICESCR.

Other domestic laws and instruments, including directives or policies with an unclear legal status, or without an apparent legal status altogether, compound the already detrimental human rights impact of the 1982 Citizenship Law by requiring – in law or in interpretation – that its implementation should take precedence over that of other legal provisions. This violates rule of law principles, reinforces a discriminatory system instituted by an unelected military government, and undermines efforts to develop an inclusive, democratic society in Myanmar.

Critically, in addition to the above, the ICJ is also concerned that the legal right to citizenship alone is not a panacea. Notwithstanding official recognition of their status as citizens, some groups, in particular, continue to experience heightened levels of discrimination,¹¹⁸ and are still treated as non-citizens, in violation of their constitutional rights and the State’s international law obligations to respect and to protect their human rights.

Discrimination and arbitrariness in the application of laws, particularly against people with South Asian ancestry, but also against members of other groups, as recognized throughout this report, is guided by bias conceptualizations of rights in Myanmar law from an era of military rule characterized by xenophobia. Reform to Myanmar’s citizenship laws is, therefore, a critical starting point to addressing associated discrimination against people throughout the country, alongside immediate changes to the discriminatory application of these laws.

6. ANNEX



International
Commission
of Jurists

Advocates for Justice and Human Rights

Asia Pacific Office
10/1 Soi Ari 2
Phaholyouthin Road
Samsennai, Phayathai
Bangkok 10400
Thailand

t: +66 (0)2 619 8477/8478
f: +66 (0)2 619 8479

His Excellency U Win Myint
Office of the President
Republic of the Union of Myanmar
Nay Pyi Taw, Myanmar

19 June 2019

Subject: aligning the Child Rights Bill with international human rights law

Your Excellency,

We respectfully share this commentary and recommendation regarding the Child Rights Bill ("the Bill"), submitted by Myanmar's Union Parliament to your Office on 7 June 2019.

The International Commission of Jurists (ICJ), composed of eminent judges and lawyers from all regions of the world, promotes human rights and the rule of law by using legal expertise to strengthen national and international justice systems. The ICJ has its headquarters in Geneva, its Asia Pacific Regional Office in Bangkok, and has had a presence in Myanmar since 2014, working with a range of governmental and non-governmental justice sector actors.

The objectives of this Bill are generally welcome, particularly the stated objective to implement Myanmar's obligations under the UN Convention on the Rights of the Child (the CRC). However, the ICJ notes that the specific section related to nationality/citizenship does not appear consistent with this stated objective of the Bill, and if implemented would therefore violate the State's international legal obligations under the CRC.

Article 7 of the CRC protects the right of a child to acquire a nationality/citizenship, and obliges States to ensure that national laws do not result in a child being stateless:

1) The child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality* and as far as possible, the right to know and be cared for by his or her parents; 2) *States Parties shall ensure the implementation of these rights* in accordance with their national law and their obligations under the relevant international instruments in this field, *in particular where the child would otherwise be stateless* [emphasis added].

Based upon drafts viewed by the ICJ, the Bill does not protect the legal right of a child to acquire a nationality/citizenship, nor does it satisfy the State's related obligation to prevent statelessness. In a draft viewed by the ICJ, section 22 reads:

မွေးဖွားကြောင်း မှတ်ပုံတင်သည့် ကလေးသူငယ်တိုင်းသည် နိုင်ငံသားဖြစ်မှုဆိုင်ရာ အခွင့်အရေးကို တည်ဆဲဥပဒေပါ ပြဌာန်းချက်များနှင့်အညီသာလျှင်ရရှိစေရမည်။ (Unofficial translation by the ICJ: "Every child registered for birth shall have the right to citizenship only in accordance with provisions under existing law").


Currently, section 10 of the existing 1993 Child Law is formulated in a similar manner (although without recognizing the right to registration at birth), and authorities have widely interpreted this to mean that a child can only acquire citizenship upon fulfilling requirements of the 1982 Citizenship Law and its bylaws. The content and implementation of the 1982 Law, which primarily confers citizenship on the basis of membership of a "national race" is highly discriminatory and arbitrary. This has contributed to statelessness throughout the country, undermining the rule of law and in violation of the constitutional guarantee for equal rights and equal protections before the law (section 347). In its current form, the aforementioned section of the

Bill will likely render similar outcomes, contrary to and undermining the Bill's purpose to implement the CRC, and in violation of the State's obligations under that treaty.

Therefore, the ICJ respectfully recommends that the President request the parliament to review the section of the Bill pertaining to the right to nationality/citizenship, in order to: ensure compliance with the State's obligations under the CRC by protecting the child's right to nationality/citizenship; ensure consistency with objectives of the Bill; and clearly formulate the provision to enable effective implementation by officials and adjudication by courts.

Our legal advisers would welcome an opportunity to discuss this, and to provide any technical assistance to ensure the Bill aligns with international law and standards. We are also sharing the ICJ's new 12-page assessment (14 pages in Burmese language) of the legal framework for citizenship in Myanmar, with recommendations to align this with international law.

Yours sincerely,

A handwritten signature in blue ink that reads "Frederick Rawski". The signature is written in a cursive, flowing style.

Frederick Rawski
Director for Asia and the Pacific
International Commission of Jurists
Bangkok, Thailand
Frederick.rawski@icj.org

Copy: Sean Bain, ICJ Legal Adviser, sean.bain@icj.org

Daw Hnin Win Aung, ICJ Legal Adviser, hninwin.aung@icj.org

¹ Application and interpretation of these terms in Myanmar is generally confusing and inconsistent. In Burmese language there is no uniform or commonly accepted definition of the meaning of “indigenous,” “indigenous races,” “national races,” and “ethnic groups” – either as cultural concepts or legal terms. The issue is important because of the link between these concepts and citizenship in Myanmar’s legal framework. Adding to this confusion is the existence of different translations to and from the English language, and the frequency of mistranslation between the two languages. In both languages, the terms are often conflated. In this report, in both Burmese and English, the ICJ has generally adopted the terms considered to best convey the intended conceptual meaning to readers, except where a term is used in reference to a specific legal provision. Note that section 3 of the 1948 Union Citizenship Act contains the term “any of the indigenous races of Burma” in English, and “မြန်မာနိုင်ငံတိုင်းရင်းသားတစ်မျိုးမျိုး” in Burmese. The most recent guidance from the Union Attorney General’s Office (UAGO) of the Union of Myanmar differs from this, by advising to translate the term “indigenous” as “ဌာနေနှင့်ဆိုင်သော၊ တိုင်းရင်း” and to translate the term “indigenous races” as “တိုင်းရင်းသားလူမျိုးများ”. “The English-Myanmar Law Dictionary,” 4th Edition, 2017, pp. 168. The 2015 Law Safeguarding the Rights of National Races also defines the term *tainyinthar lumyo mya*, in section 2(a). For discussion of these issues, see for example: Mary P. Callahan, “Distorted, Dangerous Data? *Lumyo* in the 2014 Myanmar Population and Housing Census,” SOJOURN: Journal of Social Issues in Southeast Asia, 32:2, 2017; Nick Cheeseman, “How in Myanmar “National Races” Came to Surpass Citizenship and Exclude Rohingya,” Journal of Contemporary Asia, 47:3, 2017, pp. 464 and 477 (endnote 1).

² For instance, all the rights recognized and guaranteed by the Universal Declaration of Human Rights (UDHR) apply to everyone, with the sole exception of the rights under article 21 (participation in public life, voting and election, access to serve in the public service), which the UDHR expressly guarantees only to citizens.

³ The 1947 Constitution (enacted in 1948) translated the term “taingyintha” as “indigenous races,” and later the 1974 Constitution translated this term as “national races”. While translations between Burmese and English terms are contested, notably, none of Myanmar’s three constitutions (in 1947, 1974 then 2008) specified membership of these groups. A prescribed eight “national races” was first introduced in the 1948 Union Citizenship Act, section 3. The 1982 Citizenship Law, section 3 contains a very similar provision: “Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period prior to 1185 B.E., 1823 A.D. are Burma Citizens.” While section 3 recognizes the residency in Myanmar of other “ethnic groups” (Burmese: မျိုးနွယ်စုများ / *myo nwe su mya*), their recognition as “nationals” or not is left to the decision of the Government, under section 4. On indigeneity and citizenship in postcolonial states, see: Jose Maria Arraiza and Olivier Vonk, “Report on citizenship law: Myanmar,” European University Institute Country Report 2017/14, 2017, pp. 10-11. On the introduction of colonial concepts of “race” during British rule, see: pp. Niklas Foxeus, “The Buddha was a devoted nationalist: Buddhist nationalism, *ressentiment*, and defending Buddhism in Myanmar,” Religion, May 2019, pp. 13-14. For further discussion of Buddhist nationalism and the State in Myanmar, see: International Crisis Group, “Buddhism and State Power in Myanmar,” Asia Report No. 290, 5 September 2017, particularly pp. 7-8.

⁴ Republic of the Union of Myanmar, “The 2014 Myanmar Population and Housing Census: The Union Report,” Census Report Volume 2, pp. 207-210. The identity cards for which data was enumerated are: Citizenship Scrutiny Card; Associate Scrutiny Card; Naturalized Scrutiny Card; National Registration Card; Religious Card; Temporary Registration Card; Foreign Registration Card; and Foreign Passport.

⁵ Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines a “stateless person” as “a person who is not considered as a national by any State under the operation of its law.” Myanmar contributes to the largest population of stateless people in the world. See: Advisory Commission on Rakhine State, “Towards a peaceful, fair and prosperous future for the people of Rakhine: final report of the Advisory Commission on Rakhine State,” 2017, pp. 26. See also: UN High Commissioner for Refugees (UNHCR), “Global trends: forced displacement in 2017,” 2018, pp. 11, 24-25, 64-69.

⁶ See: ICJ, “Right to Counsel: the Independence of Lawyers in Myanmar,” 2013; ICJ, “Achieving Justice for Gross Human Rights Violations in Myanmar,” 2018.

⁷ See for example: Smile Education and Development Foundation (SMILE), "Assessing the risks of statelessness for religious minorities in Myanmar," 2016; Advisory Commission on Rakhine State (citation above), pp. 5-6; SMILE and Justice Base, "Access to documentation and risk of statelessness," 2017. UNHCR, "FAQs on Citizenship and Access to Civil Documentation in Myanmar," 2017, pp. 5-6; UNHCR, "Citizenship and statelessness in Burma: an analysis of international standards and the Myanmar citizenship legal framework," 2018; Burma Human Rights Network (BHRN), "Discrimination and Corruption Plague the Burmese Passport System," 2018; UNHCR, UN Women; Norwegian Refugee Council (NRC), the Statelessness Network Asia Pacific, Institute on Statelessness and Inclusion, The Seagull, "A gender analysis of the right to a nationality in Myanmar," 2018, pp. 14-34; Independent International Fact-Finding Mission on Myanmar, "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar," UN Doc. A/HRC/39/CRP.2 (17 September 2018), paras. 481-98; Burma/Myanmar UPR Forum, "Universal Periodic Review Second Cycle (2015 – 2020) Mid-Term Report," 2018, pp. 12-13.

⁸ Advisory Commission on Rakhine State, (citation above), page 31, recommendation 17. This recommendation states in full: "While recognizing that the 1982 law is the current basis for citizenship, the Commission recommends the Government set in motion a process to review the law. As part of such a review, the Government might wish to consider the following: Aligning the law with international standards and treaties to which Myanmar is a State Party, including Articles 7 and 8 of the Convention on the Rights of the Child; Bringing the legislation into line with best practices, including the abolition of distinctions between different types of citizens; That as a general rule, individuals will not lose their citizenship or have it revoked where this will leave them stateless; Enabling individuals who have lost their citizenship or had their citizenship revoked to reacquire it, if failing to do so would leave them stateless; Finding a provision for individuals who reside permanently in Myanmar for the possibility of acquiring citizenship by naturalisation, particularly if they are stateless; Re-examining the current linkage between citizenship and ethnicity; Within a reasonable timeline, the Government should present a plan for the start of the process to review the citizenship law. The Government should also propose interim measures to ensure that – until new or amended legislation is in place – existing legislation is interpreted and applied in a manner that is non-discriminatory, in line with international obligations and standards and based on an assessment of how today's needs have changed compared to the conditions prevailing in 1982. The law should be reviewed to ensure the equitable treatment of all citizens."

⁹ Global New Light of Myanmar (GNLM), "Pyidaungsu Hluttaw approves motion to form Joint Committee to implement steps to amend Constitution," 7 February 2019, pp. 2.

¹⁰ 1983 Citizenship Procedures (with respect to full citizenship), Notification 13/83. 1983 Citizenship Procedures (with respect to associate citizenship), Notification 14/83. 1983 Citizenship Procedures (with respect to naturalized citizenship), Notification 15/83.

¹¹ As per section 146 of the 1974 Constitution, which conferred authority to the government to prescribe all laws with respect to citizenship. Section 76 of the 1982 Citizenship Law repealed the 1948 Union Citizenship (Election) Act and the 1948 Union Citizenship Act.

¹² Burma Socialist Program Party Chairman U Ne Win's address at the seventh meeting of the Central Committee, in *The Working People's Daily*, vol. XIX, no. 275, 9 October 1982. For a more extensive quotation and analysis, see: UNHCR, (citation above), 2018.

¹³ 1997 Law Amending the Myanmar Citizenship Law, The State Peace and Development Council Law No 4/97.

¹⁴ The Presidency is an elected office, via election by the Presidential Electoral College. 2008 Constitution of the Republic of the Union of Myanmar, section 60.

¹⁵ See for example: Aye Nai, "Suu Kyi calls on citizenship law to be revised," *Democratic Voice of Burma*, 17 April 2013.

¹⁶ In 2012, the Government rolled out a scheme to provide identity cards to persons recognized as members of a "national race," who previously lacked official documentation due to complex dynamics and associated governance arrangements in conflict-affected areas. Two sources with close knowledge of the process in southeast told the ICJ this was an informal consequence of ceasefire arrangements between the Government and the Karen National Union, an Ethnic Armed Organization (ICJ discussions in Yangon, in May and June 2019). See also: Saw Yan Naing, "Karen IDPs Granted ID Cards," 29 May 2012, *The Irrawaddy*.

¹⁷ See: Government of Myanmar, "National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21," UN Doc. A/HRC/WG.6/23/MMR/1 (5 August 2015), paras. 133-137.

¹⁸ As described by Jose Maria Arraiza and Olivier Wonk, "In order to implement the 1982 Law, Myanmar undertook, starting in 1989, a "national verification" process to determine the citizenship status of its inhabitants and provided them with a colour-coded ID-Card: pink means full citizenship, green naturalised citizenship and blue associated citizenship" (citation above). There are further complex iterations of this system discussed elsewhere. For information on these processes under the USDP Government, see for example: Senior Advocate U Ohn Maung, "National verification process – Part 3," Friday Times Journal, 2017; Gabrielle Paluch, "Myanmar Begins Controversial Citizenship Verification Process," 7 July 2014, Voice of America; Lawi Weng, "Winners and Losers of the White Card's Demise," 9 March 2015, The Irrawaddy; Nyan Lynn Aung, "Verification program begins but most migrants frozen out," 23 July 2015, The Myanmar Times.

¹⁹ Myanmar expressed support of a recommendation to "Accelerate citizenship verification processes so that populations now deprived of identity documents do not remain in an illegal situation." Report of the Working Group on the Universal Periodic Review: Myanmar, UN Doc. A/HRC/31/13 (23 December 2015), para. 143.119. See also: Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/31/13/Add.1 (10 March 2016).

²⁰ Office of the President of the Republic of the Union of Myanmar, "Formation of Appraisal Group to define as Myanmar citizens for an old exiled Myanmar," Notification 80/2016, 24 October 2016. See also: GNLM, "Implementation Central Committee for Permanent Residency holds coord meeting," 26 March 2019, pp. 4.

²¹ Legal scholars from around the country shared these views and detailed analyses with the ICJ in an event held in Yangon in late 2018 (notes on file). See: ICJ, "Myanmar: ICJ convenes workshop on reforming 1982 Citizenship law," 3 September 2018, <https://www.icj.org/myanmar-icj-convenes-workshop-on-reforming-1982-citizenship-law/>. See also: U Chit Lwin (Advocate), "Comparative Analysis 1982 Citizenship law," July 2017, First Time; U Ba Kyain (BA.BL), "Studying Citizenship Law," September 2000, First Time Printing; U Ohn Maung (Advocate - YanKin), "Application Citizenship," 16 December 2017, Friday Times Journal.

²² Advisory Commission, (citation above).

²³ Upon receipt of the commission's final report, an official statement read: "[These] recommendations for meaningful and long-term solutions are very welcome. We will give the report our full consideration with a view to carrying out the recommendations to the fullest extent, and within the shortest timeframe possible, in line with the situation on the ground. We hope to set out a full roadmap for implementation in the coming weeks." Office of the State Counsellor of the Republic of the Union of Myanmar, "Statement by the Office of the State Counsellor on the Final Report of the Advisory Commission on Rakhine State," 24 August 2017. See also: Office of the President, "Establishment of the Committee for Implementation of the Recommendations on Rakhine State," Order No.83/2017, 9 October 2017, Republic of the Union of Myanmar.

²⁴ As recently as March 2019, Myanmar's representative to the UN in Geneva reiterated an ambiguous commitment to "issuance of citizenship" as a priority area for the Government. GNLM, "Myanmar Permanent Representative responds one-sided report of High Commissioner for Human Rights, urges her to provide technical assistance to Myanmar at Human Right Council in Geneva," 27 March 2019. Privately, senior officials are reported to have expressed reservations about reform: Poppy Elena McPherson and Simon Lewis, "Myanmar rejects citizenship reform at private Rohingya talks," Reuters, 27 June 2018. The ICJ's discussions with multiple sources present in various high-level meetings with officials also suggests an inconsistent and incoherent government approach to the issue.

²⁵ A 171-page confidential unpublished report commissioned by a group of humanitarian organizations in Myanmar, produced in 2018, found "no meaningful progress on many of the RAC's most critical recommendations." Timothy McLaughlin and Shibani Mahtani, "Myanmar's Buddhists block Rohingya Muslims from blood supplies, report says," 24 December 2018, The Washington Post.

²⁶ Statement by the President of the Security Council, UN Doc. S/PRST/2017/22 (17 November 2017). UN General Assembly resolution on the Situation of human rights in Myanmar, A/C.3/72/L.48, para 1(o), (31 October 2017). UN Human Rights Council resolution on the situation of human rights in Myanmar, UN Doc. A/HRC/40/L.19, paras 16 and 17 (19 March 2019). In paragraph 16 of the March 2019 resolution, the Council urged

Myanmar “to expedite efforts to eliminate statelessness and the systematic and institutionalized discrimination against members of ethnic and religious minorities, in particular against the Rohingya, by, inter alia, reviewing the 1982 Citizenship Law, which has led to violations of human rights; restoring full citizenship through a transparent, voluntary and accessible procedure and guaranteeing all civil and political rights; recognizing self-identification; and amending or repealing all discriminatory legislation and policies...”

²⁷ Tomás Ojea Quintana is an Argentinian lawyer who was Special Rapporteur on the situation of human rights in Myanmar, between 2008 and 2014.

²⁸ Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, UN Doc. A/HRC/25/64, para 44 (2 April 2014).

²⁹ The ICJ’s extensive reporting on the situation of Rohingya, includes: “Refugees from Myanmar: a study by the ICJ, Switzerland,” October 1992, <https://www.icj.org/wp-content/uploads/1992/10/Myanmar-refugees-thematic-report-1992-eng.pdf>; “Andaman Sea humanitarian crisis demands regional response centered on human rights,” 27 May 2015, <https://www.icj.org/andaman-sea-humanitarian-crisis-demands-regional-response-centered-on-human-rights/>; “14 general recommendations to the new Government and Parliament,” June 2016, pp. 26-27, <https://www.icj.org/myanmar-new-government-must-prioritize-rule-of-law-and-respect-for-human-rights/>; “Briefing Note: Questions and Answers on Human Rights Law in Rakhine State,” November 2017, <https://www.icj.org/myanmar-rule-of-law-must-drive-responses-to-rohingya-crisis/>; “‘Terrorist’ list publications defy rule of law principles and put lives at risk,” 25 January 2018, <https://www.icj.org/myanmar-terrorist-list-publications-defy-rule-of-law-principles-and-put-lives-at-risk/>; “ICJ submits Amicus Curiae Brief to International Criminal Court,” 19 June 2018, <https://www.icj.org/icj-submits-amicus-curiae-brief-to-international-criminal-court/>; see more at: www.icj.org/country/asia-pacific/southeast-asia/myanmar.

³⁰ Myanmar Census (citation above), pp. 207-210.

³¹ The Ministry of Labour, Immigration and Population reportedly seek USD 390 million for an electronic population registry & “smart ID cards.” The ICJ also understands that the Government has discussed this project with potential financiers/lenders. See: GNLM, “If there any issue arises regarding to repatriation, we will resolve it through diplomatic channel: Permanent Secretary U Myint Thu,” 12 November 2018, pp. 4; Kyaw Myo, “Parliament Pushes for Identity Cards to be Issued to IDPs,” 10 May 2019, The Irrawaddy.

³² Bridget Welsh and Kai-Ping Huang, “Myanmar’s Political Aspirations & Perceptions 2015 Asian Barometer Survey Report,” Center for East Asia Democratic Studies, National Taiwan University, Strategic Information and Research Development Centre, 2016, pp. 48-53. The Yangon School of Political Science (YSPS) implemented the survey.

³³ Although there have been many discreet related public advocacy actions. For recent examples, see: San Yamin Aung, “President Urged to Rid School Curriculum of ‘Discriminatory’ Language,” 27 December 2018, The Irrawaddy. BHRN, “Statement on discrimination and coercion faced by minority groups in citizenship registration process,” 19 March 2019.

³⁴ See for example: 1984 Naturalisation provisions of Costa Rica case, Inter-American Court of Human Rights; 2005 Yean and Bosico v. Dominican Republic case, Inter-American Court of Human Rights.

³⁵ The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness further provide international standards, including safeguards for national jurisdictions to avoid statelessness.

³⁶ This includes CRC Article 3 (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 8 states that: “(1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference; and (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

³⁷ CRC, article 1.

³⁸ See for example: CRC Committee, general comment No. 14, 2(c): “The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others.

Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures.”

³⁹ See for example: The United Nations General Assembly, in its resolution of 9 February 1996, A/RES/50/152, building on the prohibition of arbitrary deprivation of nationality, has “[c]all[ed] upon States to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality”.

⁴⁰ CRC, general comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (1 September 2005): “the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness... [The principle of non-discrimination] “prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum seeker or migrant.”

⁴¹ CEDAW Committee general recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32 (14 November 2014).

⁴² The Human Rights Committee’s general comment 15 on the position of aliens under the Covenant gives full detail, but starts with the statement “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination...” See also: “Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*,” 1720405 CMW/C/GC/4-CRC/C/GC/23 (16 November 2017).

⁴³ Arbitrary implementation has been a common theme emerging in the ICJ’s discussions and workshops in Myanmar, particularly with lawyers and civil society actors, over several years. This is also regularly reported in local media and is the subject of much public discourse and debate in Myanmar, largely on the Facebook platform. For a recent example, see: Nanda, “State Counsellor vows no discrimination in issuing IDs,” 18 March 2019, *The Myanmar Times*; Coconuts Yangon, “Muslim leaders forced to deny discrimination by Bago authorities: rights group,” 19 March 2019. For an analysis of arbitrary implementation with respect to Rohingyas, see: Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas,” *Journal of Immigrant & Refugee Studies*, 2017, 15:3, pp. 269-286.

⁴⁴ 2008 Constitution, sections 34 and 348. Note too section 361 recognizing the “special position of Buddhism,” and 362 recognizing “Christianity, Islam, Hinduism and Animism as the religions existing in the Union.”

⁴⁵ 2008 Constitution, sections 366(a) and 367 and 370, respectively.

⁴⁶ 2008 Constitution, section 348.

⁴⁷ Myanmar’s election laws reaffirm this restriction, in sections 8(b) and 10(e) of the 2010 Amyotha Hluttaw Election Law, ad of the 2010 Pyithu Hluttaw Election Law and of the 2010 Region Hluttaw or State Hluttaw Election Law.

⁴⁸ Note that section 60 of the 2008 Constitution affirms the Presidency is an elected office, albeit an indirect election by the Presidential Electoral College.

⁴⁹ In another qualifier to the rights of citizens, section 392(e) of the Constitution contemplates disqualifying persons from the right to vote, if so prescribed in electoral laws. However, current election laws affirm the right to vote for citizens of all categories (see: Section 6(a) of the 2010 Amyotha Hluttaw Election Law, the 2010 Pyithu Hluttaw Election Law and the 2010 Region Hluttaw or State Hluttaw Election Law). The lack of criteria for restricting voting rights means this could be used to disenfranchise categories of citizens.

⁵⁰ 2008 Constitution of the Republic of the Union of Myanmar, sections: 345) “All persons who have either one of the following qualifications are citizens of the Republic of the Union of Myanmar: (a) person born of parents both of whom are nationals of the Republic of the Union of Myanmar; (b) person who is already a citizen according to law on the day this Constitution comes into operation; 346) Citizenship, naturalization and revocation of citizenship shall be as prescribed by law; and 347) The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection.” Note that while the Constitution codifies the concept of “national races,” in section 3, these groups are not listed, and individuals who may not be a member of these groups are note

precluded from becoming a citizen of Myanmar. Other constitutional privileges afforded to members of "national races" include having representation at ministerial level in State and Region parliaments.

⁵¹ While the Constitution does not clearly protect the right to nationality, section 345 does not preclude other persons from qualifying for citizenship if this is permitted by other laws.

⁵² While not included in the 1982 Law, each of the three 1983 Citizenship Procedures include provisions related to the "citizenship scrutiny card" and a "Scrutiny Body."

⁵³ 2008 Constitution, section 96, read together with schedule one of the Union Legislative List (section 10(j)).

⁵⁴ Ibid, section 11(a): "The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, *to the extent possible*, [emphasis added] and exert reciprocal control, check and balance among themselves."

⁵⁵ Ibid, sections 19 and 381.

⁵⁶ Ibid, section 19(c).

⁵⁷ Ibid, sections 18, 296 and 378. See also: Melissa Crouch, "Access to Justice and Administrative Law in Myanmar," USAID Promoting the Rule of Law Project, 2014, pp. 2-14.

⁵⁸ Ibid, section 97(b).

⁵⁹ Ibid. Section 46 establishes a Constitutional Tribunal to, inter alia, "interpret the provisions of the Constitution." See also Chapter 6 of the Constitution.

⁶⁰ Ibid, sections 108, 209 and 456.

⁶¹ 1982 Citizenship Law, Sections 67–69.

⁶² The Commander-in-Chief of the Tatmadaw appoints high-ranking military personnel to three key security-related ministries, as per section 232(Bii) of the 2008 Constitution. On the Central Body established by the 1982 Citizenship Law, a secretary joins the body as may a deputy secretary. See: State Peace and Development Council, The Law Amending the Myanmar Citizenship Law, (The State Peace and Development Council Law No 4/97), Section 3.

⁶³ A village tract may consist of anywhere from one to around ten villages. On the roles of authorities at this level, see for example section 12 of the 1983 Citizenship Procedures, Notification 13/83.

⁶⁴ Terms used to describe government functions have changed over the years to reflect law and governance arrangements. Myanmar law related to legal expressions provides guidance on how to interpret the names of pre-existing State entities in a contemporary context. The term "Council of State" was replaced by the "State Law and Order Restoration Council," under section 2(b) of the 1988 Adaptation of Expressions Law. Subsequently, this term was replaced by the "State Peace and Development Council," under section 2(a) of the 1997 Adaptation of Expressions Law. The term was again changed, under section 2(c) of the 2011 Law Relating to the Adaptation of Expressions, to "The President or the Union Government."]

⁶⁵ Under the 1982 Law this power is vested in the "Council of State," and is now vested in the "President or the Union Government." The "Union Government" consists of: the President; two Vice-Presidents; 23 individual persons who serve as Union Ministers; and the Union Attorney General (total of 27 individuals). Office of the President, "Reorganization of Union Government," Notification 1/2018 (30 March 2018).

⁶⁶ The 2008 Constitution contains several references to "national races" and this is also a commonly used colloquial term in Myanmar. See the text box above.

⁶⁷ Section 3 of the 1982 Law reads: "Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D. are Burma citizens." Section 4 of the 1983 Citizenship Procedures states, "The First Anglo-Burmese War broke out in 1824. In the aftermath of that period, many foreigners migrated into the State, and therefore, the period before 1185 M.E. or 1823 A.D is demarcated."

⁶⁸ 1982 Citizenship Law, section 6: "A person who is already a citizen on the date this Law comes into force is a citizen. Action however, shall, be taken under section 18 for infringement of the provision of that section."

⁶⁹ This criteria is convoluted. Section 4 of the 1982 Law empowers authorities to determine eligibility for citizenship without reference to this criteria; this authority is re-stated and elaborated upon in section 9 of each the 1983 Citizenship Procedures.

⁷⁰ 1982 Citizenship Law, section 5: "Every national and every person born of parents, both of whom are nationals are citizens by birth."

⁷¹ Ibid. Chapter 3 states that "Associate Citizenship" is for "applicants for citizenship under the Union Citizenship Act, 1948." Chapter 4 states that "naturalized citizenship" is for persons who entered Burma/Myanmar prior to 1948 and had not yet applied for citizenship under the 1948 Law.

⁷² UNHCR, "Citizenship and statelessness in Burma," (citation above), pp. 18.

⁷³ 1982 Citizenship Law, sections 30(c) and 50(c).

⁷⁴ Ibid, sections: 24, 26, 27(a), 28, 46, 48, 49(a), 50.

⁷⁵ Ibid, sections 35(d) and 58(d).

⁷⁶ Ibid, sections 35(f) and 58(f).

⁷⁷ Ibid, sections: 14, 15(a), 16 and 17.

⁷⁸ If a child is born of a foreigner and an associate or naturalized citizen, and the parent loses their citizenship, the child does too. See 1982 Citizenship Law, sections 29(b), 51(b). Furthermore, ICJ legal advisers are aware of situations where a foreign father of a child returns to their country of origin, leaving the child and its mother (a Myanmar citizen) in Myanmar, but the State has not granted citizenship to the child on the basis that child has a right to citizenship of their father's country, even where the situation doesn't allow this.

⁷⁹ 1982 Citizenship Law, section 73. Note that the adopted child's right to citizenship is assessed on the basis of the status of their birth parents, and so an adoptee may be prohibited from obtaining any form of citizenship, even if the adopted parents are citizens. At the time of publication of this report, the right of an adopted child to citizenship was being discussed in public debate, linked to related provisions within the Child Rights Bill under consideration by the Union Parliament and by the President of the Union.

⁸⁰ 1982 Citizenship Law, section 22: "A person whose citizenship has ceased or has been revoked shall have no right to apply again for citizenship or associate citizenship or naturalized citizenship."

⁸¹ Ibid, section 15(b).

⁸² Ibid, section 20(b).

⁸³ Ibid, section 21. Note the 1982 Law and its 1983 procedures prescribe additional criminal penalties, for instance under sections 18 and 19 of the 1982 Law.

⁸⁴ 1982 Citizenship Law, section 5, defines this: "Every national and every person born of parents, both of whom are nationals are citizens by birth."

⁸⁵ A full citizen is not excluded from potential charges under the 1982 Citizenship Law, section 40: "Whoever forges a certificate of associate citizenship or abets such act shall be liable to imprisonment for a term of fifteen years and to a fine of kyats fifty thousand."

⁸⁶ Ibid, sections 36, 37, 39(b), 39(c), 40, 59 and 60.

⁸⁷ See for example, section 29 of the 1983 Citizenship Procedures (with respect to full citizenship), Notification 13/83. This contemplates legal action under, inter alia, the Foreigners Registration Act, which includes criminal penalties.

⁸⁸ With respect to criminal penalties, a role for the judiciary appears to be implicitly suggested in section 74 of the 1982 Law: "Except on penal matters, all matters relating to this Law shall be decided by the only organizations which are conferred with authority to do so."

⁸⁹ Notification 13/83, sections 31(a)(3) and 38. Notification 14/83, sections 29(a)(3) and 38(e). Notification 15/83, sections 34(a), 40 and 43 (full citation above).

⁹⁰ See discussion of this in section 5 of this report.

⁹¹ 1982 Citizenship Law, sections 69 and 70(a).

⁹² See endnotes number 63 and 64, above.

⁹³ See for example, chapter 5 (appeals) in each of the three 1983 Citizenship procedures.

⁹⁴ 1982 Citizenship Law, Section 70(b).

⁹⁵ If promulgated, the Child Rights Bill would replace the 1993 Law. The ICJ has viewed different drafts of the Bill dating back to 2015. At the time of writing, it had been passed by the Union Parliament and sent to the President of the Union for review. See Annex 1.

⁹⁶ In reporting as part of the UN Universal Periodic Review (UPR), Myanmar has stated that "a child is recognized as a citizen in accordance with the Citizenship Law." Consideration of the reports submitted by States parties under article 44 of the Convention, Third and fourth periodic reports of States parties due in 2008, Myanmar, UN Doc CRC/C/MMR/3-4 (17 May 2011), para. 63. Myanmar's next UPR is scheduled for November 2020.

⁹⁷ The term appears to have first emerged in a 1990 edition of the Working People's Daily. See: Nick Cheeseman (citation above), pp. 468-9 and 478 (endnote 6). See also: International Republican Institute (IRI), "Assessment of minority rights in Myanmar," 2017, pp. 41.

⁹⁸ The Union Minister of Labour, Immigration and Population confirmed the use of these directives in response to questions in the Pyithu Hluttaw (lower house of parliament) on 29 April 2016. Comments available at: <https://www.pyithuhluttaw.gov.mm/question-713>.

⁹⁹ This issue has come up extensively in the ICJ's discussions with lawyers and human rights activists, including in events hosted by the ICJ in Myanmar. See: Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, UN Doc. A/HRC/40/68 (5 March 2019), paras. 53 and 58. See also: Khin Su Wai, "Old identity, new identification for Mandalay minorities," 11 April 2014, The Myanmar Times; Jacob Goldberg, "For 'mixed-blood' citizens, Yangon's passport office is a racist hell," 14 June 2018, Coconuts Yangon; The Irrawaddy, "Dealing with Rising Religious Tensions in Myanmar," 25 May 2019. Further information is available in reports cited above, in endnote number 7.

¹⁰⁰ See for example, further comments attributed to the Union Minister for Labour, Immigration and Population in 2019: "We have to take time to scrutinize the family lines of the mix-blood. However, we are doing that step-by-step to avoid delays" in Kyaw Myo, "Parliament Pushes for Identity Cards to be Issued to IDPs," The Irrawaddy, 10 May 2019.

¹⁰¹ Article 21 of the UDHR permits States to the rights to participation in public life, voting and election, and access to serve in the public service to citizens only.

¹⁰² See for example, 2018 Yangon Municipal Law, section 17(b).

¹⁰³ 2008 Constitution, section 346, and Legislative Schedule One, section 10(j).

¹⁰⁴ Ibid, sections 209, 216, 217 and 456.

¹⁰⁵ 2014 Census (citation above).

¹⁰⁶ See, ICCPR, e.g. Article 15(1) in respect of the principle of *nullum crimen sine lege*.

¹⁰⁷ For further discussion and sources of law on this principle, see: ICJ, "Challenges to Freedom of Religion or Belief in Myanmar," 2019 (unpublished/forthcoming), part 2.5.2.

¹⁰⁸ See, for example: Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

¹⁰⁹ Under the 2008 Constitution, Myanmar's military, the Tatmadaw, is not subject to effective oversight from civilian executive authorities, the legislature or the judiciary. Its Commander-in-Chief is empowered to appoint high-ranking military personnel to three ministerial portfolios, including the Minister of Home Affairs and the Minister of Border Affairs. For detail, see: ICJ, "Questions and Answers on Human Rights Law..." (citation above).

¹¹⁰ See chapter 5 in each of the three 1983 Citizenship Procedures.

¹¹¹ ICJ, "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights," February 2017, pp. 30 and 65, <https://www.icj.org/myanmar-amend-special-economic-zones-law-to-protect-human-rights-new-icj-report/>.

¹¹² See for example: ICJ and Amnesty International, "Parliament must reject discriminatory 'race and religion' laws," 3 March 2015, <https://www.icj.org/wp-content/uploads/2015/03/Myanmar-Reject-discriminatory-race-and-religion-draft-laws-Advocacy-2015-ENG.pdf>; ICJ, "SEZs in Myanmar," (citation above) pp. 43.

¹¹³ This term (in italics) is prevalent in Myanmar law and can constitute to contribute to a conflict of law, which is hard to interpret given the lack of guidance on this specific matter. The ICJ, in the course of extensive research on the legal system including through discussions with lawyers and judges, is unaware of domestic jurisprudence that clearly clarifies or otherwise interprets the legal effect of this adage; although, access to information is challenging, so this does not necessarily mean that guidance does not exist.

¹¹⁴ The legal maxims of "lex specialis" and "lex posterior derogat legi priori" will be relevant in considering a conflict of laws, for instance where provisions of the Citizenship Law are contrary to the purpose of the Child Law (or the Bill) with respect to citizenship.

¹¹⁵ See note and references in endnote 97, above.

¹¹⁶ As is the case of Rohingya Muslims, who are one of the groups excluded from the list.

¹¹⁷ For a detailed assessment, see: Justice Base, "Constitutional Analysis of Myanmar's 1982 Citizenship Law," December 2018.

¹¹⁸ Take for instance the situation of Kaman Muslims in Kyaukphyu of Rakhine State. See: Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, UN Doc. A/73/332 (20 August 2018), para. 52; ICJ, "SEZs in Myanmar," (citation above) pp. 68.

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**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org