

**STATE RESPONSIBILITY OF MYANMAR GOVERNMENT
TOWARD ROHINGYA CASE IN THE PERSPECTIVE OF
INTERNATIONAL HUMAN RIGHTS LAW**

A BACHELOR DEGREE THESIS



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YOGYAKARTA**

2013

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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This bachelor degree thesis has been examined and approved by the legal advisor
to be submitted in the front of the board of examiners in Final Examination on

April 12th, 2013

Yogyakarta, April 12th, 2013
Legal Advisor,


(Dr. Sefriani, SH., M.hum.)

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Bismillahirrohman nirrohim

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Adalah benar-benar mahasiswa Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi /Legal Memorandum/Studi Kasus dengan judul :STATE RESPONSIBILITY OF MYANMAR GOVERNMENT TOWARD BURUNDI CASE IN THE PERSPECTIVE OF INTERNATIONAL HUMAN RIGHTS LAW

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ECI ERNAWATI

MOTTO

Better to walk alone than running to follow other (Eci Ernawati)

No one can go back and make a new beginning but anyone can start from now and make a happy ending (Anonymous)

Nothing is impossible (Eci Ernawati)

Innama'al u's riyusron, Actually after difficulty there is easily (Qs. Insyirah 6)

Life is like riding a bicycle. To keep your balance you must keep moving (Albert Einstein in his letter to his son Eduard, Feb 3rd, 1930)

A person who never made a mistake never tried anything new (Albert Einstein)

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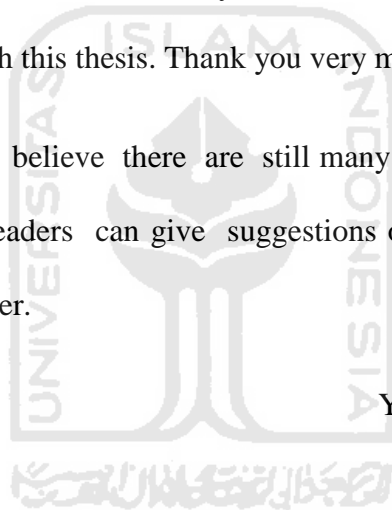
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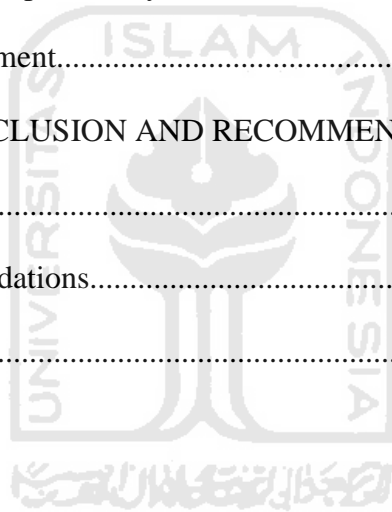
*From the deepest of my heart, I dedicate this thesis to
My beloved people, Bapak, Mamak, Papah, Mamah, Mas Eko,
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ABSTRACT

This Paper discuss about Rohingya conflict in Myanmar. They are regarded as people who do not have citizenship and unrecognized by the government of Myanmar. Rohingya people are considered as temporary resident and do not receive the full rights of citizenship. The military regime routinely turned them into slave labor, severely restricted their rights to travel and marry, and denied their access to both medical care and education. Many parties remain silent toward fate of Rohingya Muslims. Even Myanmar as the owner of Rohingya territory also ignores it.

The aim of this thesis to analyze human rights violations which committed by the government of Myanmar toward Rohingya ethnic, and also for learning further on the State Responsibility of Myanmar Government toward Rohingya Case in The Perspective of International Human Rights Law. It explained about state responsibility which should be conducted by the government of Myanmar to Rohingya ethnic. The method in obtaining legal materials was using library studies and documentation. Data collected from books that related to the human rights violation and state responsibility especially for Rohingya case, and the research used case approach by analyzing the issues from the point of view of case.

The Myanmar government committed human rights violations in Rohingya case, including systematic prosecution, massacres, stateless, marriage ban, religious and ethnic discrimination. The violation by Myanmar government has been violated provision in some International Instrument, like instrument are regulated in the Universal Declaration of Human Rights related to the basic of the human rights protection; International Covenant on Civil and Political Rights of 1966 related to the right of freedom from slavery and servitude and forced or compulsory labor; and International Covenant on Economic, Social and Cultural Rights of 1966 related to the right to work and to enjoyment of just and favorable conditions of work, right to social protection, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health, right to education and to participation in cultural life. Caused by some facts and any circumstances was conducted by Myanmar government toward Rohingya Ethnic, Myanmar government should be responsible for Rohingya case.

Keywords:

Human Rights, Violation, State Responsibility

CHAPTER I

INTRODUCTION

A. Context of Study

Myanmar conflict has raised international concern. Case of Rohingya has reaped international public criticism towards Myanmar government. The case became the center of attention of various groups ranging from human rights activists and leaders of some countries. Oppression which was experienced by Rohingya Muslim had opened people's eyes to the history of unrecognized ethnic in Myanmar. There are about 137 ethnic groups, including some other Muslim ethnic groups such as Chinese Muslims and Indian Muslims. Both ethnic groups were recognized by the Myanmar government as citizens, and they live peacefully. However, Rohingya Muslims never experiences such good treatment from Myanmar government, because Rohingya ethnic has different backgrounds. Therefore, they are marginalized within societies who live around border between Myanmar and Bangladesh.¹

Rohingya ethnic is a group of people who live in the province of Arakan, western Burma (Myanmar). Islam was introduced to Myanmar since the 7th century. Before Myanmar gained its independence in 1948, the first stopover is Rohang area or now called Arakan. The Islamization of this area then formed a

¹ *Pembantaian Islam Rohingya dan Ancaman Bagi Umat Budha Indonesia*, <http://regional.kompasiana.com/2012/08/01/pembantaian-islam-rohingya-dan-ancaman-bagi-umat-budha-indonesia/>, accessed: September 30, 2012

new ethnic called Rohingya.² The population of Rohingyas, one of several Muslim groups in Arakan,³ is estimated to be at least 1.4 million in this province with a total population of approximately 3-3.5 million.⁴ Rohingya are believed to be descendants of the Arabs during the 7th century who settled in western Myanmar for centuries. They live in the territory of Rakhine, but the physical characteristics and their language are close related to the Bengal people in Bangladesh. Rohingya political leaders claim that Rohingya are an ethnically distinct group, descendants of the first Moslems who migrated to northern Arakan in the eighth century, although they also said that they are a mix of Bengalis, Persians, Moghuls, Turks, and Pathans who settled in the area later on.⁵

Myanmar is another name of Burma, as majority of ethnic population in Myanmar, this ethnic formerly worked with Japanese in the war against British for Myanmar Independence. There are also Rohingya as minority ethnic, they are considered allies of England during the Second World War took place remained loyal to the British after Myanmar independence. In 1947, representatives of various ethnic groups in Myanmar signed a union agreement. In this agreement,

² Rohidin, 2012, *Indonesia Peduli Minoritas Moslem Rohingya di Myanmar*, in the perspective of Islam, Presented in a panel discussion, organized by International Law Department of the Faculty of Law, Universitas Islam Indonesia, August 9, 2012, in Yogyakarta

³ There are three different classes of Muslim people in Arakan: the Kamal, the Arakanese Muslim, and the Rohingya. Most or all of the refugees currently in Bangladesh are Rohingyas. (explained by U Kyaw La, Chairman of the Muslim Liberation Organization of Burma, in New York, N.Y. (Oct. 29, 1992).

⁴ Thomas K. Ragland, *Burma's Rohingyas in Crisis: Protection of "Humanitarian" Refugees under International Law*, 14B.C. Third World L.J., by the Boston College Third World Law Journal, p. 301

⁵ Rohingya Solidarity Organization (RSO), "A Memorandum of the Burma Citizenship Law of 1982," November 1982, unpublished paper; RSO, "The Problems of Rohingya Moslems of Arakan in Burma," 1992, unpublished paper; Rohingya Patriotic Front (RPF), *Rohingya Outcry and Demands*, (Bangladesh: RPF, 1976); Arakan Rohingya National Organization (ARNO), "Peaceful Coexistence," *The Newsletter*, Vol. 1, Issue 2, April 1999, p. 1.

also signed by General Rung San (father of Aung San Suu Kyi). At that time muslim of Rohingya ethnic were excluded.

After Myanmar independence in 1948, some ethnic Myanmar got the freedom to form their own state (federal). Like a ethnic Chin formed Chin state and ethnic Mon formed Mon state.. But for Rohingya can not form part of the state. Then the discriminatory treatment was arised, Arakan Muslims never do the rebellion to establish an autonomous state, but in vain. Starting from 1962, under General Ne Win, all Muslims in Arakan are labeled as dark and illegal immigrants, during the British occupation. In 1974 the Emergency Immigration Act abolished the Burmese citizenship to Rohingya Muslims. And then in 1982, Emergency Immigration Citizenship Regulations abolish citizenship of the Rohingya ethnic Myanmar list.⁶

Rohingya people are regarded as people who do not have citizenship and unrecognized by the government of Myanmar. Most Rohingya who have been permitted to reside in Burma are considered by the Burmese authorities as "foreign resident", not as citizens. This unrecognized citizenship rights implies that the Rohingya are subject to abuses, including restrictions on their freedom of movement, discriminatory limitations on access to education, and arbitrary confiscation of property.⁷ Rohingya people are considered as temporary resident and do not receive the full rights of citizenship. The military regime routinely turned them into slave labour, severely restricted their rights to travel and marry, and denied their access to both medical care and education. Since the policy of

⁶ *Mesin Genosida Rohingya di Bulan Ramadan*,
<http://makassar.tribunnews.com/2012/08/02/mesin-genosida-rohingya-di-bulan-ramadan>, accessed: April 25, 2013

⁷ *Denial of Citizenship and Accompanying Rights* ,
<http://www.hrw.org/reports/2000/malaysia/maybr008-01.htm>, accessed: September 17, 2012

Immigration Act was issued in 1974, Myanmar government introduced the identity card of population, Indian, Chinese, and Bengal ethnic can have it but Rohingya ethnic who only receives The Foreign Registration Cards.⁸

Myanmar government executes highly systematic discrimination toward Rohingya, since the enactment of the Act of 1982 concerning citizenship. Myanmar refuses the citizenship of Rohingya Moslems and does omissions without protection and legal certainty.⁹ The discrimination raises a conflict that has not been resolved until this day, between Rohingya Muslims and Buddhist majority.

The hostility between the Buddhist majority of Rakhine ethnic and Rohingya Muslims have happened, since the influx of Moslem immigrants from the Bengal region towards Chittagong province of Arakan, as the result of implementation of the British colonial government. Thousands of Rohingya people and Rakhine were killed in sectarian conflict in 1942 during the Second World War. Japanese occupation forces also killed thousands of Rohingya people who were accused for supporting British.

In 1947, some leaders of Rohingya created Mujahid Party demanded the establishment of an autonomous government called the Moslem Autonomous Region in northern Arakan. This demands a blunder and caused backlash between ethnic Rakhine people and military junta government. In 1978, Ne Win Junat as a

⁸ Jawahir Thontowi, 2012, "Intervensi (Bantuan) Kemanusiaan Terhadap Minoritas Moslem Rohingya di Myanmar", Presented in a panel discussion about *Indonesia Peduli Minoritas Moslem Rohingya di Myanmar*, organized by International Law Department of the Faculty of Law, Universitas Islam Indonesia, August 9, 2012, in Yogyakarta, p. 8

⁹ http://www.kontras.org/index.php?hal=siaran_pers&id=1563, accessed: september 20, 2012

leader launched "Operation King Dragon" in a region of Rohingya in Arakan. Cruel torture and destruction of mosques forced one third of Rohingya to flee to save herself and family to Bangladesh. During the exile, Rohingya people were forced to continue the journey to India, Pakistan and various countries in the Middle East.¹⁰

Torture against Rohingya occurred systematically. Burmese security forces committed killings, rape, and mass arrests against Rohingya Muslims after failing to protect both them and Arakan Buddhists during deadly sectarian violence in western Burma in June 2012. Government restrictions on humanitarian access to the Rohingya community have left many of the over 100,000 people displaced and in dire need of food, shelter, and medical care.¹¹ The clashes were sparked after an ethnic Rakhine woman was allegedly raped and killed by three Rohingya men in last May. On June 3, a group of Rakhine vigilantes attacked and killed 10 Rohingyas on a bus. They were believed to bear responsible upon the woman's death.¹² Media report after the incident illustrated tense situation, after 10 of Rohingya men were killed flagrantly, even the bus which they driven was burned down.¹³ The incident sparked a large-scale conflict between the Moslem Rohingya and Buddhist communities within the state Rhakine. Human Rights

¹⁰ *Akar Masalah*, <http://indonesiarayanews.com/news/kronik/06-10-2012-21-41/masyarakat-jepang-dan-ketakutan-...?page=1&device=desktop> , accessed: september 9, 2012

¹¹ *Burma: Government Forces Targeting Rohingya Muslims*, <http://www.hrw.org/news/2012/07/31/burma-government-forces-targeting-rohingya-muslims-0>, accessed: November 7, 2012

¹² *Call to Put Rohingya in Refugee Camps*, <http://www.rfa.org/english/news/rohingya-07122012185242.html>, accessed: October 7, 2012

¹³ <http://indonesiarayanews.com/news/kronik/06-10-2012-21-41/masyarakat-jepang-dan-ketakutan-...?page=1&device=desktop> , september 9, 2012

Watch confirmed that nearby local police and army stood by and watched but did not intervene.¹⁴

The Rohingyas also experienced religious torture. Rohingya Muslims were oppressed, it made tens of thousands people dead, residence burned, women raped, and they were expelled from the country. They were chased wherever they run like people who do not have citizenship rights. There is no rational reason for them to be viciously persecuted.¹⁵ In Arakan, tension between the Buddhist and Moslems often turned into violence. Hypocrite apparent government apparatuses often humiliate Rohingya people by discrediting them on behalf of nationalism.¹⁶

Myanmar President, Thein Sein even told the UN that refugee camps or deportation was solution to almost one million Rohingya. He proposed to deport Rohingya if there was third country prepared to accept them.¹⁷

In a statement posted on the government website Thursday following deadly ethnic violence between Muslim Rohingyas and Buddhist Rakhines in western Burma last month, Thein Sein said that the Rohingyas are not welcome in his country.

“We will take care of our own ethnic nationalities, but Rohingyas who came to Burma illegally are not of our ethnic nationalities and we cannot accept them here,” he said.

The statement said Thein Sein told the U.N. High Commissioner for Refugees Antonio Guterres in a meeting Wednesday that the Rohingyas should be placed in U.N.-sponsored refugee camps.

¹⁴ *Burma: Government Forces Targeting Rohingya Muslims*, <http://www.hrw.org/news/2012/07/31/burma-government-forces-targeting-rohingya-muslims-0>, accessed: November 7, 2012

¹⁵ http://www.inpasonline.com/index.php?option=com_content&view=article&id=1143:ironi-ham-dunia-dalam-tragedi-rohingya&catid=70:opini&Itemid=1 , accessed: September 9, 2012

¹⁶ <http://indonesiarayanews.com/news/kronik/08-02-2012-05-55/rasisme-dan-islamophobia-di-myanmar-1> , september 9, 2012

¹⁷ *Derita Muslim Rohingya dan Kebisuan Dunia* , Senin, 30 Juli 2012, http://www.taqrif.info/indonesia/index.php?option=com_content&view=article&id=1428:derita-muslim-rohingya-dan-kebisuan-dunia&catid=61:aghaliathaye-eslami&Itemid=148, accessed October 7, 2012

“The solution to this problem is that they can be settled in refugee camps managed by UNHCR, and UNHCR provides for them. If there are countries that would accept them, they could be sent there,” he said.¹⁸

The worst is when Myanmar democracy fighters as well as Nobel Peace Prize winner, Aung San Suu Kyi keeps silent when facing President Thein Sein policy in resolving the Rohingya case.¹⁹ The statement from Thein Sein has given thought about a carelessness of Myanmar government toward Rohingya ethnic. In other words, Myanmar government does not care about the victim of conflict from Rohingya ethnic.

On behalf of humanity, justice, and human rights, it is appropriate that the world thought together a permanent solution to Rohingya. The main responsibility clearly lies in the hand of Myanmar government.

The existence of country is shaped by humans solely in order to ensure the protection of human rights for life, liberty, and his property. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.²⁰ A property right which is inherited in humans is defined as Human Rights, because such right is owned by humans since they were born to this world. The concept of state was carried on by John Locke in his book “Two Treatises of Civil Government”. In this regard, the state responsibility also consist of legal enforcement against violations of human rights principles. If the state allowed the

¹⁸ *Call to Put Rohingya in Refugee Camps*, July 12, 2012, <http://www.rfa.org/english/news/rohingya-07122012185242.html>, accessed: October 7, 2012

¹⁹ *Kisah Lengkap Pembantaian 10 Orang Etnis Muslim Rohingya*, Posted on July 29, 2012, <http://demokrasiindonesia.wordpress.com/2012/07/29/kisah-lengkap-pembantaian-10-orang-etnis-muslim-rohingya/>, accessed: October 7, 2012

²⁰ Universal Declaration of Human Rights, Art. 1

absence of the rule of law or even violated human rights, the state has acted with impunity.²¹ The responsibility is not only for the concerned state, but also for the international community and international organizations like United Nations. By considering the concern of United Nations and international society against human rights, the society and state should be able to respect each other and treat each human being in accordance with the dignity of their human rights.

Until this day, Rohingya conflict has not found any best solution. The International societies still have homework to solve this problem. The confuse still remains on the question of which party that should be responsible upon the problem. Many parties remain silent toward fate of Rohingya Muslims. Even Myanmar as the owner of Rohingya territory also ignores it. Rohingya Muslims live in the territorial of Myanmar for a long time. However, since 1982, the Citizenship Regulation of Myanmar has not recognized Rohingya people as citizens of Myanmar. The Myanmar government just recognizes them as illegal immigrants. Rohingya people are treated discriminatively within Myanmar territory. Other ethnics in Myanmar, especially Buddhist are hostile against Rohingya Muslims, and it raised conflict between them. The statement which had been delivered by Thein Sein was proof that the Myanmar government does not care toward Rohingya conflict. Additionally, Victims of Rohingya case also received less concern from Myanmar government. Based on such fact, it raised the question on the violation which was committed by the Myanmar government in responding the conflict. Then, related to the response of Myanmar government

²¹ LG. Saraswati et.all., 2006, *Hak Asasi Manusia , Teori Hukum dan Kasus*, Filsafat UI Press. p. 195

towards Rohingya case, this research discussed on state responsibility which should be given by Myanmar government as a state that have territory inhabited by Rohingya ethnic.

B. Statements of Problem

1. Are there human rights violations committed by the Myanmar government toward Rohingya ethnic?
2. What is the state responsibility should be conducted by Myanmar government to Rohingya ethnic?

C. Research Objectives

1. The aim of this thesis to analyse human rights violations which committed by the government of Myanmar toward Rohingya ethnic.
2. The aim of this thesis also for learning further on the State Responsibility of Myanmar Government toward Rohingya Case in The Perspective of International Human Rights Law. It explained about state responsibility which should be conducted by the government of Myanmar to Rohingya ethnic.

D. Definition of Technical Terms

The terms which were used in this thesis will clearly explained to make the analysis easier to be understood by the readers.

State Responsibility means the obligation to give answers to the things that happened and the obligation to provide a remedy on the harm that may be caused.²² In general term, state responsibility comprises two elements, an unlawful act, which is imputable to the state.²³ In the draft, articles on Responsibility of States said that, Every Internationally wrongful act of a State entails the international responsibility of that State.²⁴ In the international law, state responsibility was defined as an obligation that must be carried out by the state to other states by the order of international law.²⁵

Human rights are rights that people have simply because he is human.²⁶ In Universal Declaration of Human Rights said that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty,²⁷ Everyone has the right to recognition everywhere as a person before the law,²⁸”

²² Sugeng Istanto, 1998, *Hukum Internasional*, Andi Offset, Yogyakarta. p. 77

²³ Martin Dixon MA, 2000, *International Law*, Fourth Edition, Blackstone Press Limited, London. p. 232

²⁴ Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. November 2001, Art. 1

²⁵ Rebecca M.M. Wallace, 2002, *International Law*, Fourth Edition, Sweet&Maxwell, London. p. 175.

²⁶ Rhona K.M Smith at.all., 2010, *Hukum Hak Asasi Manusia*, PUSHAM UII. p.11

²⁷ Universal Declaration of Human Rights, Art. 2

²⁸ Universal Declaration of Human Rights, Art. 6

Human rights violations occur when actions which are committed by state (or non-state) actors deal with abuse, ignore, or denying basic human rights (including civil, political, cultural, social, and economic rights).²⁹

Rohingya Case is conflict between the Moslem Rohingya and Buddhist communities in Rhakine that related to the case of systematic discrimination against Rohingya which was by Myanmar government. Under the Act of 1982 concerning citizenship, the citizenship of Rohingya Moslems is refused and Myanmar government supports omissions in the absence of legal protection and certainty.³⁰ The discrimination raises a conflict that has been not resolved between Rohingya Muslims and other ethnic groups who are predominantly Buddhist. This conflict was started from the ordinary criminal case in early June 2012 in which a woman was raped and murdered by a man in Rhakine, Myanmar. Incidentally, the religion of victim was Buddhist and the perpetrators were Muslim. Since such incident happened, some of Buddhists in Rhakine accused Rohingya Muslim as terrorist and it caused violence in Rhakine which involving actions of intimidation, expulsion, and murder.

²⁹ http://en.wikipedia.org/wiki/Human_rights

³⁰ http://www.kontras.org/index.php?hal=siaran_pers&id=1563, accessed: september 20, 2012

E. Literature Review

The concept of human rights in the modern context was motivated by the thought of a more humane. Therefore, the concept of human rights is defined as “Human rights could generally be defined as those rights which are inherent in our nature and without which we cannot live as human beings”.³¹ These rights are considered universal, which is owned by a human simply because he is human. This perspective shows the issues of race, gender, religion, social status, and citizenship are irrelevant to be disputed. It also states that these rights can be applied universally. All rules and regulations regarding human rights always refer to the UDHR (Universal Declaration of Human Rights). One of the initiators of UDHR from Lebanon, Rene Cassin, said that the content of UDHR is actually divided into five programs: civil rights (Articles 1-11), social rights (Articles 12-17), political rights (Articles 18-21), the rights of economic and cultural (Articles 22-27), as well as the responsibility of the state (Articles 28-30).³² Some of international conventions governing about human rights such as economic social and cultural rights are regulated in ICESCR (*International Covenant on Economic, Social and Cultural Rights*), and Civil and Political Rights in ICCPR (*International Covenant on Civil and Political Rights*). Economic social and cultural rights include the right to a job, a decent livelihood, health and education, education and child protection. Civil and Political rights consist of the rights to

³¹ Retno Kusniati, 2010, “Integrasi Standar Perlindungan, Penghormatan, dan pemenuhan HAM dalam Tugas dan Fungsi Satuan Kerja Perangkat Daerah”, presented in *Semiloka Agenda Strategis Penelitian dan Pengembangan Lintas Sektoral di Bidang HAM*, Kementerian Hukum dan Hak Asasi Manusia RI Balitbang HAM, on April 17, 2010 in Wiltop Hotel, Jambi, p. 80

³² Yosep Adi Prasetyo, 2012, “Hak Ekosob dan Kewajiban Negara, Pernerkuatan Pemahaman Hak Asasi Manusia untuk Hakim seluruh Indonesia”, Holiday Resort Lombok, 28 - 31 Mei 2012, p. 5

life, equality before the law and courts, political participation and the right to be immediately examined. Those regulations are made for protecting the rights of every individual who live in a country.

Individuals who live in a country consist of two categories, they are citizens and non-citizens. People who are not citizens called as alien or foreigner. In order to determine if a person's inhabitants status is are citizen or not, the government of each country uses their own national law. In the Rohingya, case the party that has authority to determine the status of citizenship is the Myanmar. Since they live within the jurisdiction of Myanmar territory. Although each country is authorized to determine citizenship laws that are applied in the territory of the country, the country also should pay attention to the principles of international law contained in international treaties, customary of international law and general principles of international law on citizenship.³³ According J.G. Starke, significance of citizenship status (Nationality) is a person of international law in terms of:³⁴

1. Granting diplomatic rights protection abroad. Every country has the right to protect its citizens abroad.
2. State of the nationality of a particular person will be responsible to other countries if the country neglect its obligation to prevent unlawful acts committed by concerned person. Country has a right to punish or not to punish, after the unlawful act was done.

³³ Arsensius, *Perlindungan Orang Asing dalam Hukum Internasional*, <http://www.jurnal.untan.ac.id>

³⁴ *ibid.*

3. In general, a state may not refuse or receive back its own nationals in its territory.
4. Nationalities closely linked to loyalty and one of the main rights is an obligation of loyalty to serve in the military of a country loyally.
5. A country has border authority, except for a special treaty that bound to do it right, to refuse extradition of its citizens to other countries requesting extradition.
6. The status of the enemy in the war can be determined by the nationality of the person.
7. The implementation of state criminal jurisdiction and other jurisdictions based on one's nationality.

Progressive development in the field of human rights is inseparable from the basic principle that states (government) have an obligation to guarantee and protect human rights of citizens and takes it as a responsibility. In this context, the status of citizenship is necessary as guarantee over people who live in the territory of state. The state responsibility is one of important issues that are always discussed in international law because state is the main legal subjects of international law. The rules of 'state responsibility' indicate the circumstances in which a state will be fixed with legal responsibility over the violation of an international obligation and the consequences this entails.³⁵

State Responsibility is regulated in the Draft of International Law Commission. The draft consist of 4 (four) parts and 59 (fifty-nine) articles. First

³⁵ Martin Dixon MA, *op.cit*, p. 230

part is about The Internationally wrongful act of a state. Second about Content of the International Responsibility of State. Third about The Implementation of International Responsibility of a State and the last part discusses General Provision.³⁶ In the *Draft of State Responsibility* said that Possibility that every State may be held to have committed an internationally wrongful act Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.³⁷

According to ILC (Draft International Law Commission), every internationally wrongful act of a state entails the international responsibility of that state.³⁸ There is an internationally wrongful act of a State when conduct consisting of an action or omission³⁹:

- a. is attributable to the State under international law; and
- b. Constitutes a breach of an international obligation of the State.

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.⁴⁰ It means that although national law recognises that the conduct is lawful, international law declare that it

³⁶ Sefriani, 2010, *Hukum Internasional: Suatu Pengantar*, Rajawali Pers, Jakarta. p. 274, seen also Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. November 2001

³⁷ Draft Articles on State Responsibility, *Text of the draft articles provisionally adopted by the International Law Commission on first reading*. Art. 2

³⁸ Draft Articles on State Responsibility, *Text of the draft articles provisionally adopted by the International Law Commission on first reading*, Art. 1, seen also Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. November 2001. Art. 1

³⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. Art. 2

⁴⁰ Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. Art. 3

is invalid. Therefore, international law provision will prevail in determining the status of the state action.

State wrongful act may happen if there is action or omission which can be delegated or attributable to the state under international law.⁴¹ In relation to the omission which could cause the state responsibility as happened on Rohingya Case, there is possibility there are some omissions which were committed by Myanmar government because there is no effort of Myanmar government to solve conflict issue.



⁴¹ Sefriani, *op.cit.*, p. 270

F. Research Method

1. Object of Research

- a. Human rights violations committed by the Myanmar government
- b. The state responsibility should be given by Myanmar government

2. Legal Materials

a. Primary

- Universal Declaration of Human Rights of 1948
- International Covenant on Economic, Social and Cultural Rights of 1966
- International Covenant on Civil and Political Rights of 1966
- Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC. November 2001

b. Secondary

Books and journal related to the human rights violation and state responsibility

c. Tertiary

Legal material obtained through legal dictionary and English dictionary.

3. Method of Gathering Legal Materials

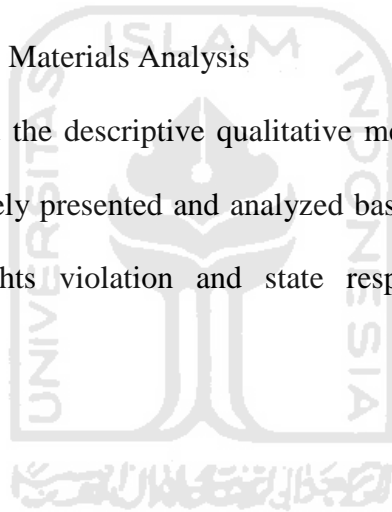
The method in obtaining legal materials was using library studies and documentation. The writer collected data from books that are to the human rights violation and state responsibility especially for Rohingya case.

4. Approach Method

The research used case approach by analyzing the issues from the point of view of case.

5. Method of Legal Materials Analysis

The writer used the descriptive qualitative method. The obtained data were descriptively presented and analyzed based on the case related to the human rights violation and state responsibility of Myanmar Government.



CHAPTER II

**STATE RESPONSIBILITY UNDER INTERNATIONAL HUMAN
RIGHTS LAW PERSPECTIVE**

A. Human Rights under International Law

The international community has reaffirmed many times the universality, indivisibility, interdependence, and interrelatedness of all human rights, whether civil, political, economic, and social or culture. Every person is entitled to them by virtue of being a human being.⁴²

1. Definition of Human Rights

According to the Black's Law Dictionary, is stated that the word Human Rights is the freedoms, immunities, and benefits that, according to modern values (esp. At an international level), all human beings should be able to claim as a matter of right in the society in which they live.⁴³ Human rights are the basic rights and freedoms to all humans are considered entitled: the right to life, liberty, freedom of thought and expression, and equal treatment before the law, among others.⁴⁴ In each part of rights has different meaning. Right to life is a phrase that describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being.⁴⁵ The right to life is the fundamental right, of which all other rights are corollaries. The

⁴² Alina Kaczorowska, 2002, *Public International Law*, Old Bailey Press, London ,p. 254

⁴³ Bryan A. Garner, 2004, *Black's Law Dictionary*, Eight Edition, Thomson Business, United States of America, p. 758

⁴⁴ Michelle Maiese, 2004, *Human Rights Protection*,
<http://www.beyondintractability.org/bi-essay/human-rights-protect>, accessed: October 18, 2012

⁴⁵ *Right to life*, http://en.wikipedia.org/wiki/Right_to_life, accessed: November 10, 2012

right to liberty is a part of the right to life, specifically referring to your freedom of action.⁴⁶ The right to freedom of expression upholds the rights of all to express their views and opinions freely. It is essentially a right which should be promoted to the maximum extent possible given its critical role in democracy and public participation in political life.⁴⁷ Freedom of thoughts and expression has been superior to other human rights. That is because the expression of an individual is the most fundamental activity for self-fulfillment and press is an essential condition of democracy, through which people participate in forming a political decision.⁴⁸ Then, equality before the law, also known as legal equality, is the principle under which all people are subject to the same laws of justice (due process).⁴⁹

The term "human rights" refers to those rights that are considered universal to humanity, regardless of citizenship, residency status, ethnicity, gender, or other considerations.⁵⁰ Such rights are ascribed "naturally", which means that they are not earned and cannot be denied on the basis of race, creed, ethnicity, or gender.⁵¹

⁴⁶ *Right*, http://www.importanceofphilosophy.com/Politics_Rights.html, accessed: November 10, 2012

⁴⁷ *Freedom of Expression*, http://www.hrea.org/index.php?doc_id=408, accessed: November 10, 2012

⁴⁸ *ibid.*

⁴⁹ *Equality before the law*, http://en.wikipedia.org/wiki/Equality_before_the_law, accessed: November 10, 2012

⁵⁰ *Human Rights Definition*, <http://civilliberty.about.com/od/internationalhumanrights/g/Human-Rights-Definition.htm>, accessed: October 13, 2012

⁵¹ David Little, *Universality of Human Rights*, <http://www.usip.org/research/rehr/universality.html>, accessed: October 18, 2012

a. The Definition based on the Scholar

Some scholars give the definition of human rights, for instance:

1) John Locke

This scholar argued in detail, mainly in writings associated with the Revolution of 1688 (The Glorious Revolution), that certain rights self- evidently pertain to individuals as human beings (because they existed in ‘the state of nature’ before humankind entered civil society); that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property; then, upon entering civil society (pursuant to ‘a social contract’), humankind surrendered to the state only the right to enforce these natural rights, not the rights themselves; and that the state’s failure to secure these reserved natural rights (the state itself being under contract to safeguard the interests of its members) gives rise to a right to responsible popular revolution.⁵²

2) Thomas Jefferson

This scholar gave poetic eloquence to the plain prose of the 17th century in the Declaration of Independence proclaimed by the 13 American Colonies on July 4, 1744:⁵³

‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness’.

⁵² Henry j. Steiner, Philip Alston, 2000, *International Human Rights in Context*, Second Edition, Oxford University Press, New York, p. 324-325

⁵³ *ibid.*, p.325

3) The Marquis de La Fayette (Lafayette)

He imitated the pronouncements of the English and American Revolution in the (French) Declaration of the Rights of Man and of the Citizen of August 26, 1789. Insisting that ‘men are born and remain free and equal in rights’, the declaration proclaims that ‘the aim of every political association is the preservation of the natural and imprescriptible rights of man’, identifies these rights as ‘Liberty, Property, Safety, and Resistance to Oppression’, and defines ‘Liberty’ so as to include the right to free speech, freedom of association, religious freedom, and freedom from arbitrary arrest and confinement (as if anticipating the Bill of Rights added in 1791 to The Constitution of the United States of 1787).⁵⁴

b. The Definition based on the Universal Declaration of Human Rights

In 1948, the General Assembly adopted Resolution 217A, being a Universal Declaration of Human Rights. The first two articles lay the universal foundation of human rights: human beings are equal because of their shared essence of human dignity; human rights are universal, not because of any State or international organization, but because they belong to all of humanity.⁵⁵ The two articles assure that human rights are the birthright of everyone, not privileges of a select few, nor privileges to be granted or denied, it was related to the definition of

⁵⁴ *ibid.*

⁵⁵ <http://www.un.org/rights/HRToday/>, accessed: October 18, 2012

Human Rights according to the Declaration. Article 1 declared: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.⁵⁶

The Declaration contains a list of economic, social, cultural, and political rights and provides in Art. 2 that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind’.⁵⁷ In Article of UDHR said that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty”.⁵⁸

⁵⁶ Universal declaration of Human Rights, Art. 1

⁵⁷ Martin Dixon MA, *Op.Cit.*, p. 329

⁵⁸ Universal Declaration of human Rights , Art. 2

2. Protection of Human Rights based on International Instruments

a. Based on Universal Declaration of Human Rights

The Universal Declaration covers the range of human rights in 30 clear and concise articles. Each article has criteria of protection. The first two articles lay the universal foundation of human rights. It is as basic of human rights as human. The cluster of articles, 3 to 21, sets forth civil and political rights to which everyone is entitled. The right to life, liberty, and personal security, recognized in Article 3 Everyone has the right to life, liberty, and security of person.⁵⁹

According to the article 3 of UDHR, means that all people in this world have same right to life, in other word every person is forbidden to kill each other. This article also said that everyone has the right liberty and personal security, it is mean that all people in this world is independence, free from colonialism and also intervention from other party. They have right to self-determination. When someone get disturbance from other, he has right to get protection. Because, he has the right in security of person.

The cluster of articles, 22 to27, sets forth the economic, social and cultural rights to which all human beings are entitled. The cornerstone of these rights is Article 22, acknowledging that, as a member of society, everyone has the right to social security and is therefore entitled to the realization of the economic, social, and

⁵⁹ Universal Declaration of Human Rights, Art. 3

cultural rights "indispensable" for his or her dignity and free and full personal development. Five articles elaborate the rights necessary for the enjoyment of the fundamental right to social security, including economic rights related to work, fair remuneration and leisure, social rights concerning an adequate standard of living for health, well-being, and education, and the right to participate in the cultural life of the community. The cluster of articles, 28 to 30, provides a larger protective framework in which all human rights are to be universally enjoyed. Article 28 recognizes the right to a social and international order that enables the realization of human rights and fundamental freedoms. Article 29 acknowledges that, along with rights, human beings also have obligations to the community which also enable them to develop their individual potential freely and fully. Article 30, finally, protects the interpretation of the articles of the Declaration from any outside interference contrary to the purposes and principles of the United Nations.

Some rights which is protected by Universal Declaration of Human Rights, such as:

- 1) right to life, liberty, and security of person⁶⁰
- 2) right to recognition everywhere as a person before the law⁶¹

⁶⁰ Universal Declaration of Human Rights, Art. 3

⁶¹ Universal Declaration of Human Rights, Art. 6

- 3) right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law⁶²
- 4) Right to freedom of movement and residence within the borders of each State.⁶³
- 5) right to leave any country, including his own, and to return to his country⁶⁴
- 6) right to seek and to enjoy in other countries asylum from persecution
- 7) right to a nationality⁶⁵
- 8) right to own property alone as well as in association with others⁶⁶
- 9) right to freedom of thought, conscience and religion⁶⁷
- 10) right to freedom of opinion and expression⁶⁸
- 11) right to freedom of peaceful assembly and association⁶⁹
- 12) right to take part in the government of his country, directly or through freely chosen representatives⁷⁰
- 13) right to equal access to public service in his country⁷¹

⁶² Universal Declaration of Human Rights, Art. 8

⁶³ Universal Declaration of Human Rights, Art. 13

⁶⁴ Universal Declaration of Human Rights, Art. 13 (2)

⁶⁵ Universal Declaration of Human Rights, Art. 15 (1)

⁶⁶ Universal Declaration of Human Rights, Art.17

⁶⁷ Universal Declaration of Human Rights, Art. 18

⁶⁸ Universal Declaration of Human Rights, Art. 19

⁶⁹ Universal Declaration of Human Rights, Art. 20

⁷⁰ Universal Declaration of Human Rights, Art. 21 (1)

⁷¹ Universal Declaration of Human Rights, Art. 21 (2)

- 14) right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality⁷²
- 15) right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment⁷³
- 16) right to a standard of living adequate for the health and well-being of himself and of his family⁷⁴
- 17) right to education⁷⁵
- 18) right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits⁷⁶

The Declaration has no binding legal force. Therefore, it does not impose any immediate duty upon member states to implement its provisions. However, it has had considerable impact on the development of human rights: it has been partially incorporated into many national constitutions (including those of the Uni Soviet Union and China), has served as a basis for national legislation, has been referred to in court opinions and decisions and deliberations of UN

⁷² Universal Declaration of Human Rights, Art. 22

⁷³ Universal Declaration of Human Rights, Art. 23 (1)

⁷⁴ Universal Declaration of Human Rights, Art. 25

⁷⁵ Universal declaration of Human Rights, Art. 26

⁷⁶ Universal declaration of Human Rights, Art. 27 (1)

and has constituted a source of inspiration for many internationally binding treaties.⁷⁷

On 16 December 1966 the GA adopted the International Covenant on economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) (Resolution 2200A (XXI)), together with the Optional Protocol to the ICCPR which provides for a mechanism for dealing with communications from individuals claiming to be victims of violations of the rights set out in the Covenant.⁷⁸

The differences between the UDHR and the Covenant are:⁷⁹

- i) The Covenants are more precise, providing detailed guidelines for the conduct of governments, specific legal protection for individuals, and detailing instances in which public order, safety, health, morals etc. can be invoked to limit individual rights;
- ii) The Covenants contain various measures of implementation, in some cases recognizing the rights of individuals to seek address of their grievances on the international plane;
- iii) The Covenants were not adopted by the GA but were subject to ratification.

⁷⁷ Alina Kaczorowska, *op.cit* ,p. 257

⁷⁸ *ibid.*, p. 258

⁷⁹ *ibid.*

Although the Covenants are treaties binding only those who ratify them, they also constitute the codification of human rights, and consequently some of them reflect customary international law.⁸⁰

- b. Based on International Covenant on Civil and Political Rights of 1966

This Covenant (ICCPR) entered into force in 1976 and, as at 1 October 2000, there were 147 parties, including the UK. The parties of the Covenant undertake 'to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Convention, without distinction of any kind'. The International Covenant on Civil and Political Rights (ICCPR) provides a reasonably comprehensive list of civil and political rights and fixes state parties with a definite legal obligation to respect them.⁸¹

The ICCPR is generally based upon the European Convention on Human Rights. There are some rights which are protected by the articles of this Covenant. Its articles 6-27 promote and protect the following rights and fundamental freedoms: right to life (art.6), freedom from torture or cruel, inhuman or degrading treatment or punishment (art.7), freedom from slavery and servitude and forced or compulsory labour (art.8), freedom from arbitrary arrest or detention

⁸⁰ *ibid.*

⁸¹ Martin Dixon MA, *op.cit.*, p. 333

(art.9), right to human treatment for all persons deprived of their liberty (art.10), freedom from imprisonment on the ground inability to fulfill contractual obligations (art.11), freedom to choose residence (art.12), limitations on expulsion of aliens lawfully admitted to the territory of contracting state (art.13), right to fair trial (art.14), freedom from retroactive application of criminal law (art.15), right to recognition as a person before the law (art.16), freedom from arbitrary intervene with privacy and freedom from attacks on honour and reputation (art.17), freedom of thought, conscience and religion (art.18), freedom of opinion and expression (art.19), freedom from war propaganda, and the advocating of racial or religious hatred (art.20), right to peaceful assembly (art.22), right to family life and right to equality between spouses in respect of their rights and responsibilities as to marriage, during and at its dissolution (art.23), right of children to be protected (art.24), right to participate in public affairs and elections (art.25), right for all persons to be regarded as equal before the law and entitlement to equal protection of the law (art.26), protection of the rights of minorities in the territories of contracting states (art.27).⁸²

⁸² Alina Kaczorowska, *op.cit.*, p. 259-260, see also International Covenant on Civil and Political Rights (ICCPR), art. 6-27

c. Based on International Covenant on Economic, Social and Cultural Rights of 1966

This Covenant also entered into force in 1976 and, as at 1 October 2000, there were 147 parties, including the UK, same like as International Covenant on Civil and Political Rights. Originally it was intended that there should be only one treaty, covering the whole range of human rights, but in view of the rather more subjective nature of economic and social rights (hence ‘second generation’) it was rightly considered preferable to deal with them separately.⁸³ The Covenants covers three categories of rights:⁸⁴

- 1) The right to work and to enjoyment of just and favorable conditions of work, including the right to form and join trade unions;
- 2) The right to social protection, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health;
- 3) The right to education and to participation in cultural life.

⁸³ Martin Dixon, *op.cit.*, p. 334

⁸⁴ Alina Kaczorowska, *op.cit.*, p. 259

3. Protection of Human Rights toward Individual

Protection of human rights is to ensure that people receive some degree of decent, humane treatment. All states have a stake in promoting worldwide respect for human rights, because political systems that protect human rights are thought to reduce the threat of world conflict.⁸⁵ In order to stop the cycle of violence, states must institute policies aimed at human rights protection. Many believe that the protection of human rights "is essential to the sustainable achievement of the three agreed global priorities of peace, development, and democracy".⁸⁶ Respect for human rights has therefore become an integral part of international law and foreign policy. The specific goal of expanding such rights is to "increase safeguards for the dignity of the person".⁸⁷

According to some theories of jurisprudence (legal philosophy), rights and duties are related, so that every right (or power) there is correlative duty.⁸⁸ In constitutional terms, what this means is that rights are relative: one person's rights are not unlimited, since if they were, their exercise would inevitably come into conflict with some other person's rights.⁸⁹ Thus, in any civilized society, one of the functions of the constitution is to ensure a balance rights, interests and powers, so that the rights of one individual are weighed against those of another, and against those of the society as a whole.⁹⁰

⁸⁵ Antonio Cassese, 1990, *Human Rights in a Changing World*, Temple University Press, Philadelphia, p.2

⁸⁶ *Human Rights Today: A United Nations Priority*, <http://www.un.org/rights/HRToday/>, accessed: October 18, 2012

⁸⁷ Antonio Cassese, *op.cit.*, p.3

⁸⁸ Irving Stevens, 1996, *Constitutional and Administrative Law*, 3rd Edition, Pearson Professional Limited, Great Britain, p. 113

⁸⁹ *ibid.*

⁹⁰ *ibid.*

Virtually every human rights instrument includes a nondiscrimination clause. Given that, every universality of human rights is based on the premise that all people are born 'free and equal in dignity and rights'⁹¹, a prohibition on discrimination in the enjoyment of those rights is inevitable.⁹² While some instruments explain a general prohibition on discrimination, others restrict the prohibition on discrimination to the extent necessary to ensure equal enjoyment of the rights and freedoms.⁹³ Discrimination on a variety of specified grounds is prohibited by diverse international instrument.⁹⁴ Such as religious discrimination and racial discrimination.

Freedom of religion in a State is facilitated when there are corresponding provisions prohibiting discrimination on religious grounds.⁹⁵ In this context, state has obligation to protect citizen from discrimination of religious. The prohibition on discrimination on grounds of, inter alia, religious belief is entrenched in international human rights law. Individuals must be free in exercise of this, one of the most fundamental human rights available, to determine his or her own theological or philosophical convictions and to manifest such beliefs free from State interference, at least insofar as the religious practice does not infringe or impede the exercise of the fundamental rights of others.⁹⁶ On 25 November 1981, the United Nations' General Assembly, adopted, a Declaration on the Elimination of All Forms of Intolerance and of

⁹¹ Universal Declaration of Human Rights, Art. 1

⁹² Rhona K. M. Smith, 2005, *Textbook on International Human Rights*, 2nd Edition, Oxford University Press, New York, p. 184

⁹³ *ibid.*

⁹⁴ *ibid.*, p. 185

⁹⁵ *ibid.*, p. 195

⁹⁶ *ibid.*, p. 196

Discrimination Based on Religion or Belief (GA Res. 36/55).⁹⁷ The General Assembly states its consideration that 'religion or belief for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed' (proclamation preceding the Declaration).⁹⁸

Various specialized international texts have addressed the problem of racial discrimination in the definable fields: the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organization in 1958 and the Convention against Discrimination in Education 1960, which was concluded under the auspices of the United Nations Educational, Scientific and Cultural Organization, are two of the most notable of this texts.⁹⁹ Growing international concern prompted the General Assembly to adopt a Declaration on the Elimination of All Forms of Racial Discrimination. This Declaration Condemns all forms of racial differentiation, decrees Government policies based on superiority an endangerment to international peace and security, and proclaims the goal of the United Nations as being Global society free from racial segregation and discrimination.¹⁰⁰

Providing for equality under law, the declaration states that everyone is entitled to equal rights and freedoms without discrimination of any kind. Peace

⁹⁷ *ibid.*, p. 197

⁹⁸ *ibid.*

⁹⁹ *ibid.*, p. 192

¹⁰⁰ *ibid.*

and freedom cannot be ensured as long as fundamental human rights are violated.¹⁰¹

4. Obligation of the State concerning Human Rights

All human rights treaties and other documents reflect the notion that it is primarily the duty of states and their authorities or agents to respect, protect, fulfill, and promote all human rights:

a. To respect

To respect a right means refraining from interfering with the enjoyment of the right.¹⁰² States have a duty to ensure that human rights are respected by state authorities or state agents themselves and by citizens, corporations and other non-state actors operating within their boundaries. Often this means that the state should refrain from action, for example refrain from hindering people to assemble or to choose their own education. However sometimes it means that the state should not refrain from action, but take action. For example, by investing in the security of those who want to freely assemble or demonstrate in order to ensure they will not be harassed by those who might have different opinions.¹⁰³

¹⁰¹ Tenzin Gyatso, H.H. the XIVth Dalai Lama, Human Rights, Democracy and Freedom, <http://www.dalailama.com/messages/world-peace/human-rights-democracy-and-freedom>, accessed: December 13, 2012

¹⁰² *The Human Rights-Based Approach*, <http://www.unfpa.org/rights/approaches.html>, accessed: December 12, 2012

¹⁰³ *State is duty bearer*, <http://www.ediec.org/areas/state-obligations/protect-respect-and-promote-hrs/>, accessed: December 12, 2012

b. To protect

To protect the right means enacting laws that create mechanisms to prevent violation of the right by state authorities or by non-state actors. This protection is to be granted equally to all.¹⁰⁴ All human rights must themselves be protected by law. This is what is called 'the rule of law'. In practical terms this means that states have a duty to ensure that the constitution and other laws are geared towards the protection of human rights, both where it comes to relations between the state and individuals (own citizens or foreigners), as well as between individuals themselves (own citizens and/or foreigners). Furthermore, any disputes about these rights should be submitted for adjudication through a competent, impartial, and independent judicial system.¹⁰⁵

c. To fulfill

To fulfill the right means to take active steps to put in place institutions and procedures, including the allocation of resources to enable people to enjoy the right. A rights-based approach develops the capacity of duty-bearers to meet their obligations and encourages rights holders to claim their rights.¹⁰⁶

¹⁰⁴ *The Human Rights-Based Approach*, <http://www.unfpa.org/rights/approaches.html>, accessed: December 12, 2012

¹⁰⁵ *State is duty bearer*, <http://www.ediec.org/areas/state-obligations/protect-respect-and-promote-hrs/>, accessed: December 12, 2012

¹⁰⁶ *The Human Rights-Based Approach*, <http://www.unfpa.org/rights/approaches.html>, accessed: December 12, 2012

d. To promote

States have a duty to ensure that human rights are promoted and implemented, so that individuals can fully enjoy those rights. Often this implies the development of adequate policies, the allocation of sufficient budgets and other resources by the state as well as the creation of space for non-state actors to do their work in a proper way.¹⁰⁷

5. Violation of Human Rights

Violation of human rights is biggest threat toward peace and security. Today, some of the most serious threats to international peace and security are armed conflicts that arise, not among nations, but among warring factions within a State. Although situations of internal violence, they often spill over borders, endangering the security of other States and resulting in complex humanitarian emergencies. The human rights abuses prevalent in internal conflicts are now among the most atrocious in the world.¹⁰⁸

¹⁰⁷ *State is duty bearer*, <http://www.ediec.org/areas/state-obligations/protect-respect-and-promote-hrs/>, accessed: December 12, 2012

¹⁰⁸ *Human Rights and Conflicts*, <http://www.un.org/rights/HRToday/>, accessed: November 22, 2012

a. Definition of Human Rights Violation

Until this day, there is no clear definition about human rights violation. The consent of expert defines that human rights violation is state obligation which arise from international human rights instruments.¹⁰⁹ Violation of state obligation can be caused by acts commission or acts of omission. In other definition, human rights violation is commission or omission by state toward unconvict norm in national criminal law but it is a human rights norms internationally recognized.¹¹⁰

Based on definition above, we can see that the party who has responsibility is state. The point of state human rights violation is state responsibility. The concept of state responsibility under international law usually is understood as state responsibility arises as impact of international law violation by state.¹¹¹ Related to the international human rights law, definition of state responsibility is “responsibility caused by violation of state toward obligation to protect and respect human rights”. The obligation arises from international human rights agreement, or international customary law, especially *jus cogens*.¹¹²

¹⁰⁹ Rhona K.M Smith et.all., *op.cit*, p.69

¹¹⁰ C. De Rover, *To Serve and to Protect* (International Committee of The Red Cross, 1988), p. 455, in *ibid*.

¹¹¹ Elements of international law violation usually is formulated as: commission of prohibition action; or omission of action which obliged by international law; and doing violation of international law. See also the element of wrongful act in *draft ILC*, article 2 : There is an internationally wrongful act of a State when conduct consisting of an action or omission:(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

¹¹² Rhona K.M Smith et.all., *loc.cit.*, the meaning of *Jus cogens*: the literal meaning of which is "compelling law," is the technical term given to those norms of general international law

Human rights violations occur when actions by state (or non-state) actors' abuse, ignore, or deny basic human rights (including civil, political, cultural, social, and economic rights). In regard to human rights violations of United Nations laws, Article 39 of the United Nations Charter designates the UN Security Council (or an appointed authority) as the only tribunal that may determine UN human rights violations,

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.¹¹³

b. Proof of Violation

Almost every time we can see that violation of human rights happen in the world, such as Palestine, Iraq, and Myanmar. However, they try to hide the violation of human rights. Human rights violation is closed to avoid the responsibility.

The rejection of human rights violation needs deeply monitoring or investigation. From the monitoring or investigation will get general illustration about compliance by States to fulfill its international obligations in the field of human rights. Related to the implementation of ratification of international human rights agreement, such as monitoring toward the realization of obligation. Through investigation will get the

that are argued as hierarchically superior (Sources: Rebecca M.M. Wallace, 1994, *International Law*, 2nd Edition, p. 33, in The Concept of Jus Cogens and the Obligation Under The U.N. Charter, *Sanata Clara Journal of International law*, <http://www.scujil.org/volumes/v3n1/3>) , see also the meaning of Jus cogens in Vienna Convention on the Law of Treaties 1969, Art. 53 about Treaties conflicting with a peremptory norm of general international law ("jus cogens"), and Art.64 about Emergence of a new peremptory norm of general international law ("jus cogens").

¹¹³ United Nation Charter, Art. 39

evident of human rights violation. The collection of evident will be used to ask the responsibility or dispute resolution.

B. State Responsibility Under International Law

According to the International Court of Justice, the general principles of law recognized by civilized nations¹¹⁴, it is one of sources of International Law. Then, State responsibility as general principle of international law also the sources of law which recognized by every state.¹¹⁵ State responsibility is concerned with the violation of a subjective international right even when it does not involve material damage.¹¹⁶ On the other hand, international liability is premised upon the occurrence of significant harm or damage and not on any violation of an international obligation or subjective international right of a State.¹¹⁷ To some extent, the regime of liability could overlap with circumstances giving rise to wrongfulness, and for this reason, the Commission avoided categorizing the topic as one dealing exclusively with “lawful” activities.¹¹⁸

¹¹⁴ Statute of The International Court of Justice, Art. 38 Clause 1 (c)

¹¹⁵ Rhona K.M Smith dkk., *op.cit.*, p. 71

¹¹⁶ Rudiger Wolfrum, “Internationally Wrongful Acts”, in Encyclopedia of Public International Law, Instalment 10, pp. 271-277, para. 276. See also Karl Zemanek, “Causes and Forms of International Liability” in Bin Cheng and E. D. Brown (eds.), *Contemporary Problems of International Law: Essays in honour of George Schwarzenberger on his eightieth birthday* (1988), pp. 319-333, para. 323.

¹¹⁷ Pemmaraju Sreenivasa Rao, “First Report on prevention of transboundary damage from hazardous activities”, General Assembly, document A/CN.4/487, paras. 41-44.

¹¹⁸ Alan E. Boyle “State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?” 39 *International and Comparative Law Quarterly* 1-25 (1990). On the differences between State responsibility and liability topics, see: (a) Mohammed Bedjaoui, “Responsibility of States: Fault and strict liability”, *Encyclopedia of International Law*, Instalment 10, 1987, pp. 358-362; (b) Karl Zemanek, “State Responsibility and Liability”, in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (1991), pp. 187-201; (c) Teresa A. Berwick “Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes”, vol. X, *Georgetown International Environmental Law Review*, 257-267

1. The definition of state responsibility based on Scholar

In the Spanish Zones of Morocco Claims: Great Britain v Spain (1925) 2

RIAA 615 Judge Hubert said that:¹¹⁹

“Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation”.

The implementation of international law in every state is same, if the state breaches the obligations so they must bear responsibility for that breach. Traditionally, responsibility of states for internationally wrongful acts was based on customary rules originating from the practice of states as applied by the PCIJ and ICJ and by international arbitral international arbitral tribunals.¹²⁰

According to Karl Zemanek, Responsibility of States means that internationally wrongful act, committed by one state against another, entails certain consequences for its author in the form of new obligations toward the victim.¹²¹

According to M.N. Shaw, which become important characteristic of state responsibility depend on basic factors such as, international law obligation between two state, actions or omission violate international law which arise

(1988); and (d) Samong Sucharitkul, “State Responsibility and Liability in Transnational Relations”, in Jerry Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, pp. 283-299 (1996).

¹¹⁹ Alina Kaczorowska, *op.cit*, p. 164

¹²⁰ *ibid.*

¹²¹ Rhona K.M Smith et.all., *loc.cit*, see also Karl Zemanek, Responsibility of States: General Principles, in Rodolf L. Bindsdhlr, et.al., *Eyclopedia of Public International Law, 10, State Responsibility of States, International Law and Municipal Law*, V. 10, Amsterdam: Elsevier Science Publisher B.V., 1987, p. 363

responsibility of state, damage or loss as impact of breach of law or omission.¹²²

2. Basic and Characteristic of State Responsibility

Karl Zemanek explained that in accordance with the relatively of international rights and duties, which is one of the characteristic of international law as a decentralized system, responsibility of states arises in response to the violation of a subjective international right of another State. However with the United Nation Charter and with the recognition of peremptory norms of international law (*jus cogens*) in the Vienna Convention in the Law of Treaties, obligations owed to the international community as a whole began to emerge.¹²³

Basic of state responsibility either come from provisions of International agreement or International customary law. The provision also is regulated in the principle 21 Stockholm Declaration on the Human Environment:¹²⁴

“State have, in accordance with the Charter on the United Nation and the Principles of International Law, the sovereign right to exploit their own resources pursuant to their environmental policies, and the responsibility to ensure the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction...”

Responsibilities are attributed to the State means that state have obligation to give compensation if the state make loss for other state. The

¹²² *ibid.*, p.72

¹²³ Karl Zemanek, *op.cit.*,p.364

¹²⁴ Rhona K.M Smith dkk., *op. cit.*, p.75

statement stated by Permanent Court of International Justice in the decision of Chorzow Factory:

“It is principle of international law, an even a general conception of law, that any breach of an engagement involves an obligation to make reparation...”¹²⁵

State obligation which is attributed and make loss to pay compensation regulated in article 2 clause 3 of ICCPR:

Each State Party to the present Covenant undertakes:¹²⁶

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹²⁵ D. J. Harris, 1998, *Case and Materials on the International Law*, Fifth Edition, Sweet and Maxwell, London, p. 486

¹²⁶ International Covenant on Civil and Political Rights (ICCPR), art. 2 (3)

3. State Responsibility on the International Law Commission

Traditionally, the term “state responsibility” has had both a narrower and a broader scope than the ILC articles—narrower in that it referred only to a limited subject, namely, state responsibility for injuries to aliens; broader in that it embraced the whole range of issues relating to that subject, including not only “secondary” issues such as attribution and remedies, but also the primary rights and duties of states, for example, the asserted international standard of treatment and the right of diplomatic protection.¹²⁷

The topic of state responsibility has been greatly clarified and developed by the International Law Commission (ILC). In the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft ILC), stated that state responsibility raised if there is a violation which categorized as wrongful act or omission or combination both of them. It is stated in the Article 1: “Every internationally wrongful act of a State entails the international responsibility of that state”.¹²⁸

The basic concepts of the Draft, its structure and content were prepared by Alberto Ago. The ILC has made three essential contributions to the development of rules of state responsibility:¹²⁹

- a. Alberto Ago introduced as distinction between ‘primary rules’, which impose certain rules of conduct (obligations to do), and ‘second level rules’ which define consequences of internationally wrongful acts

¹²⁷Daniel Bodansky and John R. Crook, 2002, “Symposium: The ILC’s State Responsibility Articles”, *The American Journal of International Law*, Vol. 96:773, p. 776

¹²⁸ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 1

¹²⁹ Alina Kaczorowska, *op. cit.*, p. 166

attributable to a state. Primary rules are of a substantial nature as they define international obligations of a state in each particular context. Secondary rules contain principles which govern state responsibility. The Draft is solely concerned with ‘second level rule’.

- b. The ILC promotes two regimes of state responsibility – ‘ordinary responsibility’ and ‘aggrieved responsibility’ – whilst maintaining the unitary nature of a wrongful act. The emphasis is on the character of the obligation breached. Aggrieved responsibility occurs when a state breaches peremptory norms of international law.
- c. Damage has been dissociated from the wrongful act and is no longer considered as a constituent element. The Special Rapporteur explained this solution as follows:

‘It will be a matter for the primary rule in question to determine what is the threshold for a violation: in some cases this may be the occurrence of actual harm, in others a threat at such harm, in others again, the mere failure to fulfill a promise, irrespective of the consequences of the failure at the time. Similarly, it will be a matter for the primary rules and their interpretation to specify what are the range of interests protected by an international obligation, the branch of which will give rise to a corresponding secondary obligation of reparation’: “Fourth Report on State Responsibility”.¹³⁰

The dissociation of damage from a wrongful act will allow the secondary rules to cover all possible breaches of primary rules without

¹³⁰ Mr James Crawford, Special Rapporteur, A/CN.4/517, para 28 in *ibid.*

excluding responsibility of the delinquent state in case where there is no damage or the damage is not compensable.¹³¹

4. The element of State Responsibility according to Draft ILC 2001

In August 2001, the International Law Commission (ILC) adopted its “Draft Articles on the Responsibility of States for Internationally Wrongful Acts”,¹ bringing to completion one of the Commission’s longest running and most controversial studies.¹³² The articles powerfully express the community and individual interest in the rule of law through the fundamental and initial requirements that states perform their obligations and cease any ongoing wrongful act.¹³³ The ILC gives preference to the objective theory in its article 1 and 2 of the Final Draft. Article 1 provides that every internationally wrongful act of a State entail the international responsibility of that State.¹³⁴ According to Draft ILC, every international wrongful act can arise state responsibility. In article 2 of Draft ILC about Elements of an internationally wrongful act of a State stated that, there is an internationally wrongful act of a State when conduct consisting of an action or omission:¹³⁵

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

¹³¹ *ibid.*,

¹³² Daniel Bodansky and John R. Crook, 2002, “Symposium: The ILC’s State Responsibility Articles”, *The American Journal of International Law*, Vol. 96:773, p. 773

¹³³ Dinah Shelton, 2002, “Righting Wrongs: Reparations in The Articles on State Responsibility”, *The American Journal of International Law*, Vol. 96:833, p. 839

¹³⁴ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 1

¹³⁵ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 2

The first element is attributable to the state under international law, or we called as imputability doctrine. A theory known as the doctrine of imputability says that a state is only responsible for action that is imputable or attributable to it. The most commonly accepted interpretation of this says that the state is responsible for acts done by officials within their apparent authority.¹³⁶ State responsibility is engaged by the acts or omissions of individuals. It is a fundamental matter of responsibility, therefore, to distinguish those acts that are attributable to a state from those which are not. Attribution has the effect of indicating that the act in question is an act of the state concerned.¹³⁷

The matter of attribution may arise in any of the following:

- a. The acts of the state and its officials;

A state can only act through its organs and representatives.

The organs and representatives of a state include the following; the executive and administration; the judiciary; the legislature; the armed forces; and federal states and its component states.¹³⁸ This statement regulated in the article 4 of Draft ILC.¹³⁹ In the other hand the conduct of a person or entity which is not an organ of the State also should be responsible if

¹³⁶ *Doctrine of Imputability*, <http://210.46.97.180/zonghe/book/43Imputability>, accessed: November 22, 2012

¹³⁷ Alina Kaczorowska, *op.cit.*,170

¹³⁸ *ibid.*

¹³⁹ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 4: (1)The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. (2)An organ includes any person or entity which has that status in accordance with the internal law of the State.

the person or entity is acting in that capacity is empowered by the law of that State to exercise elements of the governmental authority which is considered an act of the State under international law. This statement regulated in the article 5 of Draft ILC.¹⁴⁰

b. The acts of private persons;

The ILC Draft provides for two situations, in which a state may be responsible for unlawful acts committed by private persons,¹⁴¹

1) first, when their conduct is directed or controlled by state,

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.¹⁴²

2) second, when their conduct is acknowledged and adopted

by a state its own, Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if

¹⁴⁰ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 5: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

¹⁴¹ Alina Kaczorowska, *op.cit.*,172

¹⁴² Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 4

and to the extent that the State acknowledges and adopts the conduct in question as its own.¹⁴³

c. The acts of insurrectionaries.

In the case of insurrections such a view was less certain as a number of writers argued that a state engaged in repressing insurgents was not responsible for harm caused to foreigners.¹⁴⁴ Lord McNair stated five principles regarding the responsibility of lawful governments for the consequences of insurrection and rebellion;¹⁴⁵

- 1) A state on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner unless it can be shown that the government of that state was negligent in the use of, or in the failure to use, forces at its disposal for the prevention or suppression of the insurrection.

¹⁴³ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art.11

¹⁴⁴ Alina Kaczorowska, *op.cit.*, p. 173

¹⁴⁵ *ibid.*, p.173-174, insurrection also stated in Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 10 about *Conduct of an insurrectional or other movement*: (1) The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. (2) The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

- 2) This is variable test, depending on the circumstances of the insurrection.
- 3) A state is not responsible for damage resulting from military operations directed by its lawful government unless the damage was unnecessary.
- 4) A state is not responsible for loss or damage caused by the insurgents to a foreigner after that foreigner's state has recognised the belligerency of the insurgents.
- 5) A state can usually defeat a claim in respect of loss or damage sustained by resident foreigners by showing that they have received the same treatment in the matter of protection or compensation, if any, as its own nationals.

ILC Final Draft encompasses the general proposition that a state will not be responsible for acts of any insurrectionary movement. The position changes if the movement subsequently becomes the government of the state or establishes a new state in part of the territory of preexisting state.¹⁴⁶ In such cases the new government formed by the insurgents will be responsible for the acts of the movement during the insurgency. It will also bear responsibility for any acts committed by the previous government.¹⁴⁷

¹⁴⁶ Alina Kaczorowska, *op.cit.*, p.174

¹⁴⁷ *ibid.*

Articles 1 and 2 do not mention any fault on the part of state. The notion of fault or culpa particularly inappropriate in respect of state responsibility for wrongful act because, first, it requires the discovery of the intentions or motives of wrongful act and, second, it misunderstands the main purpose of imposing responsibility on state which consists of restoring equality of states vis a vis their international obligations which has been disturbed by the commission of a wrongful act.¹⁴⁸

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.¹⁴⁹ International Law obligation can be arisen from international agreement, customary law, or court decision. An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.¹⁵⁰ International Court of Justice in the *Diplomat and Consular Staff Case* stated that to arise Iran responsibility is determined by 2 things. First, is the action can be attributed to Iran and second, is the Iran action violate obligation of agreement or international law.¹⁵¹ The elements of wrongful act there are two, action or omission. Regarding omission which makes state responsibility can be seen in the *Chorfu Channel Case*, where court stated that Albania is

¹⁴⁸ Alina Kaczorowska, *op.cit.*, p. 169

¹⁴⁹ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art.12

¹⁵⁰ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art.13

¹⁵¹ Sefriani, 2010, *Hukum Internasional: Suatu Pengantar*, Rajawali Pers, Jakarta. p.270

considered and should be aware of any mines in its territorial sea, but not give warning to state that crossed in his waters.¹⁵²

5. The Principle of Reparation

In the Black's Law Dictionary, stated that reparation is "(1) The act of making amends for a wrong; (2) Compensation for injury or wrong, especially for wartime damages or breach of an international obligation".¹⁵³

According to Ian Brownlie, said that reparation will be used to refer to all measures which a plaintiff may expect to be taken by defendant state; payment of compensation (or restitution), an apology, the punishment of the individuals responsible, the taking steps to prevent a recurrence of the breach of duty, and any other forms of satisfaction.¹⁵⁴

Article 31 of Final Draft ILC sets forth the general rule from Chorzow Factory that the responsible state is legally and automatically¹⁵⁵ obliged to make full reparation for injury, including any material or moral damage caused by the wrongful act.¹⁵⁶ Article 32 adds that responsible state cannot invoke its own law as a basis for failing to provide

¹⁵² *ibid.*,

¹⁵³ Bryan A. Garner, (edit), 1999, *Black's Law Dictionary*, Seventh Edition, St. Paul Minn: West Group, p. 1301

¹⁵⁴ Ian Brownlie, 1991, *Principles of International Law*, Fourth Edition, Oxford University Press, Oxford, p. 460

¹⁵⁵ Reparation is thus not contingent upon a demand or protest by any state, although the form of reparation may be determined by the injured state or states. Commentaries, Art. 31, para. 4

¹⁵⁶ Although the commentary says that "injury" means any damaged caused by the wrongful act and thus includes any material or moral damage caused, the formulation is intended to exclude merely abstract concerns or general interest of state.

reparations.¹⁵⁷ The generality of the principle of full reparation is probably inevitable given the wide variety of international obligations. Clearly, the amount of reparation will vary according to the quantum of harm.¹⁵⁸

The forms of reparation, listed in article 34, are restitution, compensation, and satisfaction, either singly or in combination, accompanied in appropriate cases by interest.

a. Restitution

Restitution is defined in Article 35 as reestablishing.¹⁵⁹ The definition of restitution itself has been uncertain, as some decisions have referred to the reestablishment of the status quo ante and others to the situation that would have existed if the wrongful act had not been committed. The grounds for not granting restitution have been widened to allow the greater flexibility within the goal of full reparation. The PCIJ referred to the “impossibility” of restitution as the basis for substituting compensation.¹⁶⁰

¹⁵⁷ Dinah Shelton, *op.cit.*, p. 845

¹⁵⁸ *ibid.*, p. 846

¹⁵⁹ A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. (Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art. 35)

¹⁶⁰ Dinah Shelton, *op.cit.*, p. 850

b. Compensation

Where the restitution is not provided or does not fully eliminate the consequences of the harm, the state responsible must compensate for any financially assessable damage, including loss of profits, that its wrongful act caused the injured state or its nationals.¹⁶¹

There are nevertheless exceptions to the compensation rule in the case of:¹⁶²

- 1) Treaty provisions;
- 2) Confiscation as a penalty for crimes;
- 3) Legitimate exercise of police power;
- 4) Measures of defence;
- 5) Seizure by way of taxation;
- 6) Destruction of property of neutrals arising from military operations;
- 7) Taking of enemy property as reparation

¹⁶¹ *ibid.*

¹⁶² Alina Kaczorowska, *op.cit.*, p. 188

c. Satisfaction

One of forms of reparation is satisfaction, Ian Brownlie define that satisfaction as effort of violator to fulfil the obligation to changes the loss according to customary law or agreement which is made by the parties, and it is not restitution or compensation.¹⁶³ Satisfaction may consist of an acknowledgement of the breach, an expression of regret or apology, or “another appropriate modality” that is neither disproportionate nor “humiliating” to the responsible state.¹⁶⁴ Like restitution and compensation, satisfaction is intended to restore the injured state to its preinjury status, as though the wrong had not occurred, but it focuses on the wrongful conduct of the responsible state so as to provide a remedy for injuries that are not financially assessable, such as moral or legal injury.¹⁶⁵

¹⁶³ Rhona K.M Smith dkk., *op. cit.*, p. 80

¹⁶⁴ Dinah Shelton, *op.cit.*, p. 848

¹⁶⁵ *ibid.*

C. The Relation between State Responsibility and Human Rights

As historical, state responsibility principle has close relationship with human rights. Today, human rights has been regulated in international human rights law, firstly was developed through principle of state responsibility for the treatment of aliens (state responsibility for the treatment of aliens).¹⁶⁶ In the context of human rights, the country is also the main caretaker legal subjects. State is awarded obligation through declarations and international human rights covenants as the main entity responsible fully to protect, enforce and promote human rights.

State responsibility can be seen in the UDHR 1948. In the preamble of the UDHR in 1948 asserted that:

Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.¹⁶⁷

In accordance with the preamble above, it is clear that human rights enforcement is a duty of all nations, is not intended to create ideal conditions for the entire nation, but a common standard to be achieved by all people and all

¹⁶⁶ Rhona K.M. Smith et. al., *loc.cit.*, This principle was explained by Victor Conde: “State responsibility for treatment of aliens (principle): a classical international law principle that served as a historical antecedent to modern human rights law. This principle provided that a state had legal obligation to treat nationals of another state in a manner that conformed to certain minimum standards of civilization. When a foreign national was injured by the state, that state owed a legal obligation to the state of the injured persons nationality to pay compensation or otherwise remedy the injury, and the latter state could collect compensation from the offending state for such damages.” H. Victor Conde, 2004, *A Handbook of International Human Rights Terminology Second Edition*, University of Nebraska, p. 142-143

¹⁶⁷ The General Assembly, Preamble of Universal Declaration of Human Rights 1948

countries in the world. This paradigm shows the openness of human rights in pluralistic countries in enforcing human rights. However human rights should take into account the availability of resources owned by the state, so as not to cause further problems when they are run by the state human rights concerned.

Various international and regional for recognize that individuals have standing to make claims against states for violation of human rights. Within the United Nation system, four international agreements give individuals or groups of individuals the rights to complain about violations of the protected rights: the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The ICCPR gives individuals the right to make written representations to the UN Human Rights Committee for violations of the Covenant by those states that have accepted the Protocol.¹⁶⁸ The UN Committee on Economic, Social and Cultural Rights, which would similarly give individuals the right to complain of breach of the Covenant by a state party to such protocol.¹⁶⁹

¹⁶⁸ Edith Brown Weiss, 2002, "Invoking State Responsibility in The Twenty First Century", *The American Journal of The International Law*, Vol. 96:798, p. 809

¹⁶⁹ *ibid.*, p. 810

D. Human Rights and State Responsibility in Islamic Perspective

Human Rights in Islamic perspective is different from the meaning of human rights are commonly known. For all the rights of an obligation of the state or individuals that should not be overlooked. Rasulullah SAW has said: "*Verily your blood, your wealth and your honor unclean to you*". (Narrated by HR Bukhari and Muslim).¹⁷⁰ The state not only to refrain from touching these rights, it also has an obligation to provide and guarantee these rights. The obligation to provide and guarantee of rights by state can be called as responsibility.

Islam also learned about responsibility, Islam aims to maintain peace of mind and soul not only for a particular individual but for everyone. In order to maintain the peace of mind and soul, it is required to have a co-ordination among all world community. This coordination should exclude the distinction of race and country. Islam does not also demand for any compulsion of religious beliefs, as everyone is personally responsible to God.¹⁷¹

1. Human Rights based on Islamic Perspective

The first major contribution of Islam is a paradigm shift towards human rights. In the Islamic worldview, rights are not subject to any class struggle or a favors by authorities, but a matter of one's own

¹⁷⁰ *HAM Menurut Konsep Islam*, <http://www.angelfire.com/id/sidikfound/ham.html>, accessed: November 11, 2012

¹⁷¹ *The Political System of Islam*, <http://qurratulain.wordpress.com/2006/08/31/the-political-system-of-islam/>, accessed: November 18, 2012

fulfillment.¹⁷² These rights are not determined in view of the social status or the politics of majority and minority; nor are they linked to any racial or gender considerations.¹⁷³ The Qur'an and the *Sunnah* declare all human beings as the progeny of Adam. Therefore, all humans, irrespective of their gender and color, are declared essentially equal.¹⁷⁴ In Arabic, the basic term for right is "haqq", which is first of all a name of God, who is Al-Haqq. That is Truth and Reality. The term haqq means also "duty" as well as "right", obligation as well as claim, law as well as justice. It means also what is due to each thing, what gives reality to a thing, what makes a thing be true. The word Haqq, which is one of the richest in Arabic, involves God, the Quran (which is also called Al-Haqq), law, our responsibilities before God and His law, as well as our rights and just claims.¹⁷⁵

According to the Sharia (Islamic law), right and obligation are among the essential elements of the dignity of man granted to him by God, the most high. The dignity of man is the yardstick of the validity and uprightness of observing rights and duties in accordance with God's will. However, according to the Sharia, right and obligation are restricted to realizing the will and the satisfaction of God. They are also restricted by the public interest, and by not doing harm to the others. People have

¹⁷² *Islam and Human Rights*, <http://www.ips.org.pk/islamic-thoughts/1128-human-rights-an-islamic-perspective.html>, accessed: November 7, 2012

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ Rachida El Diwani, "Human Rights in Islamic Perspectives", Fulbright Scholar, Chatham College, Woodland Road, Pittsburgh PA 15232, p. 3

to identify and agree upon rights and duties concerning new development in their lives, but, in a manner not at variance with the will and laws of God, and in a way that insures the dignity and interest of man and setting forth justice among men.¹⁷⁶ Accordingly, the citizen, rights, and obligation in the eyes of Islam, its values and principles constitute a concomitant, integrated and legal system of life, as well as a legal and irrevocable necessity for guaranteeing the dignity and sanctity of man's interests, security and stability. It is also a legal necessity for the establishment of justice among individuals, groups and all the people at large according to the will of God, Almighty.¹⁷⁷

Every right or duty or national exercise that stand at variance with or contravene the dignity, safety, stability and sovereignty of man in accordance with the will of God, the most high shall have no regard, and is considered null and void in the sight of Islam and its values. Because man's dignity and the land are an endowment by God, the most high, and rights and duties are concomitant and integrated values designed to safeguard and protect man's integrity and the land according to the laws and the will of God. On the other hand, according to the Sharia, rights and duties are collateral and complimentary (one and the same thing).¹⁷⁸

Every right established by Islam is collated by a duty. People must

¹⁷⁶ *Islam and the Rights and Duties of the Citizen*,
<http://www.dialogueonline.org/islamandtherights.htm>, accessed: December 13, 2012

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

respect these rights and duties and refrain from encroaching upon them because they are a gift of God, the most high.¹⁷⁹

Rights as well as the values of citizenship that Islam establishes in one and the same country within the framework of co-existence among the international communities:¹⁸⁰

a. Right to Life

The life of man and its protection is one of the fundamentals and established traditions of the Sharia (Islamic law). Right to protection of life are in fact divine injunctions not to kill and consider life inviolable.¹⁸¹

Allah said:

“And that you slay not the life which Allah has made sacred, save in the course of justice. Thus He has commanded of you in order that you may discern...” (*al-An'am* 6:151).

“...Whosoever kills a human being for another than manslaughter or corruption (*fasad*) in the earth it shall be as if he had killed all mankind, and whoso saves life of one it shall be if he had saved the life of all mankind...” (*al-Ma'idah* 5:32).

According to Islam, any transgression on the life of a single individual is regarded as a transgression on mankind as a

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ Jack Donnelly, 2003, *Universal Human Rights in Theory and Practice*, Second Edition, Cornell University Press, Ithaca New York, p. 72

whole. Just for being an human being, Islam forbids and condemns the slaying of a person and condemns such a crime. The Apostle of God, peace and blessings be upon him also says: “Whoever used an iron bar to take his own life away would have his iron bar in his hands, and would be beaten by it in hell-fire eternally and forever; and whoever throws himself down from the top of a mountain and killed himself would frequently throw himself down in hell-fire eternally and forever”.¹⁸² As such, Islam prescribes severe punishment in this world against a killer, and that the death penalty in order to deter others from committing the same offence, and to purify the murderer from the enormity of his crime and save him from the everlasting punishment in the hell-fire in the hereafter.¹⁸³ Thus it is clear that, Islam lays absolute emphasis on the sanctity of the life of the human being, citizen and non-citizen alike, regardless of gender, race or religion.¹⁸⁴

Addition in International Instrument also regulated about Prohibition of the death penalty that is genocide in the International Covenant on Civil Rights and Political fully comply with the sanctity of life in the Islamic Law. Article 2 (b) Organization of the Islamic Conference Cairo Declaration

¹⁸² *Islam and the Rights and Duties of the Citizen*, <http://www.dialogueonline.org/islamandtherights.htm>, accessed: December 13, 2012

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

on Human Rights in Islam stipulates that: 'Forbidden to the means which results in genocidal annihilation of mankind'.¹⁸⁵

b. The Right of Dignity

As Islam gives man the right to live, so it grants him the right of dignity. “And come not near unto adultery. Lo it is an abomination an evil way...” (*Bani Israil* 17:32). Through Islam, man is honoured just for being a human being, not because of his national, gender, colour or religious affiliation.¹⁸⁶

c. The Right to Justice

Justice is the central issue in the Islamic Sharia. It is one of the Sharia's invariable objectives aimed at realizing the dignity of man and fulfilling the interest of the people.¹⁸⁷ The right to justice proves to be instead a duty of rulers to establish justice.¹⁸⁸ Setting forth justice among the people is the way to eradicate oppression and eliminate injustice on earth.¹⁸⁹ Right to justice: “And if you judge between mankind, that you judge justly...” (*an-Nisa* 4:58).¹⁹⁰ For, justice represents the will of

¹⁸⁵ Mashood A. Baderin, 2003, *International Human Rights and Islamic Law*, Oxford University Press, translated in Bahasa Indonesia by Komisi Nasional Hak Asasi Manusia, p. 73

¹⁸⁶ *loc.cit.*

¹⁸⁷ *loc.cit.*

¹⁸⁸ Jack Donnelly, *loc.cit.*

¹⁸⁹ *Islam and the Rights and Duties of the Citizen*, <http://www.dialogueonline.org/islamandtherights.htm>, accessed: December 13, 2012

¹⁹⁰ *Islam and Human Rights*, <http://www.ips.org.pk/islamic-thoughts/1128-human-rights-an-islamic-perspective.html>, accessed: November 7, 2012

God, the most high in establishing equality among creatures. Hence commitment to justice and adherence to its divine standards is the true criterion of believing in the oneness of God and submission to His will.¹⁹¹ There is no doubt that justice is the true expression and the clear and categorical proof of the highest degrees of faith in the oneness of God, the most high. It also represents respect and submission to His commandments. As such, Islam lays strong emphasis on the establishment of justice even in the event of quarrel and enmity.¹⁹²

d. The Right to Freedom

The right to freedom is a duty not to enslave unjustly (not even a general duty not to enslave).¹⁹³ While stipulating absolute servitude to God, the most high and not any other human being or stone or anything. Islam, at the same time sets forth the highest degrees of human freedom, and reaffirms strong rejection of the state wherein people adopt each other as lords other than God, the most high.¹⁹⁴

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ Jack Donnelly, *loc.cit.*

¹⁹⁴ *Islam and Human Rights*, <http://www.ips.org.pk/islamic-thoughts/1128-human-rights-an-islamic-perspective.html>, accessed: November 7, 2012

e. The Right to Equality

Islam resolves that all people are equal before the Sharia. “And of His signs is this: He created you of dust and you are now human beings dispersed everywhere...” (*ar-Rum* 30:20); “O mankind Be careful of your duty to your Lord (*Rabb*) Who created you from a single soul and from it created its mate and from them both has spread abroad a multitude of men and women. Be careful of your duty (*taqwa*) toward Allah in whom you claim (your rights) of one another...” (*An-Nisa* 4:1). There is no disparity among them in the application of the law (Were Fatma the daughter of Muhammad to steal, Muhammad would have severed her hand).¹⁹⁵

f. The Right to Belief

Islam has established a general principle concerning faith and way of thinking.¹⁹⁶ Koran said that “There is no compulsion in religion...” (*al-Baqarah* 2:256); “Revile not (*wala tasabbu*) those unto whom they call (pray) beside Allah...” (*al-An'am* 6:109). Also: “For you your religion, for me my way of life...” (*al-Kafirun* 109:6). Islam has also established the principle of respecting the feelings of the others, and refraining from

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

harming them or their faith.¹⁹⁷ Islam has even gone farther than proclaiming the freedom of faith by proclaiming the freedom to practice the rites of the faith and arbitration according to its laws in matters concerning personal status associated with the faith within the framework of the general sovereignty of the Muslim state.

g. The Right to Respect Personal Privacy

Islam forbids spying on privacy. Moreover, the Apostle of guidance, peace be upon him has forbidden the pursuit of imperfection or weak spot. “O you who believe enter not houses other than you own without first announcing your presence and invoking peace (*salam*) upon the folk thereof. That is better for you that you may be heedful...” (*an-Nisa* 24:27).

2. State Responsibility based on Islamic Perspective

The most important of an Islamic State Responsibility is to provide a suitable environment for implementation of Islamic rules in society. The Islamic rules (Shariah), the "broad path" can be described as the entirety of Divine commands concerning human actions, for God is the Sole Legislator.¹⁹⁸

¹⁹⁷ *ibid.*

¹⁹⁸ Mohammad R. Taheri, “The Basic Principles of Islamic Economy and Their Effects on Accounting Standards Setting”, Associate Professor of Shahid Chamran University, Iran, p. 6

According to the political system of Islam, the duties of the state are broadly categorized as:

- a. Executive: These duties cover the range of civil, military and administrative responsibilities. By keeping the sovereign powers to almighty Allah, it is the responsibility of the state to maintain
- b. Legislative: The legislature in Islam is subjected to the word of God (Quran), which is the source of law in all walks of life, spiritual as well as temporal. According to Islamic law, the legislative power of the State is not entirely without limits. In Theoretically it is opposed by the view that God is the law giver determine the highest and should not be allowed through His revelation in the Qur'an.¹⁹⁹ The jurists (Fiqh expert) generally consider legislation allowing state what forbidden by Allah in the Qur'an or forbid what is allowed by God in Al-Qur'an as beyond the limits of human legislation that permitted by Islamic Law.²⁰⁰
- c. Judiciary: Judiciary demands for equality of law for all, in which the head of the state is not exempted even. In case of conflicts between individuals or parties from different communities, a private international law will regulate the cases.

¹⁹⁹ Mashood A. Baderin, *loc.cit.*, p. 51

²⁰⁰ *ibid.*, p. 52

- d. Cultural: The cultural duty of the state is not limited only to maintain cultural values within the territory but also to organize foreign mission to make others know what Islam stands for.²⁰¹

The concept of government in Quranic teachings is much more extensive than what has been suggested by conventional political science. Although government means the process of enforcing policies and making decisions by officialdom, but in Quran, special tasks have been assigned to it which changes its nature. According to Quranic teachings, caliphate and guardianship of God aims to pave the way for human perfection. Therefore, everything takes its meaning in the light of monotheism and human perfection.²⁰²

Review of Quranic verses on qualifications of rulers, will clearly show what responsibilities are shouldered by an Islamic government and in what fields it should be active. Government's obligations can be divided into two broad categories: Those obligations which are related to psychological, social and national security and peace; and obligations which pertain to economic comfort and welfare.²⁰³

²⁰¹ *The Political System of Islam*, <http://qurratulain.wordpress.com/2006/08/31/the-political-system-of-islam/>, accessed: November 18, 2012

²⁰² *Obligations of the Islamic Government*, http://www.iranreview.org/content/Documents/Obligations_of_the_Islamic_Government.htm, accessed: November 23, 2012

²⁰³ *ibid.*

CHAPTER III

STATE RESPONSIBILITY OF MYANMAR GOVERNMENT TOWARD ROHINGYA ETHNIC

A. Violation of Human Rights committed by Myanmar Government toward Rohingya Ethnic

There are many violation committed by Myanmar Government toward Rohingya ethnic. Myanmar continues to attract international attention with regards to human rights concerns. The army committed human rights violations in connection with official development projects, including forced labour, killings, beatings, land confiscation, forced farming, restrictions on movement, and confiscation of property.²⁰⁴ Battalions providing security for the Yadana, Yetagun and Kanbawk-Myiang Kalay natural gas pipelines in Tanintharyi Division and Kayin State forced civilians to work on barracks, roads and sentry huts.²⁰⁵ Authorities also confiscated land without compensation in relation to the Shwe gas project in Rakhine State, and targeted villagers suspected of opposing or questioning the project. Authorities arrested, detained and interrogated local villagers, forcing some to flee the area.²⁰⁶

An estimated 28,000 people have been displaced by recent violence in Rakhine State and some 4,600 homes burnt according to UN,

²⁰⁴ Claudio Cordone, 2010, "Pursuing Justice: For All Rights, For All People", *The State of The World Human Rights, Amnesty International Report*, p. 237, Open letter to the governments of Bangladesh, India, Indonesia, Malaysia, Myanmar and Thailand on the plight of the Rohingyas (ASA 01/001/2009, 237)

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

media and NGO reports which indicate that many of the victims are Rohingya. The total number reported displaced is now over 100,000 since clashes broke out between ethnic Rakhine Buddhists and Muslim Rohingya in June 2012.²⁰⁷

According to Arakan Report in July 2012 by Insani Yardim Wakfi (The Foundation for Human Rights and Freedoms and Humanitarian Relief), report that there are many human rights violation happened in Rohingya, such us:²⁰⁸

1. Muslims continue to be killed in Arakan on a daily basis.
2. It is known that a large number of Muslims are currently jailed and are subjected to torture but their identities and exact number cannot be verified.
3. Women are being raped.
4. The ongoing travel ban and curfew imposed on the Rohingya population have completely paralyzed life.
5. Mosques, houses and villages are being set on fire and destroyed.
6. Mosques and madrasahs cannot be repaired without government permit. To monitor compliance with the regulation, masjids and madrasahs have to be photographed

²⁰⁷ Tomas Ojea Quintana, Rita Izsák and Chaloka Beyani, October 31, 2012, Myanmar Urged to End Violence and Protect Vulnerable Communities in Rakhine State – UN Experts, <http://www.burmapartnership.org/2012/10/myanmar-urged-to-end-violence-and-protect-vulnerable-communities-in-rakhine/>, accessed November 30, 2012

²⁰⁸ “Current State of Human Rights”, *Arakan Report*, July 2012, Insani Yardim Wakfi (The Foundation for Human Rights and Freedoms and Humanitarian Relief), Büyük Karaman Caddesi Taylasan Sk. No.3 Fatih - İstanbul – Turkey, p. 14-15

three times a year as a routine practice. If unpermitted maintenance is spotted, those responsible are sentenced to between six months and six years in prison plus a fine. No new mosques or madrasah have been allowed to be built in the last 20 years.

7. A photograph featuring all family members has to be handed to government officials every year. Families are required to pay taxes to the state for every child born and every family member died.
8. Muslims have no freedom of travel. A Muslim has to get permission and pay tax to travel from one village to another.
9. Muslims are forbidden from building their houses out of concrete; they have to make them from wood. The houses are considered as state property and if they are burned down accidentally, owners are sentenced to prison sentences as long as six years.
10. To set up a business a Muslim has to establish partnership with Buddhist. In this partnership, the Buddhist partner owns half of the business without investing any capital.
11. Muslims have to pay annual taxes for the livestock they own.
12. Muslims cannot marry without a permit. A couple wishing to get married has to pay a tax. Sometimes they are denied a permit even if they pay the tax.

13. Muslims are deprived of all public services. For instance, when they get sick they cannot go to state hospitals for treatment.
14. Muslims are not allowed into higher education institutions.
15. Muslims are forbidden to work in public sector jobs. Today there is not a single Muslim civil servant in Arakan.
16. Muslims cannot own fixed line telephones or cellular phones.
17. Muslims are not allowed to own motor vehicles.
18. When Muslims are accused of a crime, they are not give the right to defense and are immediately imprisoned. The police or the army have the authority to raid a Muslim house without a warrant and accuse its inhabitants of any crime. Raiding officers immediately jail the residents if they cannot get a bribe in return for not arresting them.
19. Muslims are subjected to curfew after nine o'clock at night and cannot visit their relatives or neighbors without permission from the police.
20. Muslims are forced to work for the state and Buddhists without receiving any wage in return.
21. Muslims have no right to citizenship. They carry white identification cards bearing the title "foreigner". These cards are only for identification purposes and do not entitle cardholders to any rights.

22. Muslims are not issued passports. They are provided a document to cross into neighboring Bangladesh and sometimes they cannot return to their country because their documents are not accepted. Arakanese Muslims sought shelter in neighboring countries to escape from decade-long systematic persecution and the yearlong refugee life has become a hope for survival. Although it is not possible to estimate the exact number of refugees in Bangladesh, it is well known by everyone, including the UN, that striving to survive in camps under extremely difficult conditions.

Since June 2012, More than 300 Muslim villages, mosques and madrasahs were set on fire on grounds that they were sheltering the criminals.²⁰⁹ Mosques were besieged by Buddhist fanatics. According to independent human rights organizations, around 1,000 people have been killed and thousands of Muslims have been forced out of their homes and villages and into forests since violence erupted in June.²¹⁰ There are some violation classification since June 2012:²¹¹

1. Many thousands of Rohingya have been killed.
2. Thousands of Rohingya are missing.
3. Thousands of homes have been destroyed.

²⁰⁹ “Current State of Human Rights”, *Arakan Report*, July 2012, Insani Yardim Wakfi (The Foundation for Human Rights and Freedoms and Humanitarian Relief), Büyük Karaman Caddesi Taylasan Sk. No.3 Fatih - İstanbul – Turkey, p. 13

²¹⁰ *ibid.*

²¹¹ *Urgent International Actions to Protect Rohingya People*, November 8, 2012, <http://www.burmapartnership.org/2012/11/urgent-international-actions-to-protect-rohingya-people/>, accessed: November 30, 2012

4. Hundreds of women have been raped.
5. More than 100,000 people have been forced to flee their homes.
6. Hundreds and thousands of Rohingya have been living under siege while most of them suffering from starvation and diseases.
7. Rohingya refugees and internally displaced are blocked from receiving adequate food, shelters, medical treatment and other humanitarian aids.
8. A new system of apartheid against Rohingya is being introduced and practiced.

In the Rohingya case, Myanmar government has violate the rights was guaranteed in the International Human Rights Declaration. The Universal Declaration of Human Rights (UDHR), though not a binding treaty, articulates the most basic rights that all UN member states, including Myanmar, are expected to promote and protect. Several of the UDHR provisions, including the prohibition on discrimination, the right to life and liberty, and the right to freedom from torture and other ill-treatment, constitute rules of customary international law. These derive from consistent state practice and the consistent view among states, courts, and experts that these rules are universally binding, regardless of any individual state's treaty status. Thus, while Myanmar is not a state party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, it is still bound by the absolute prohibition against the use of

torture.²¹² Seven provisions of the UDHR are shown in this report to have been violated systematically by Myanmar authorities, including:

1. The right to life, which includes a prohibition on arbitrary deprivation of life, in all circumstances (Article 3);
2. The right to liberty, which includes a prohibition on arbitrary deprivation of liberty and arbitrary arrest and detention (Articles 3 and 9);
3. Freedom from torture and other cruel, inhuman or degrading treatment or punishment—which applies at all times and to all persons without exception (Article 5);
4. The right to a fair trial and the presumption of innocence (Articles 10 and 11);
5. Freedom of thought, conscience, and religion (Article 18);
6. Freedom of expression, limited restrictions on which (for security, public order, the reputation of others) were not applicable to the cases documented in this report
7. including freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19);

²¹² “The Repression of Ethnic Activist in Myanmar”, 2010, *Amnesty International*, London WC1X 0DW United Kingdom, Index: ASA 16/001/2010, p. 11-12

8. Freedom of peaceful assembly and association—whose restrictions are similar to those on freedom of expression, and which were not applicable to the cases contained in this report (Article 20).

Four other provisions are also shown to have been violated:

1. The right to equal protection against discrimination (Article 7);
2. The right to not be subjected to arbitrary interference with privacy, family, home (Article 12);
3. The right to a standard of living adequate for the health and well-being of self and family, including food (Article 25);
4. The right to participate in the cultural life of the community (Article 27).

Based on information above, human rights violation of Rohingya people will be classified as:

- a. Stateless

The government of Myanmar does not recognize Rohingya Muslims as citizens, despite their claims to the land in Myanmar's Rakhine province that dates hundreds of years. They have been accused of being ethnically tied to neighbouring Bangladesh and are diminutively called "Kalar", a slur against their darker skin. However, Bangladesh does not recognize them, largely crowding them into camps like the one at Shahburi Bib, where the Rohingya

are largely left stateless.²¹³ Some Rohingya have been in Myanmar for centuries while others arrived in recent decades; regardless of how long they have been in country, Myanmar authorities consider them undocumented immigrants and do not recognize them as citizens or as an ethnic group. As a result, Rohingya are de jure stateless, according to the 1982 Burmese Citizenship law, and are viewed as a source of instability in the country.²¹⁴

The issue above categorized as violation of provision about rights of nationality. Universal Declaration of Human Rights stated that “Everyone has the right to a nationality”²¹⁵, its mean that everyone has the right to get citizenship status without discrimination. In Myanmar case, Rohingya people has the right to nationality of Myanmar. Specific obligations relating to prevention and reduction of statelessness are established under the 1961 Convention on the Reduction of Statelessness and in regional treaties. The 1961 Convention requires that States establish safeguards in legislation to address statelessness occurring at birth

²¹³ Maryam Ishani, 2 July 2012, *Myanmar's minority Muslims under attack*, http://www.genocidewatch.org/images/Myanmar_12_07_02_Myanmar_s_minority_Muslims_und_er_attack.pdf, accessed: December 24, 2012

²¹⁴ Irin, 16 November 2012, *Myanmar: Briefing: Myanmar's Rohingya crisis*, <http://www.unocha.org/cerf/node/1387>, accessed: December 24, 2012

²¹⁵ Universal Declaration of Human Rights, Art. 15

or later in life. The Convention also establishes obligations for States in the event of State succession.²¹⁶

Other International Instruments also violate by Myanmar government, such as, Convention on The Nationality of Married Women (Article 1-3)²¹⁷, International Convention on the Elimination of All Forms of Racial Discrimination (Article 5)²¹⁸, International Covenant on Civil and Political Rights (Article 24 clause 2)²¹⁹, Convention on the Elimination of All Forms of Discrimination against Women (Article 9)²²⁰, Convention on the Rights of the Child (Article 7 and 8)²²¹, and International

²¹⁶ Jay Milbrandt, 2011, "Stateless", *Cardozo Journal of International and Comparative Law*, 20 *Cardozo J. Int'l & Comp. L.* 75, p. 88

²¹⁷ Article 1: Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife; Article 2: Each Contracting State agrees that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national; Article 3: (1) Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy. (2) Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

²¹⁸ Article 5 (point d(iii)): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (d) Other civil rights, in particular: (iii) The right to nationality

²¹⁹ Article 24(2): Every child shall be registered immediately after birth and shall have a name.

²²⁰ Article 9: (1) States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. (2) States Parties shall grant women equal rights with men with respect to the nationality of their children.

²²¹ Article 7: (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

Convention on the Protection of the Rights of All Migrant Workers.

b. Systematic Prosecution of Forced Labour

The Rohingya, who live in Myanmar's Rakhine State, suffer from systematic persecution, including forced labour, forced eviction, land confiscation, and severe restrictions on freedom of movement.²²²

This condition violate the rights which is guaranteed by Universal Declaration of Human Rights. UDHR stated that Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.²²³ Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.²²⁴ Based on the article of UDHR, people have rights to work without enforcement

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.

Article 8: (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. (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.

²²² "Thailand/India/Indonesia: Rohingyas at risk need protection", 17 February 2011, *Amnesty International Public Statement*, AI Index: ASA 01/004/2011, 1 Easton St., London WC1X 0DW, UK

²²³ Universal Declaration of Human Rights, Art. 23 (1)

²²⁴ Universal Declaration of Human Rights, Art. 23 (3)

and intervention. The article give guarantee to free choice of employment, it means that there are prohibition to forced labour, and in the other side they have rights to just and favourable remuneration, so Myanmar government could not force Rohingya people to work without humanity (forced labour). The other provision which regulated about the prohibition of force labour is Article 8 (clause 3) of ICCPR, stated that

- (a) No one shall be required to perform forced or compulsory labour;

Based on this article, we can conclude that there is no party who can be required Rohingya people to perform forced or compulsory labour, include Military junta of Myanmar. In next provision in Article 8 (clause 3) of ICCPR stated that

- (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
- (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
 - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

The clause of article above elaborate the exception of forced labour prohibition (the forced labour can be forced to the party in this criteria). Based on this clause Rohingya people is not include in the exception. It means that there is no provision which permitted forced labour to Rohingya people. Therefore, Myanmar government has been violate this provision.

c. Massacres

The Burmese rule (Myanmar rule) in Arakan paved the way for a period marked with rights violations against the Rohingya people. In the 1938 massacre, thousands of Arakanese Muslims were killed and more than 500,000 were forced to leave their homeland. In 1942 Muslims were target of another massacre that claimed 150,000 Muslim lives. The death toll of attacks on Muslims in 1947, the Monsoon Operation of 1954 and the King Dragon Operation of 1978 is in ten thousands.²²⁵

This conduct has violated the basic of human rights. As a human we have right to life. Life is first rights of human since they were came to this world. UDHR article 3 stated that everyone has

²²⁵ “Current State of Human Rights”, *Arakan Report*, july 2012, Insani Yardim Wakfi (The Foundation for Human Rights and Freedoms and Humanitarian Relief), Büyük Karaman Caddesi Taylasan Sk. No.3 Fatih - İstanbul – Turkey, p. 6

the right to life, liberty and security of person.²²⁶ It means that all people in this world have same right to life, in other word every person is forbidden to kill each other. In Article 6 of ICCPR also stated that

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Based on article above, we can conclude that there is no party who shall be arbitrarily deprived of his life, related to the Rohingya case, Military regimes cannot deprived of Rohingya people.

d. Religious and Ethnic Discrimination

The situation of Arakanese Muslims deteriorated in the aftermath of the 1962 coup. Most of the commercial enterprises owned by Rohingyas until that time were nationalized and thereby economic power of Muslims was reduced. State-controlled media started to portray Rohingyas as foreigners and Muslims in government positions were replaced with Buddhists.²²⁷ Ethnic groups face official discrimination at schools and governmental institutions, cultures, languages, history and identities of ethnic peoples are restricted or completely banned.²²⁸ Members of ethnic communities are used as forced labor by the military and face

²²⁶ Universal Declaration of Human Rights, Art. 3

²²⁷ *loc.cit*

²²⁸ *ibid.*

insulting treatment at work.²²⁹ These civilians are treated really badly and they sometimes pay the price of their ethnicity with their lives. Arakanese Muslims are worst affected by discriminative and restrictive policies.

This case contrary to provision in Article 18 UDHR jo ICCPR, stated that

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Myanmar government violate this provision, related to the discrimination which occurred in Rohingya.

e. Marriage Ban

Muslims face serious restrictions when they want to get married. Muslims have to meet a dozen of procedural requirements to receive a permit for marriage, which makes extremely difficult for Muslims to marry. A significant part of the Burmese government policy to reduce the Muslim population, the marriage restrictions create serious social problems for Muslims. Authorities demand couples to pay high taxes to get marriage permits. Both the man and the woman willing to get married have

²²⁹ *ibid*

to pay a tax between 50 and 300,000 kyat.²³⁰ The waiting period for the permit is approximately 2-3 years, those failing to pay the tax are not allowed to marry, and sometimes even those who pay the tax are not granted a permit. That is why some couples cross into Bangladesh illegally to marry.²³¹

According to this case, there are some violation toward right of marriage. Rohingya Muslims have to meet a dozen of procedural requirements to receive a permit for marriage, which makes extremely difficult for Muslims to marry. The fund of married is so expensive. Rohingya Muslim get more expensive fund than other ethnic in Rohingya. Here, there are discrimination related to the requirements of marriage to Rohingya Muslim. This case violate the provision which regulate in UDHR. In Article 16 (clause 1) of UDHR stated that

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

This article said that everyone who has full age have the right to marry and to found a family without discrimination, because everyone have equal right without limitation race, nationality or religion. As we know Rohingya people have different race, nationality and religion with other Myanmar

²³⁰ *ibid.*, p. 9

²³¹ *ibid.*

citizen, but it is not mean that they have abused. Myanmar government is not permitted to discriminate the right of married to Rohingya people. So we can conclude that Myanmar violate the provision which is regulated in UDHR.

The classification of violation above is biggest violation was happened in Myanmar by Military junta, it is still many violation was happened in Myanmar out of the classification. The violation by Myanmar government has been violated provision in some International Instrument, such as Universal Declaration of Human Rights related to the basic of the human rights protection; International Covenant on Civil and Political Rights of 1966 related to the right of freedom from slavery and servitude and forced or compulsory labour; International Covenant on Economic, Social and Cultural Rights of 1966 related to the right to work and to enjoyment of just and favorable conditions of work, right to social protection, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health, right to education and to participation in cultural life; and Convention on the Reduction of Statelessness 1961, Convention on The Nationality of Married Women, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, and International Convention on the Protection of the Rights of All Migrant Workers, related to the status of stateless to Rohingya people.

B. State Responsibility should be given by Myanmar Government

The UN General Assembly Resolution 56/231 ('Resolution 56/231') of 24 December 2001²³² deplored human rights violations against ethnic and religious minorities, women and children. It strongly urged the Myanmar Government 'to ensure full respect for all human rights and fundamental freedoms, including economic and social rights, and to fulfill its obligation to restore the independence of the judiciary and due process and to end the impunity of and bring to justice any perpetrators of human rights violations, including members of the military, and to investigate and prosecute alleged violations committed by government agents in all circumstances.'²³³

Myanmar government has not only manifestly failed to protect the Rohingya population but it has also been a primary force behind the persecution and destruction of them. In other side we also remember about the statement of Myanmar President which is contained in the context of study in chapter 1. According to the statement we find the proof that he does not care with the Rohingya victim, it is include negligence of the Myanmar government. Thus the "responsibility to protect Rohingya" lies with the international community.

All human rights treaties and other documents reflect the notion that it is primarily the duty of states and their authorities or agents to respect, protect, fulfill, and promote all human rights. The fourth of principle should be fulfilled by

²³² *Situation of Human Rights in Myanmar*, GA Res 56/231

²³³ Chiew Choong Yee, Adrian, Lau Wai Ming, Louise Anne Sapstead, Tan Eu Gene, 2002, "South East Asia and International Law", *Singapore Journal of International and Comparative Law*, 6 Sing. J. Int'l & Comp. L. 604, Contributors and National University of Singapore, Vol. 604-638, p. 6-7

Myanmar toward Rohingya ethnic, because it is obligation of Myanmar Government as the owner of Rohingya territory.²³⁴ In Rohingya case, to prove that Myanmar should be responsible, determined by 2 things. First, is the action can be attributed to Myanmar and second, is the Myanmar action violate obligation of agreement or international law.

1. Facts of caused responsibility of Myanmar government

According to ILC (Draft International Law Commission), Every internationally wrongful act of a state entails the international responsibility of that state.²³⁵ There is an internationally wrongful act of a State when conduct consisting of an action or omission²³⁶:

- a. is attributable to the State under international law; and
- b. constitutes a breach of an international obligation of the State.

In relation to the action, Military regime of Myanmar has made conduct which arised affliction to Rohingya ethnic. This conduct has been mention in point A, Chapter III, such as discrimination, massacres, and violation of human rights. In addition, related to the omission which could cause the state responsibility was happened to Rohingya Case, there were some omissions which were committed by Myanmar government because there was no effort of

²³⁴ Draft articles on Responsibility of State for Internationally Wrongful Acts, ILC, November 2001, Art.12

²³⁵ Draft Articles on State Responsibility, *Text of the draft articles provisionally adopted by the International Law Commission on first reading*, Art. 1, seen also Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. November 2001. Art. 1

²³⁶ Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. Art.2

Myanmar government to solve conflict issue. Both of the Myanmar conduct could be claimed wrong.

Chapter II of this thesis also has explained that a state can only act through its organs and representatives. The organs and representatives of a state include the following; the executive and administration; the judiciary; the legislature; the armed forces; and federal states and its component states.²³⁷ In this case there are some actor who make the violation, such as military regime, the military regime routinely turned them into slave labour, severely restricted their rights to travel and marry, and denied their access to both medical care and education. Chapter III (point A) elaborate some of violation about that. From its fact we can analyse that there are action by the organ of Myanmar Government (the armed forces). Like statement from Brownlie, said that “whenever misconduct on the part of (person in state service), whatever may be their particular status or rank under domestic law, result in the failure of a nation to perform its obligation under international law, the nation must bear responsibility for the wrongful acts of its servants.....”.²³⁸ From this statement we can conclude that Myanmar should be responsible for the action of military regime.

Based on reason above author found that the first element was fulfilled, which is the action can be attributed to Myanmar.

²³⁷ *ibid.*

²³⁸ Supardan, *Tanggung Jawab Negara*, <http://supardanmansyur.blogspot.com/2011/12/bab-x-tanggung-jawab-negara.html>, accessed January 19, 2013

The second element is constitutes a breach of an international obligation of the State. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.²³⁹ There are some breach of international obligation by Myanmar. Myanmar violate some international obligation which was regulated in International Instrument, where have been mentioned point A chapter 3, such as International Instrument, such as Universal Declaration of Human Rights related to the basic of the human rights protection; International Covenant on Civil and Political Rights of 1966 related to the right of freedom from slavery and servitude and forced or compulsory labour; International Covenant on Economic, Social and Cultural Rights of 1966 related to the right to work and to enjoyment of just and favorable conditions of work, right to social protection, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health, right to education and to participation in cultural life; and Convention on the Reduction of Statelessness 1961, and etc.

Based on the reason above author found that the second element was fulfilled, which is the Myanmar action violate obligation of agreement or international law. Based on both of the reason, all of elements of an internationally wrongful act of a State has been

²³⁹ Supra FN. 144

fulfilled by Myanmar. Therefore, Myanmar should be responsible for the violation which occurred in Rohingya case.

2. Reparation of Myanmar Responsibility

When wrongful act was happened by state, it arised a new legal relationship between the countries concerned, in particular the obligation to make improvements (reparation). The legal consequences of wrongful act does not eliminate the necessity to comply obligations were violated. In other words, a violation of an obligation does not relieve the obligation. In article 30 of Draft ILC stated that,

The State responsible for the internationally wrongful act is under an obligation:²⁴⁰

- a. to cease that act, if it is continuing;
- b. to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Based on article above, point a, related to the violation which occurred in Rohingya, Myanmar should be responsible to cease that act (violation of human rights) by Military regimes, because since the last time until now the violation is continuing. It means that Myanmar responsible to stop the conduct of Military regimes.

In article 31 and 34 of draft ILC about Responsibility of States for Internationally Wrongful Acts, said that state responsible to provide full reparation toward injury by the internationally wrongful act.²⁴¹ The

²⁴⁰ Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC. Art. 30

²⁴¹ Article 31 (1): The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.; Article 34: Full reparation for the injury caused

injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.²⁴² Myanmar responsible to give reparation related to the damage of Rohingya people properties and public facilities of Rohingya people, such as Mosques, houses and villages are being set on fire and destroyed. In article 35 of ILC, stated that;

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article above said that State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed. It means that Myanmar responsive under an obligation to make restitution, that is re establish the situation of Rohingya territory before the wrongful act by Myanmar was committed. Myanmar government should be rebuild the public facilities of Rohingya people and reestablish the condition in Rohingya.

Related to the citizenship status of Rohingya ethnic, although the state has rights to determined who could be their citizen, but

by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

²⁴² Responsibility of States for Internationally Wrongful Acts, Art. 31 (2)

the determination of requirements should be appropriate to the International Convention, International Customary Law, and Legal Principle about legality citizenship. In Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination, stated that;

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law,....”

Although the provision of the instrument stated about the protection of citizenship rights of the individual, but in the sense of ethnic itself, most of the ethnic groups continued to receive the protection of the right to citizenship, because the ethnic groups come from individuals grouped by the same cultural origin. Everyone in these ethnic groups have the right to citizenship. Granting citizenship to individuals within ethnic groups is a form of protection against the existence of ethnic itself. With the citizenship of the individual, members of ethnic groups can enjoy the other rights guaranteed in national legislation.²⁴³

In the case of Rohingya ethnic, their nationality is not recognized by the government of Myanmar to release Burma Citizenship Law 1982, stated that;

²⁴³ Philip Vuciri Ramaga, 1993, “The Group Concept in Minority Protection”, *Human Rights Quarterly*, Vol. 15, No. 3, (Johns Hopkins University Press), p. 584

“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.”²⁴⁴

According to this article properly Myanmar Rohingya has citizenship status, but in the Article 4 of Burma Citizenship Law stated that "the Council of State may decide Whether any national or ethnic group is not", so that under the provisions of the ethnic Rohingya lose citizenship (stateless). Burma Citizenship Law 1982 does not provide clear limitation or criteria about unrecognized ethnic by the council. The limitation fully handed over to the council. In the Convention on the Reduction of Statelessness stated the things that make a person can lose their citizenship as follows:

- a. Where the nationality has been obtained by misrepresentation or fraud.²⁴⁵
- b. That, inconsistently with his duty of loyalty to the Contracting State, the person has in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or has conducted himself in a manner seriously prejudicial to the vital interests of the State;²⁴⁶
- c. That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite

²⁴⁴ Burma Citizenship Law 1982, Art. 3

²⁴⁵ Convention on the Reduction of Statelessness, Art. 8(2b)

²⁴⁶ Convention on the Reduction of Statelessness, Art. 8 (3a)

evidence of his determination to repudiate his allegiance to the Contracting State.²⁴⁷

- d. A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.²⁴⁸

Out of the reasons above, citizenship rights of the person cannot be eliminated. If the reason Myanmar refuses to recognize Rohingya caused by nationality of Rohingya Ethnic is Bangladesh, so the reason is discriminatory and contrary to the international law.

Based on the facts above, author found that Myanmar should be repeal and replace the Burma Citizenship Law, because in this regulation there are obscurity of the article. In one side there is article stated that Rohingya ethnic was recognized an Myanmar Citizen, but another article set opposite.

²⁴⁷ Convention on the Reduction of Statelessness, Art. 8 (3b)

²⁴⁸ Convention on the Reduction of Statelessness, Art. 7 (4)

3. The Responsibility should be conducted by Myanmar Government

State accountable for making mistakes obliged under international law to make improvements over the loss caused by the offense. These losses include both material and moral damages. In this case Myanmar government should be responsible for the Rohingya case, such as:

- a. The government of Myanmar takes immediate steps to end the violence and resolve the issues of displacement and segregation of Muslim communities in Rakhine State, include discriminatory harassment and prosecution of members of minority religious groups.²⁴⁹ Especially for Rohingya Muslim.
- b. Myanmar responsible to give compensation related to the damage of Rohingya people properties and public facilities of Rohingya people, such as Mosques, houses and villages are being set on fire and destroyed. Myanmar government should be rebuild the public facilities of Myanmar people.
- c. The government of Myanmar must repeal and replace the 1982 Burma citizenship Law with a law in line with international law standards and human rights principles. It is related to the status of Rohingya people as citizen.

²⁴⁹ “ The repression of ethnic minority activists in Myanmar”, *Amnesty International Publications 2010*, Index: ASA 16/001/2010, London WC1X 0DW, United Kingdom, p. 56

Myanmar should be replace the regulation and recognized Rohingya ethnic as citizen of Myanmar. As we know Rohingya people were lived in Myanmar territory in long time. On behalf of humanity, Myanmar government as nearest party who must give human rights protection with citizen status, because Myanmar is the owner of Rohingya territory.



CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

There are violations committed by the Myanmar government toward Rohingya ethnic. The government committed human rights violations in Rohingya case, including systematic prosecution, massacres, stateless, marriage ban, religious and ethnic discrimination. The violation by Myanmar government has been violated provision in some International Instrument, such as Universal Declaration of Human Rights related to the basic of the human rights protection; International Covenant on Civil and Political Rights of 1966 related to the right of freedom from slavery and servitude and forced or compulsory labour; International Covenant on Economic, Social and Cultural Rights of 1966 related to the right to work and to enjoyment of just and favorable conditions of work, right to social protection, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health, right to education and to participation in cultural life; and Convention on the Reduction of Statelessness 1961, Convention on The Nationality of Married Women, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, and International Convention on the Protection of the

Rights of All Migrant Workers, related to the status of stateless to Rohingya people.

Based on some facts and any circumstances was conducted by Myanmar government toward Rohingya Ethnic, we conclude that Myanmar government should be responsible for Rohingya case. The state responsibility should be conducted by Myanmar government to Rohingya ethnic are:

1. The government of Myanmar takes immediate steps to end the violence and resolve the issues of displacement and segregation of Muslim communities in Rakhine State, include discriminatory harassment and persecution of members of minority religious groups.
2. Myanmar responsible to give compensation related to the damage of Rohingya people properties and public facilities of Rohingya people, such as Mosques, houses and villages are being set on fire and destroyed. Myanmar government should be rebuild the public facilities of Myanmar people.
3. The government of Myanmar must repeal and replace the 1982 Burma citizenship Law with a law in line with international law standards and human rights principles. It is related to the status of Rohingya people as citizen. Myanmar should be replace the regulation and recognized Rohingya ethnic as citizen of Myanmar. As we know Rohingya people were lived in Myanmar territory in long time. On behalf of humanity, Myanmar government as nearest party who must give human rights

protection with citizen status, because Myanmar is the owner of Rohingya territory.

B. Recommendations

From those facts shown in this thesis related to the state responsibility of Myanmar Government toward Rohingya ethnic case. According to the facts, there are some recommendation to urge the Myanmar government to:

1. Halt all violations of international human rights and humanitarian law;
2. Facilitate independent, impartial, and thorough investigations of all allegations of serious human rights violations; prosecute alleged perpetrators, irrespective of rank or status, in fair proceedings; and provide adequate reparations to victims in accordance with international standards;
3. Urgently take all necessary steps to end the violence and protect all individuals within the territory or subject to the jurisdiction of Myanmar, in an equal and non-discriminatory manner. Immediately prevent, investigate and prosecute all human rights abuses and crimes committed by security forces and civilians against Muslims in Rakhine State.
4. Fully cooperate with UN agencies and international NGOs to enable the non-discriminatory provision of humanitarian assistance and support to all affected communities. Take all necessary steps to prevent future conflict by ensuring equal access to justice, repealing discriminatory laws, and restoring the rights of the Rohingya and other ethnic minorities in

Myanmar. Integrate the principles of human rights, equality and non-discrimination into the legal reform process in Myanmar.

5. Myanmar should continue to improve its human rights record accordingly.
6. Related to the stateless status of Rohingya people, Myanmar should ratify the 1954 and 1961 Conventions on Statelessness and should fulfil the obligations of these instruments including the introduction of necessary domestic legislation to provide procedures to determine status, amend or repeal all legislation which fails to meet international human rights standards, including the 1982 Law on Citizenship, which denies the Rohingyas the right to citizenship.
7. Ratify and effectively implement international human rights treaties, including Universal Declaration of Human Rights related to the basic of the human rights protection; International Covenant on Civil and Political Rights of 1966 related to the right of freedom from slavery and servitude and forced or compulsory labour; International Covenant on Economic, Social and Cultural Rights of 1966 related to the right to work and to enjoyment of just and favorable conditions of work, right to social protection, to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health, right to education and to participation in cultural life; and Convention on the Reduction of Statelessness 1961.

In addition, the other Recommendations are to the International Community:

1. Act in accordance with the doctrine of responsibility to protect, to investigate and prevent the committing of gross human rights violations against Muslim communities, which may amount to ethnic cleansing and crimes against humanity by Myanmar.
2. Act to ensure the government of Myanmar takes immediate steps to end the violence and resolve the issues of displacement and segregation of Muslim communities in Rakhine State. Take all necessary steps to ensure the protection and security of the population in Rakhine State – in particular that Provide urgent humanitarian aid and coordinate efforts to reach all affected communities including victims in isolated or military-controlled areas and those who remain in their homes or communities.
3. Support sending UN Peacekeeping Force and International Observers to Arakan. Unhindered delivery of humanitarian aids to the victims. Support for the establishment of a UN Commission of Inquiry in order to establish the true facts and bring those responsible to justice.
4. Put pressure on the government of Myanmar to repeal and replace the 1982 Burma citizenship Law with a law in line with international law standards and human rights principles.

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