

„Transfer of civilians“ as a „colonial wrong“ in international criminal law? Myanmar’s migration history as a hazardous argument

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Axel Harneit-Sievers cautions against a problematic argument made in a new publication.

Did migration processes into colonial Burma – from India and elsewhere – amount to a “transfer of civilians” into an occupied territory, a practice prohibited by international law today? Should the international community reconsider such colonial-era population movements as a “colonial wrong”, conceding that a historical injustice has been committed by European colonialism, in order to make contemporary Myanmar political and military actors more ready to accept accountability for the severe human rights violations committed against the Rohingya? These questions, based on problematic assumptions about history and with potentially dangerous political implications, were discussed at a meeting of international lawyers in Yangon, the proceedings of which were recently published online (Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.): *Colonial Wrongs and Access to International Law*; Brussels: Torkel Opsahl Academic EPublisher 9 November 2020).

International criminal justice faces a crisis of legitimacy. The International Criminal Court (ICC, constituted by the Rome Statute and operative since 2002) especially stands accused of applying what Wolfgang Kaleck has called “double standards”. Its prosecution of severe human rights violators focuses on persons from countries with little power in global politics, many of them in Sub-Saharan Africa so far. At the same time, the Court finds it virtually impossible to prosecute perpetrators protected by major powers in the international system, especially the United States. The argument of “double standards” can be extended by giving it a postcolonial pitch: international criminal law is unable to address “colonial wrongs” – crimes committed by colonial powers – and thus cannot deal with the history behind current governance failures and violent conflicts that contributed to the very human rights violations it tries to prosecute.

In order to address such questions, senior international law specialists and academics met for a conference in Yangon in November 2019. Myanmar constituted a very conscious choice of location for the conference and provided the backdrop to discuss questions such as: Did the migration of substantial non-indigenous populations (primarily from India) into colonial Burma constitute a “transfer of civilians” into an occupied territory – a practice that is regarded as a crime against humanity under today’s international criminal law? And if so, how should this be taken into account as a “colonial wrong” when prosecuting perpetrators of severe human rights violations, especially those perpetrated against the Rohingya in Myanmar’s Rakhine State in 2016-7? (The conference volume includes papers on systematic legal aspects and a few other country case studies, especially on the fate of indigenous populations in European settler colonies. However, it does not include studies on other historical examples of colonial-era population movements that could have put the Burma case into a broader historical perspective.)

The decision by the Yangon conference organizers to discuss their agenda through the lens of Burmese history (and, of course, to hold it in Myanmar itself) could be seen as courageous; one may regard it as hazardous as well. The hazard is likely obvious to students of Myanmar history and contemporary politics: Does this “transfer of civilians into occupied territory” line of argument really do justice to Burma’s actual colonial history? And does it not risk undermining the citizenship rights of people whose ancestors migrated into Myanmar a century or more ago – and whose very citizenship rights are already severely embattled in Myanmar today?

The organizers of the Yangon conference were of course aware they were entering a particularly difficult territory. They did so for good reason. In his [concept paper](#) laying the groundwork for the conference (first published in August 2019), Morten Bergsmo observes an “unusually polarised climate” in Myanmar around the issue of human rights violations in Rakhine. The official Myanmar narrative frames the issue primarily as one of “illegal migration” and “suppression of terrorism”. By contrast, a major strand in the international narrative (in reality mostly that of Western countries, U.N. institutions and the Organisation of Islamic Cooperation) discusses “the Rohingya genocide” and calls for prosecution under international criminal law. Bergsmo suggests that a recognition of “colonial wrongs”, especially the destruction of the sovereignty of the precolonial Burmese kingdom and the following mass migration of people from India into Burma, enabled by the British, may help to create a bridge, enabling a more fruitful dialogue.

I certainly agree with Bergsmo’s observation on the “unusually polarized climate” around Myanmar today that currently makes meaningful dialogue about severe human rights violations very difficult, if not impossible. However, I very much doubt that the acceptance of what may be called a “postcolonial guilt theory” of acknowledging “colonial wrongs” in Burma will contribute to any greater degree of acceptance for ICC proceedings in Myanmar. I doubt this not merely because the argument is based on weak legal and misleading historical foundations. Even worse, such a line of reasoning – if it ever enters mainstream political debate – obviously risks strengthening the militant exclusionary nationalism in Myanmar that stands at the root of the Rohingya crisis. And it risks doing so for all the wrong reasons.

To be sure, Bergsmo and the other international lawyers involved in this project do not want to trade responsibilities: In their view, this is not about downplaying or relativising responsibility for killings and other human rights violations against the Rohingya or others. It is about creating a dialogue that may lead to greater acceptance of international judicial proceedings on these violations. The book itself includes an explicit warning by the only Myanmar contributor and editor, Kyaw Yin Hlaing of the Centre for Diversity and National Harmony in Yangon. In his chapter, he reviews how contemporaries perceived the migration of Indians, and especially Indian Muslims, into colonial Burma as a result of the colonial situation, stoking fears of indigenous people being overwhelmed, of indigenous men losing their land and their women to foreigners; he also recalls how these sentiments were systematically fuelled further by military rulers as part of anti-colonial narratives since the 1960s. Kyaw Yin Hlaing cautions that, within this context, legal arguments about historical wrongs run a high risk of being misused to undermine peaceful coexistence among different ethnic groups today: “Promoting accountability and the legitimacy of international law are valid considerations, but are less important than the lives and well-being of the populations (of all kinds) living in former colonies” (362). The remainder of the volume, however, does not take much notice of this warning. Instead, rather than reflecting the concrete historical and social context that their legal arguments about “colonial wrongs” may meet in Myanmar today, the contributors proceed, with what they appear

to think of as their righteous “postcolonial” approach, into very treacherous legal and historical territory.

On the legal side, the limitations of the argument are obvious and even acknowledged accordingly by contributors. The “transfer of civilians” into “occupied territory” constitutes an international crime only since the (Fourth) Geneva Convention of 1949. The Convention explicitly outlawed such a practice informed by the experiences of Nazi Germany’s exterminatory policies in occupied Eastern Europe. (In more recent decades, the concept has usually been applied to legally attack Israeli settlement policies in the West Bank, though not for example, against Moroccan population settlement policies in the former Western Sahara). “Transfer of civilians” was reaffirmed as a “crime against humanity” and “war crime” under the Rome Statute that created the ICC. Legally, therefore, any “transfers” before 1949 – including nearly all population movements under European colonial rule in Africa and Asia – are not covered under these prohibitions. Nonetheless, various contributors to the volume set out to develop lines of argument designed to describe actions by European colonial states as legally relevant “colonial wrongs” or “grievances” that may have led to atrocities later on. Not being a lawyer myself, I am not in a position to judge whether and how any such arguments have a potential to become part of relevant international law; the authors are surely committed to this. Beyond the immanent logic of these legal arguments, however, we also need to ask whether they make sense in the concrete case of the history of colonial Burma.

It is one thing to assert historical and political responsibility of former colonial powers for obvious atrocities committed during their rule, such as the 1904-8 genocide of the Herero and Nama people in what was then German South West Africa (Namibia), or the issue of British capital punishment practices in colonial Kenya during the Mau Mau war in the 1950s. It is an entirely different – and very wrong – matter to group British migration policies in colonial Burma into the same (or a similar) class of “colonial wrongs”.

The volume under review includes two contributions, by Jacques Leider and Derek Tonkin, which document the history of migration into Arakan / Rakhine in great detail. While there has been a presence of Muslim communities in Arakan for centuries, they show specifically that labour-related cross-border migration from the Chittagong area of Bengal began even before British colonial rule and expanded rapidly under it, especially in the latter years of the 19th and the early 20th century. Labour needs of local ethnic Rakhine landlords were a major factor; settlement and land acquisition by the migrants followed. Over time this led to a concentration of Muslim agriculturalists in Northern Rakhine who later acquired the Rohingya ethnonym (a fact disputed by Rohingya nationalists who claim a much earlier origin of the term). Until 1937, all this happened within the single territory of British India of which Burma was a part, without any internal border controls. Migration into colonial Arakan, with no force by the colonial power involved, was driven by economic needs and interests, and it was pursued by local individual and group agency. To categorize this process as a “colonial wrong” constitutes an ahistorical narrative which in effect denies agency to any colonial subjects.

Likewise, Indian migration into the mainland and the urban centres of colonial Burma, especially Rangoon, was driven by the economic interest and agency of those who migrated, mostly from other parts of British India (while some came from China as well). Again, no forced labour was involved here. British policies played a stronger role than in Rakhine, in so far as the colonial state and the colonial economy created a demand for business professionals, traders and urban workers from India to move to Burma. In addition, civil servants and soldiers were temporarily transferred into colonial Burma, and some of them may have decided to settle there later on.

For all of these groups, the colonial state made movement and long-term settlement possible, for example by creating an enabling environment of transport systems and urban facilities. All this led to social tension and instances of violence by the 1930s and contributed to the prominent anti-Indian streak within Burmese anti-colonial nationalism.

However, the policies and incentives employed by the British in Burma were pretty much standard practices of “development policy”, as conceptualized by colonial powers in the first half of the 20th century; some of them were even continued after independence. To describe resulting migration processes under colonial rule as a “transfer of civilians” into an “occupied territory” (with the connotation that they were designed to overwhelm, drive out or exterminate the local Burmese population) does not only constitute a severe category error. It risks feeding into the “anti-foreigner”, xenophobic narrative within Burmese (and Rakhine) nationalism that has its historical roots in the late colonial period but has become ever more extreme under military rule since 1962. In effect, this narrative culminated in the discriminatory 1982 Citizenship Law and contributed to the perception of the Rohingya as “illegal aliens”, leading to violence and ultimately resulting in their flight and expulsion, in 2017.

Of course, the experts advancing the “colonial wrongs” argument who contributed to the volume under review do not intend to condone any such discrimination or violence. But they appear to underestimate the fact that a core element of the very narrative they are proposing in order to increase global acceptance for international criminal law – that colonialism committed a crime by bringing in “foreigners” – is in fact already a core element of the exclusionary narrative of Burmese nationalism. It has been in use for decades, has been worsening over time, and it has already led to extreme marginalization and violence.

Does all this matter? Clearly, a more balanced approach – one that does not just let powerful perpetrators off the hook while prosecuting only those who are already out of power – is very necessary in order to secure the very legitimacy of the international criminal law system. However, the Myanmar example shows that an inappropriate application of a simplistic, if not outright wrong postcolonial narrative is risky. Defenders of the Myanmar official position on the Rohingya issue hardly need international lawyers to remind them that “Indians”, “Bengalis” or other foreigners who migrated into the country in colonial times came in as a result of a “colonial wrong”. They have been making this point all along, but now they can do so with innovative phrasing and the international academic and legal legitimation provided by this volume.

Disturbingly, they appear to do so already: Derek Tonkin (281-2, and email communication, 18.11.2020) documents the first two instances of the verbatim use of the “transfer of civilians” argument employed by high-ranking Myanmar officials in U.N. contexts, within weeks after the publication of Morten Bergsmo’s concept paper. It is difficult to think of this as a mere coincidence.

The military coup of February 1st, 2021, has led the country into a massive crisis. The outcome is anything but clear at this point in time, and Myanmar may face an extended period of military rule, violent conflict, economic decline and even state failure. But the broad resistance against the military takeover and the political dynamics since the coup also have a potential to do away with long-established, outdated ideas and institutions in Myanmar’s political and legal system, in order to create a true break with the past.

Many in Myanmar and internationally no longer see the Myanmar military as a legitimate partner in any substantive discussion about the political future of the country; in their view, the

Tatmadaw has to return to the barracks without claiming special political prerogatives, or it has to disappear as an institution. A **Rohingya voice has been emerging in the protests** against the regime, and there is hope that the community will gain broader acceptance among the Burmese majority population.

The declaration of the Federal Democracy Charter and the intent to abolish the 2008 constitution by the Committee Representing Pyidaungsu Hluttaw (CRPH) on March 31st, 2021, imply an outright rejection of fundamental political ideas and institutions imposed by the Tatmadaw over decades. This could and should include a rejection of the very concept of belonging represented by the idea of “national races” (*taingyintha*), and of the system of graded citizenship rights, based on an individual’s real or putative migratory background. Instead, Myanmar should acquire a new citizenship law that follows globally accepted standards, is inclusive and provides equal rights to everyone living in the country, not subject to political or bureaucratic manipulation.

I have shown in this article that arguments about real or imagined “colonial wrongs” in the debate and legal discourse about contemporary human rights violations, when applied to Burma/Myanmar, were highly problematic even before the coup. Now and in any future processes of transitional justice, however, they deserve to be discarded in their entirety, as a misguided attempt of appeasing perpetrators of human rights violations on a grand scale and their political allies.

Dr. Axel Harneit-Sievers, a historian by professional background, has been the country director of the Heinrich Böll Stiftung’s Myanmar office in Yangon from 2018 until May 2021. Opinions expressed here are personal and do not necessarily reflect the position of the Heinrich Böll Stiftung.