

Atrocity crimes in Myanmar ?



Assessing violence in the wake of the
1 February 2021 attempted coup



This document is a high-level briefing paper only. It does not constitute legal advice and should not be relied upon as such.

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Executive summary

Since the Myanmar military (or ‘Tatmadaw’) staged its coup on 1 February 2021, widespread reports have emerged of security forces using excessive and lethal violence to suppress protest and civil disobedience against the coup. Alleged violence has included killings, arbitrary detention, torture, and enforced disappearances. On 7 July 2021, the UN Special Rapporteur on the Situation of Human Rights in Myanmar described the military’s crackdown on protests as involving ‘acts that amount to crimes against humanity’.¹ There are also recent reports of clashes between security forces and armed individuals acting under the auspices of, or in cooperation with, armed groups. On 7 September 2021, the National Unity Government (‘NUG’) announced a “people’s defensive war” and condemned the military for perpetrating “war crimes”.² These facts raise a further question of whether the situation can be characterised as an armed conflict such that International Humanitarian Law (‘IHL’) applies, including the war crimes regime.

This Briefing Paper aims to provide a high-level analysis of the extent to which the situation in Myanmar arising out of the 1 February coup, as evidenced by publicly available information, has involved crimes against humanity and/or war crimes. The Paper focuses on “atrocity crimes” (genocide, crimes against humanity, war crimes, and ethnic cleansing) currently raised on the facts relating to the response to the coup in Myanmar. In addition to illuminating Myanmar’s responsibilities under international law, determination of the situation as involving atrocity crimes is important because all States have a responsibility to protect populations from atrocity crimes. The legal labels are indicative not only of Myanmar’s responsibility but also of the international community’s responsibility towards those within Myanmar’s borders.

The Paper concludes that as at September 2021 there is evidence emanating from numerous sources to suggest that **atrocity crimes have and continue to occur** in the context of the Tatmadaw’s crackdown on protest to the coup. Specifically, the Paper makes the following preliminary conclusions:

- i. **Crimes against humanity**—the military’s response to protests has likely involved crimes against humanity including:
 - a. **murder;**
 - b. **imprisonment or other severe deprivation of physical liberty;**
 - c. **torture;** and
 - d. **enforced disappearance.**

The available information also suggests that further crimes against humanity of **rape and other sexual violence, persecution, and other inhumane acts** may be substantiated.

- ii. **War crimes**—on the information currently available, it is incorrect to describe the vast majority of violence in response to the coup as involving war crimes. This is because most of the violence that has occurred does not meet the threshold required for characterisation as armed conflict such that International

Humanitarian Law ('IHL')—and the law of war crimes—is not applicable. However, this determination is fact-specific. Recent reports of violence between newly formed militias, including with the cooperation of established ethnic armed organisations, suggests that this characterisation of the situation may change in the very near future such that all actors should be reminded of their obligations under IHL and their actions judged accordingly.

Recommendations and steps that all States should immediately consider in order to give effect to their responsibility to protect appear at the end of the Paper.

Summary of facts

On 1 February 2021, the Myanmar military staged a coup d'état against the democratically elected civilian government of Myanmar, declaring itself the State Administrative Council ('SAC'). The attempted coup sparked widespread civilian demonstrations—according to the Armed Conflict Location & Event Data Project ('ACLED'), more than 4,700 demonstrations occurred between 1 February and 30 June 2021, 98% of which were peaceful.³ The military's response has involved widespread violence, particularly against civilian demonstrators.

Crackdown on anti-coup protests and civil disobedience

The first street protests against the military's takeover in Myanmar were recorded on 4 February, with 20 protesters gathering outside the University of Medicine in Mandalay.⁴ Protests around the country soon followed. On 6 February, thousands of protesters reportedly took to the streets in Yangon and other major cities,⁵ with several hundred thousand people participating in protests in the days and months that followed.⁶ Protests occurred alongside a Civil Disobedience Movement ('CDM'), with workers striking across sectors.⁷ The vast majority of anti-coup demonstrations up until 30 June 2021—98%—were reportedly peaceful.⁸ The 2% of protests documented as involving demonstrator violence allegedly involved retaliation against security forces with throwing stones, use of homemade weapons, or throwing back at security forces tear gas canisters.⁹

Numerous reports have documented the military's response to protests as excessively and lethally violent. In addition to the use of teargas, water cannons, and rubber bullets, multiple NGOs and news outlets have reported the use of live ammunition and military assault-style weaponry against protesters, including by specialised military divisions.¹⁰ Reports also detail a steep increase in military violence against civilians beyond the context of demonstrations, with NGO and news reports identifying incidents in which individuals have been shot in their homes or neighbourhoods,¹¹ arbitrarily arrested,¹² tortured or killed in detention,¹³ abducted to punish family members,¹⁴ or disappeared.¹⁵ There are reports of bodies of those detained being returned to their families with injuries consistent with torture,¹⁶ and with their organs removed and bodies sewn up.¹⁷ In other instances, the military has reportedly refused to return bodies to families, or demanded a ransom for their return.¹⁸ Many have suffered serious and debilitating injuries.¹⁹

Response of ethnic armed organisations

Reports indicate that since 1 February, there has been an increase in armed conflict between well-established ethnic armed organisations ('EAOs') such as the Kachin Independence Army and the Karen National Liberation Army.²⁰ These armed groups have indicated support for the anti-coup movement,²¹ but for the most part seem to have maintained that they operate independently of it.²² In some areas, such as Shan State, there has also been increased armed violence between ethnic armed groups.²³ Some ethnic armed groups have not taken a public position in relation to the coup.²⁴ Since the coup, established EAOs have also reportedly begun training civilians who are eager to learn weapons skills and warfare tactics from groups who have previous experience fighting the Tatmadaw.²⁵

Formation of anti-coup defense forces and pro-military militias

In May 2021, the National Unity Government ('NUG')—a group of ousted members of parliament, activists, and representatives from various ethnic minority groups—declared the formation of a "People's Defense Force" ('PDF') to protect supporters and oppose the military.²⁶ Alongside this group, reports indicate a proliferation of small local resistance groups—on some estimates, more than 100²⁷—calling themselves "people's defense forces".²⁸ Some have declared allegiance with the NUG's PDF or ethnic armed groups; others have not.²⁹ The ACLED has identified around 40 local defense groups that have announced their formation as being active as at 30 June 2021.³⁰ Although information is sparse as to the structure, capacity, and coordination of these groups, reports suggest great variation between them.³¹ Some reports have further detailed training operations by ethnic armed groups of those opposing the coup.³²

There are reports of sporadic armed clashes between the Tatmadaw and members of various groups in recent months.³³ On 7 September 2021, the NUG announced a "people's defensive war" and condemned the military for perpetrating "war crimes".³⁴ At the time of writing, it is difficult to determine the impact of this announcement on the ground. There have been reports of peaceful protests as well as small-scale shootings and sabotage of military structures since the announcement, and violent responses from the military.³⁵ However, similar activities have been occurring for months and it is difficult to determine whether they have occurred in response to or independently of the NUG call to arms. On 10 and 11 September, there were accounts of deadly clashes between the military and the local people's defense force in Myin Thar and nearby villages after more than 100 troops reportedly arrived in military vehicles to secure the area.³⁶ It also remains unclear whether these clashes occurred independently of the NUG's war declaration. The NUG has begun using language suggesting IHL applies to the situation, announcing PDFs are abiding by IHL and human rights principles, "most importantly, the Geneva conventions".³⁷

There are also reports of the emergence of a pro-military militia (referred to as 'Pyu Saw Htee' groups) composed of military supporters armed and acting at times at the direction of, or alongside, the military.³⁸ There are reports of targeted killings and bombings by Pyu Saw Htee members³⁹—and against them⁴⁰—and also of their participation in military offensives.⁴¹

Impact of COVID-19

On 14 July 2021, the UN Special Rapporteur on the Situation of Human Rights in Myanmar described the situation as a "perfect storm" for significant loss of life.⁴² The most recent—and by far the worst⁴³—spike in COVID cases and deaths occurring in the aftermath of the coup has been described as "uncontrolled community spread".⁴⁴ In relation to the impact of anti-coup protests on Myanmar's pandemic response, large-scale demonstrations may have acted as super-spreader events.⁴⁵ Strikes by healthcare personnel have likely left an already weak healthcare service under-staffed.⁴⁶ This has been worsened by the military's apparent targeting of health professionals in its crackdowns.⁴⁷ The country's vaccine rollout has been severely disrupted by government healthcare providers participating in the CDM, refusals to cooperate with the military, and by citizens refusing the vaccine in protest of the military regime.⁴⁸ As at 21 August 2021, approximately 3% of Myanmar's population was recorded as fully vaccinated and less than 5% as partly vaccinated.⁴⁹

There is evidence suggesting that the military has been weaponising the pandemic in its response to anti-coup protest.⁵⁰ Reports indicate that the military has restricted oxygen production and dissemination to military-controlled hospitals and healthcare facilities.⁵¹ Soldiers have allegedly fired upon people gathering at oxygen factories and shops to ensure exclusive supply of oxygen to military-controlled facilities.⁵² Military hospitals have reportedly limited their treatment to military officers and their families,⁵³ while those attempting to provide healthcare outside of military hospitals have been targeted, including by soldiers posing as COVID-19 patients to lure volunteer doctors out of hiding.⁵⁴ In certain ethnic areas, the military has banned or limited entry of medicine, oxygen, and food into the state.⁵⁵ Across Myanmar, those leaving their homes after military-imposed curfew, including to seek medical assistance, have reportedly been gunned down.⁵⁶

Reports indicate that COVID spread through prisons and that many of those in detention with symptoms consistent with COVID have not received medical attention.⁵⁷ The AAPP's data on fatalities since the coup indicates that deaths in detention are often recorded as due to COVID, notwithstanding evidence consistent with death by torture.⁵⁸ Similarly, there are reports that deaths actually caused by military brutality on the streets of Myanmar have been recorded as due to COVID-19.⁵⁹

Duties under international law

The appropriate legal characterisation of the situation in Myanmar post-coup is important because, in addition to indicating whether the violence is contrary to international law, such labels determine the responsibilities of States—including Myanmar—to do something to protect the people of Myanmar.

Atrocity crimes

All States have a responsibility to protect ('R2P') populations from **genocide, war crimes, crimes against humanity**, and **ethnic cleansing** (commonly referred to as "atrocity crimes").⁶⁰ The R2P rubric is not merely rhetoric; it gives effect to obligations under international law. International law imposes an obligation upon *all* States to prevent (and punish) genocide if aware of a "serious risk" of genocide.⁶¹ Although there is not yet a dedicated convention equivalent to the Genocide Convention expressing the obligation, the same can arguably be said for crimes against humanity.⁶² In any case, each constitute violations of *jus cogens* norms and are of such status that all States have a recognised legal interest in their prevention (*erga omnes*).⁶³ Fundamental rules of IHL have also been found to have such status.⁶⁴

The effect of these rules is that if atrocity crimes have been committed in Myanmar since 1 February 2021, certain rights and obligations flow under international law. For Myanmar, it means that the relevant obligations are indelible and cannot be set aside,⁶⁵ including by a military that has obtained power by force.⁶⁶ For other States, if a "serious breach" of *jus cogens* rules has occurred in Myanmar, it means that States are obliged to cooperate to bring an end to the breach and not to recognise the situation created by it, nor aid or assist in maintaining it.⁶⁷

International human rights law

If the situation in Myanmar cannot be said to involve atrocity crimes as established as a matter of international law, other rules of international law nonetheless constrain the extent to which force can be used against individuals in suppressing protest to the coup. Myanmar is a State Party to the following core international human rights, humanitarian, and international criminal law treaties which are, amongst others, relevant to the alleged abuses arising in relation to the coup:

- International Covenant on Economic, Social, and Cultural Rights;
- Convention on the Elimination of All Forms of Discrimination against Women;
- United Nations Convention on the Rights of the Child;
- Convention on the Political Rights of Women;
- International Convention Against the Taking of Hostages;
- International Convention for the Suppression of Terrorist Bombings;
- Geneva Conventions;
- Convention on the Prohibition of Chemical Weapons; and
- Hague Convention for the Protection of Cultural Property.

Myanmar is also bound by obligations of customary international law, including obligations of such status codified in treaties it is not a party to such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the Additional Protocols to the Geneva Conventions.

Assessment of the facts

SOURCES AND RELIABILITY OF EVIDENCE

The conclusions made in this Paper are based on publicly available information relating to the situation in Myanmar. Principally, this information consists of:

- summary data and statistics as recorded by local NGOs such as the Assistance Association for Political Prisoners ('AAPP') and international organisations such as the Armed Conflict Location & Event Data Project ('ACLED');
- alleged internal military documents and statements, as reported by news outlets; and
- eye-witness or personal testimony of individuals with direct experience of the situation in Myanmar as available through UN, NGO, and local and international news reports.

These sources of information are, at the time of writing, the most reliable and credible information available to inform high-level legal analysis of the situation in Myanmar such as that presented in this Paper. Where possible, information has been verified against other news and NGO reports.

As a matter of law, the weight that may be attached to the various sources of evidence available varies according to the authenticity, credibility, and reliability of each source.⁶⁸ Due to practical difficulties and exigencies, much of the currently publicly available information pertaining to the situation in Myanmar derives from NGO and media reports. Such sources are generally not considered "best evidence" for the purpose of determining international crimes. However, such sources remain critical to preliminary assessments of the situation. For the purposes of this Report, necessary assumptions are accordingly made about the extent to which more reliable open source evidence might be corroborated by (or rather, corroborate) direct evidence.

In addition to the open-source evidence outlined in this Paper, relevant courts may have access to the evidence collected by the Independent Investigative Mechanism for Myanmar ('IIMM'). To date, the IIMM has collected over 219,000 information items relevant to post-coup events and Head of the IIMM, Nicholas Koumjian, has stated that the Mechanism's "initial analysis indicates that these crimes are both widespread and systematic in nature".⁶⁹ The Mechanism has the mandate to share relevant information, documentation, and evidence with competent investigative, prosecutorial, and judicial authorities to facilitate and expedite criminal proceedings in national, regional, or international courts or tribunals.⁷⁰ Although this means that the evidence collected is not available to inform Briefing Papers such as this, it does mean that relevant stakeholders can turn to the IIMM for more robust and "best" evidence to further the initial analysis contained in this Paper.

POTENTIAL CRIMES AGAINST HUMANITY

Although there have been various definitions of crimes against humanity since 1945, the most commonly accepted definition is that contained in Article 7 of the Rome Statute.⁷¹ According to that definition, a crime against humanity consists of specific and contextual elements as follows:

ICC STATUTE, ARTICLE 7(1)⁷²

...“crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
9. Enforced disappearance of persons;
10. The crime of apartheid;
11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

A crime against humanity under international law therefore requires satisfaction of both *specific* and *contextual* elements—that is, the commission of certain inhumane acts and critically, that those acts occurred in the particular context of “a widespread or systematic attack directed against a civilian population”. In contrast to war crimes, there is no requirement for a nexus to armed conflict.⁷³

This section of the Paper first considers the likelihood that the existing evidence establishes the requisite contextual elements and then, whether that evidence suffices to establish acts prohibited under Article 7(1) of the ICC Statute.

Contextual elements

Existence of an “attack directed against any civilian population”

An “attack directed against any civilian population” requires: (a) “a course of conduct involving the multiple commission of [prohibited] acts”; (b) directed “against any civilian population”; and (c) “pursuant to or in furtherance of a State or organizational policy to

commit such an attack”.⁷⁴ Together, these sub-elements establish the existence of an “attack directed against any civilian population”. The attack need not be military in character; it can encompass mistreatment of the civilian population.⁷⁵

a) Relevant “course of conduct”

The “attack” element requires a course of conduct involving the commission of prohibited acts of violence.⁷⁶ NGO and press began reporting human rights abuses relating to the attempted coup in Myanmar the same week the coup occurred, beginning with reports of communications blackouts on 2 February 2021 and escalating to reports of the use of lethal force against protestors by 9 February 2021.⁷⁷ Subsequent NGO and press releases allege murders, arbitrary arrests, and enforced disappearances perpetrated by security forces from that period to present.⁷⁸ The summary data collected and published by the AAPP as at 15 September 2021, identifying 1,093 fatalities,⁷⁹ 6,553 as being detained,⁸⁰ and 1,984 issued with a warrant for arrest since the attempted coup,⁸¹ is indicative of the consistency and scale of military crackdown on protest in the ensuing period. Reports further describe conditions within detention (or as evidenced by bodies returned after death in detention) as including severe beatings, sexual harassment and humiliation, organ removal, and torture techniques such as food deprivation, cold exposure, stress positions and slow cutting.⁸² As considered later in this Report, if proven this conduct likely amounts to prohibited acts under Article 7(1) of the Rome Statute.⁸³ The coincidence, continuity, and similar *modus operandi* across reports dating from 2 February 2021 to present clearly indicate that they constitute “a campaign” or “series” of events as opposed to “a mere aggregate of random acts”,⁸⁴ or “single isolated acts”,⁸⁵ constituting a relevant “attack” under international law.

b) Directed “against any civilian population”

International jurisprudence has interpreted the phrase “directed against any civilian population” as requiring that *civilians* be the *primary* object of the attack.⁸⁶ The term “civilian population” encompasses “any group of people linked by shared characteristics that in turn make it the target of an attack”.⁸⁷ The data relating to the military’s crackdown on protest to the attempted coup illustrates that the majority of individuals targeted are civilians.⁸⁸ 1,040 of the 1,093 fatalities recorded by the AAPP are of civilian protesters,⁸⁹ and 5,806 of the 6,533 identified as in detention have been attributed civilian status by the AAPP (or lack an official affiliation with an organised militia or even a political party).⁹⁰ There is also evidence that the Tatmadaw has been targeting individuals regardless of their status—including protesters,⁹¹ family members of protesters,⁹² journalists,⁹³ residents in their homes,⁹⁴ workers,⁹⁵ and children⁹⁶—to quell opposition, including by fear-mongering.⁹⁷ Therefore, although there remains a legal question as to whether those that might be categorised as members of an organised armed group could claim civilian status for the purposes of this definition as a matter of law,⁹⁸ the military’s indiscriminate use of force against crowds and protesters likely nonetheless meets this aspect of the legal test for crimes against humanity.

c) Pursuant to or in furtherance of a State or organisational policy

Although expressly stipulated in Art 7(2)(a) of the Rome Statute, the authorities remain divided as to whether a plan or policy is strictly required to establish crimes against humanity under customary international law.⁹⁹ If of customary status, the threshold for making out this element is low—crimes must be planned, directed, or organised as opposed to “isolated, random acts of individuals”.¹⁰⁰ It is “a modest threshold that simply excludes random

action”.¹⁰¹ There is no requirement that the “policy” be formally adopted;¹⁰² the criterion may be satisfied by implication from the circumstances or manner in which the acts occur;¹⁰³ and does not require positive action from the State or organisation—implicit endorsement will suffice.¹⁰⁴ Existing reports relating to the situation in Myanmar indicate that the military’s crackdown on protest meets this test on at least three factual bases.

First, the similar *modus operandi* of military operations as reported by media and NGOs and discussed in this Report suggests that it is highly improbable that prohibited acts have occurred randomly.¹⁰⁵ In accordance with international jurisprudence, such an inference satisfies any applicable policy threshold.¹⁰⁶

Second, the violence that reportedly has been deployed by the military in putting down opposition is consistent with implementation of the Tatmadaw’s infamous ‘Four Cuts’ military strategy.¹⁰⁷ Traditionally, this strategy aims to counter guerrilla movements by delivering four “cuts” to insurgent food supply, funds, intelligence, and recruits.¹⁰⁸ It is generally deployed alongside a three-stage colour classification system whereby the colour categorisation of an area reflects the understood rules of engagement: “black” areas are those held by insurgents such that they are characterised by almost complete liberation of restraints on the use of force; “brown” areas are contested areas which permit “abusive forms of conduct”, albeit not to the same degree as black areas; and “white” areas are those that are Tatmadaw-secured.¹⁰⁹ In black areas, all non-Tatmadaw persons are seen to be “the enemy”, regardless of age, gender, or hostility, and the focus is “overwhelmingly on the military defeat of the insurgents and the intimidation of the local inhabitants”.¹¹⁰

Although the military has not explicitly invoked the Four Cuts doctrine in its response to protest to its rule, the violence documented and rhetoric employed alongside it is consistent with use of the strategy. For example, there has been less violence in spaces partially or fully under military control (such as government hospitals—potential “grey” areas) whereas mass protests have been met with open fire (likely “black” areas). The Tatmadaw’s broader use of indiscriminate violence against civilians outside the context of protests could be characterised as fear-mongering employed to stamp out support for dissidents and ensure “enemies” cannot find sanctuary.¹¹¹ The numerous reports of the military taking and refusing to return bodies, or returning them in distressing states, reinforces this analysis in evidencing a pattern of “using corpses and the bodies of the wounded to create anxiety, uncertainty, and strike fear in the civilian population”.¹¹² Even if not formally sanctioned according to the Four Cuts doctrine, the consistency of military operations with the Four Cuts strategy likely meets the requisite level of underpinning organisation necessary to satisfy the policy element of crimes against humanity.

Third, the military have made statements, both publicly and allegedly in official command documents, that suggest the violence has occurred pursuant to a policy that has in fact been formally adopted by the military. In a public announcement broadcasted on state television on 21 February, the SAC stated that “protesters are now inciting the people, especially emotional teenagers and youth to *a confrontation path where they will suffer the loss of life*”.¹¹³ On 26 March, a State MRTV news channel broadcast stated that “you should learn from the tragedy of earlier ugly deaths that you can be *in danger of getting shot to the head and back*”.¹¹⁴ *The Irrawaddy* has reported that an internal military memo dated 11 April 2021—two days after 82 protesters were reportedly massacred in Bago¹¹⁵—documented a

strict instruction given to “[o]fficers at all levels” that they “*must annihilate them* [referring to “rioters”] when [they] face them”.¹¹⁶ On 14 April 2021, a further internal memorandum was reportedly distributed providing that “All the emergency security forces must be *weaponized fully and systematically*” because “riots may extend to your control area”.¹¹⁷ These statements suggest that the violence employed by Tatmadaw troops against civilian protesters was not only consistent with a previously utilised military strategy but that it was pursuant to explicit orders. This clearly satisfies the policy element required for such violence to amount to crimes against humanity.

The alleged Tatmadaw “policy” of violent suppression of civil disobedience also evinces the necessary “State or organizational” character required of this element of the legal test for crimes against humanity. This is notwithstanding the contested legitimacy of the military’s coup. Although the coup may give rise to doubt as to whether the policy is “State” sanctioned, the military possesses the characteristics of an organisation capable of directing mass crimes in satisfaction of the broad test articulated in international jurisprudence.¹¹⁸

Attack of a “widespread or systematic” character

According to the most recent international jurisprudence, the term “widespread” “connotes the large-scale nature of the attack and the number of targeted persons”,¹¹⁹ whereas the “systematic” character of an “attack” may be established by showing their “organised nature” and “the improbability of their random occurrence”.¹²⁰ The criteria need only be satisfied in the alternative.¹²¹

In relation to the situation in Myanmar, there is evidence suggesting that both criteria are satisfied. As of 15 September 2021, the AAPP had documented 1,093 individuals as having been killed by the Tatmadaw coup and 6,533 people as in arbitrary detention.¹²² This data is broadly consistent with the reporting of the Special Rapporteur on the Situation of Human Rights in Myanmar.¹²³ Related military violence against protestors has also been documented across the country, including in large cities and in remote border areas, indicating that the crackdown has been “large-scale” in geographical nature.¹²⁴ This data suggests that the “widespread” requirement is met. Similarly, the apparently organised nature of the attack, as outlined above, indicates that the attack is “systematic”.

Specific elements

As the existing evidence relating to the situation in Myanmar since 1 February likely meets the threshold of “a widespread or systematic attack directed against a civilian population”, whether the situation amounts to crimes against humanity turns on whether, and if so, which, certain inhumane acts (enumerated in Article 7(1) of the ICC Statute) can be said to have occurred as part of the attack. This section considers those arguably present on the existing evidence.

Murder

There have been numerous reports that the Myanmar security forces have killed individuals as part of its crackdown on people protesting the 1 February attempted coup. The Special Rapporteur on the situation of human rights in Myanmar observed in a statement on 27 July 2021 that the ‘junta has murdered at least 931 people’.¹²⁵ As of 15 September 2021, the

AAPP had documented 1,093 deaths.¹²⁶ Although not all reported deaths are clearly attributable to security forces, most are alleged to be.¹²⁷ The number of fatalities documented by the AAPP correlates broadly to the periods in which military crackdown on protest has been reported as the most severe, with March clearly being the deadliest month.

Under tribunal jurisprudence, these killings will amount to the crime against humanity of murder if they can be proven to have resulted from acts or omissions committed with the intention to kill *or* to cause serious bodily harm, which the perpetrator should have reasonably known *might* lead to death.¹²⁸ The circumstances of killings reported in Myanmar to date indicate that this threshold has likely been met. In particular, notwithstanding a lack of particulars for many documented deaths, more than half recorded by the AAPP have been identified as due to gunshot wounds.¹²⁹ Approximately 111 fatalities recorded by the AAPP are attributed to gunshot direct to the head.¹³⁰ Most gunshot deaths have been reported in circumstances where live rounds have been fired upon largely peaceful protests,¹³¹ or upon residents in or near their homes during raids.¹³² The use of such weapons in law enforcement operations is generally only permissible under international law in very confined circumstances.¹³³ The widespread reports of their indiscriminate use in Myanmar following the attempted coup by security forces and targeted direction of fire suggests that death was foreseen by the shooters. This is reinforced by the public statements made by the military outlined above in which explicit warnings were issued of “loss of life” and “of getting shot to the head and back”. In regards to reports of death by other means, including instances in which civilians have been burnt alive,¹³⁴ protesters have died in detention due to lack of medical care after serious injury or after contracting COVID-19,¹³⁵ or detainees have died due to interrogation methods,¹³⁶ the foreseeability of death in the circumstances is such as to suggest the deaths amount to crimes against humanity of murder.

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

Imprisonment is a crime against humanity where it is an “arbitrary or otherwise unlawful detention or deprivation of liberty”.¹³⁷ The crime extends to prison-like conditions and other serious forms of confinement,¹³⁸ including potentially house arrest.¹³⁹ Under customary international law, the key issue is whether imprisonment is “arbitrary” which will be the case “if no legal basis can be called upon to justify the initial deprivation of liberty”.¹⁴⁰

As at 15 September 2021, the AAPP has identified 6,533 individuals as under detention in Myanmar, arrested since 1 February 2021.¹⁴¹ The majority are detained in prisons, with 42 identified as under house arrest.¹⁴² For most of those documented by the AAPP as currently under detention, no legal basis for imprisonment has been identified.¹⁴³ The circumstances of arrest or identity of the detainee in many of these cases suggests arrest was on the ground of opposition to the coup or for assisting protesters. For example, many of those identified as under detention but without information as to the ground for detention have affiliations to the NLD, were detained during implementation of the coup, during a protest, or after assisting someone who participated in a protest.¹⁴⁴ Subjecting individuals to imprisonment without a legal reason is arbitrary and where part of the Tatmadaw’s broader widespread and systematic attack against civilians, a crime against humanity. Most arrests resulting in detentions documented by the AAPP correlate to the periods in which the military

has most violently suppressed protests (February to May), suggesting that a very high number of detentions meet this threshold.

1,461 of the 6,533 individuals identified as under detention by the AAPP have been documented as being detained according to a specific section of Myanmar law.¹⁴⁵ This does not of itself justify the deprivation of liberty. International jurisprudence clearly confirms that where national law is relied upon as a basis for the deprivation of liberty, “the relevant provisions must not violate international law” in order for detention to be non-arbitrary.¹⁴⁶ In this regard, many of the laws relied upon by the Tatmadaw as a basis for detaining individuals do not meet the standards required under international law. 1,282 of those detained on a ground of local law, for instance, have allegedly been arrested under Sections 124, 505, or 505A of the *Penal Code* which define high treason and sedition. These provisions were amended (and 505A introduced) by the SAC after seizing power such that, under Section 124, acts including “attempts to excite disaffection” towards the “Defence Services or Defence Services Personnel” or that “causes to sabotage or to hinder the success of the Defence Services” are punishable by up to 20 years imprisonment.¹⁴⁷ Under Section 505 and the new Section 505A, imprisonment is warranted for acts including spreading “false news” and attempting to “hinder, disturb, damage the motivation, discipline, health [and] conduct” of “the Defence Services”.¹⁴⁸ These laws do not comply with international legal standards, particularly international human rights law. Although the right to freedom of expression¹⁴⁹ may be restricted where strictly necessary to protect a legitimate interest and proportionate to the interest being protected, the SAC’s orders do not meet this standard in clearly going beyond what may be necessary to protect national security.¹⁵⁰ The result is that detentions under the new laws are likely arbitrary and the threshold of a crime against humanity met in each case.

Torture

The AAPP has explicitly identified at least 59 individuals either killed due to “torture” or being returned dead to family members from interrogation with markings consistent with prolonged and serious beatings, stress positioning, stabbing and cutting, smashing of teeth and nails, and electric shock.¹⁵¹ Such data is consistent with other media and NGO reports, which also include testimony of many of those released from interrogation and further detail tactics including denial of sleep, food, and medical assistance.¹⁵² These reports likely satisfy the threshold of “torture” as a crime against humanity, which requires establishing: (1) the intentional infliction, by act or omission, of severe physical or mental pain or suffering upon one or more persons; (2) the person(s) were in the custody or under the control of the perpetrator; and (3) the pain or suffering did not result from, or was not inherent or incidental to, lawful sanctions.¹⁵³

The existing evidence suggests that the interrogation practices recounted by those that have been detained by security forces in Myanmar and as evidenced on bodies returned from interrogation meet the necessary severity threshold of torture. That threshold has been described in the international jurisprudence as varying according to the circumstances,¹⁵⁴ but as necessarily requiring “an important degree of pain and suffering”.¹⁵⁵ In assessing whether such acts meet the severity threshold, international tribunals have considered factors such as the nature, consistency and context of the infliction of pain, as well as its premeditation and purpose.¹⁵⁶ Reported inflictions of pain by military forces during

interrogations and as punishment are very likely to meet the required threshold. Indeed, in *Kvočka*, the ICTY explicitly recognised acts of “[b]eating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance” as acts “likely to constitute torture”.¹⁵⁷ The statements of witnesses and victims of the severity of the effects of interrogation and punishment techniques also objectively indicate “severe physical or mental pain or suffering”.

The relevant reports allege that the mistreatment has occurred while individuals have been in Tatmadaw custody.¹⁵⁸ Evidence of bodies that have been returned *by* the military *from* military custody with markings of torture reinforce these reports. Further, there are no facts to suggest that the alleged treatment of individuals in detention is inherent or incidental to lawful sanctions such that cumulatively the requirements of the crime against humanity of torture are likely met.

Rape and other sexual violence

There are reports suggesting increased sexual violence and harassment by Tatmadaw soldiers in the aftermath of the coup, particularly against women detainees.¹⁵⁹ In order for sexual violence to amount to a crime against humanity, it must amount to an act of a ‘sexual nature’ against one or more persons ‘by force, or by threat of force or coercion’ and be of a ‘gravity comparable’ to the other specific offences that may constitute a crime against humanity.¹⁶⁰ Like all crimes against humanity, there is also a mental element required to establish this crime which requires that the perpetrator “knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population”.¹⁶¹ For crimes of a sexual nature, there is a tendency to assume sexual violence is ordinarily “isolated” or “personally motivated” and must be “strategic”—not “opportunistic”—or widespread in nature to satisfy this contextual element.¹⁶² This is a misconception.¹⁶³ There is no requirement that sexual violence per se be shown to be widespread or systematic to constitute a crime against humanity—even a single or relatively limited number of sexual crimes may amount to crimes against humanity if proven to be part of an *attack* that is proven to be widespread and systematic.¹⁶⁴ Further, in linking the violence to such an attack, international tribunals have accepted that it is “sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity”.¹⁶⁵ The key evidentiary factors are accordingly “the timing, the perpetrators and the fact that the crimes occurred in connection with... other similar crimes against civilians”.¹⁶⁶

The reports that have emerged to date of sexual violence in relation to the coup have primarily alleged rape and other forms of sexual violence against female captives during interrogations.¹⁶⁷ If substantiated, these allegations may meet the contextual and substantive threshold of crimes against humanity—they have occurred alongside other violence part of the attack as substantiated elsewhere in this Paper, even if the violence has been geographically remote, occurring in prison settings.¹⁶⁸ The greatest barrier to presently concluding from these reports that rape and sexual violence have occurred as crimes against humanity is rather a lack of specificity—the public allegations that have been made are largely speculative and non-specific in nature, with reports of “sexual violence and other forms of gendered harassment and humiliation” in general,¹⁶⁹ or allegations substantiated only by vague hearsay evidence.¹⁷⁰ These accounts suggest that rape and sexual violence

have occurred but are not being adequately reported. It is well-accepted that sexual violence is often underreported—both in peacetime and times of conflict.¹⁷¹ In Myanmar, underreporting is likely being exacerbated by the current political climate, in which it is unsafe for individuals to report acts of violence to local authorities or the international community.¹⁷² Sexual violence has been weaponised by the Tatmadaw in the past in execution of the “Four Cuts” strategy and clearance operations, suggesting particularly close attention is warranted in its investigation.¹⁷³ The existing information accordingly suggests that sexual violence has likely occurred but also that further investigation and evidence-collecting is necessary to determine its extent and particularities as a potential crime against humanity.¹⁷⁴

Persecution

The crime of “persecution” is defined under international law as the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity.¹⁷⁵ The key feature of the crime is the perpetrator’s identification of the group—the *discriminatory* deprivation of rights.¹⁷⁶ The information currently available in relation to the Tatmadaw’s response to protests suggests, as outlined elsewhere in this Paper, that violence has been deployed indiscriminately to quell civil disobedience. To this extent, the distinguishing feature of this crime is not present on the facts as they stand.

There is, however, further evidence suggesting that some individuals have been targeted by the military on the basis of their membership of certain groups.¹⁷⁷ In particular, there have been reports of doctors and medical personnel being targeted by the Tatmadaw since 1 February 2021.¹⁷⁸ According to data published by Insecurity Insight, between 1 February and 31 July 2021 there were 252 reported incidents of violence against or obstruction of health care workers, 234 attributable to the SAC or Tatmadaw soldiers—incidents included arrests for providing medical care, occupation of hospitals, and seizure of medical supplies.¹⁷⁹ 190 health care workers have reportedly been arrested, 37 injured, and 25 killed.¹⁸⁰ There are reports of health care workers being forced into hiding due to fear of arrest and in some cases, their family members being arrested in their places.¹⁸¹ On 4 June, the SAC announced the passports of healthcare workers associated with the CDM were being revoked and ordered confiscation of their medical licenses.¹⁸²

To the extent that these individuals are targeted on the basis of their provision of health care and medical expertise, the material and mental elements of discrimination required for their ill-treatment by the military to amount to persecution are *arguably* present. If discriminatory in the relevant sense, the ill-treatment of health care workers has, on the information available, involved severe deprivations of fundamental rights, including the right to life, right to physical and mental inviolability, and the right to personal freedom.¹⁸³ The offending behaviours against health care workers—including killings, arbitrary detentions, enforced disappearance, torture—likely satisfy the definitions of separate crimes against humanity, satisfying the necessary severity threshold.¹⁸⁴

Enforced disappearance

On 30 August 2021, the AAPP stated that the current condition and location of 82% on their under-detention lists—approximately 5,000 people—remained unknown.¹⁸⁵ The UN Special Rapporteur has identified “a recurring pattern in which family members are not provided on

the location or well-being of those detained”.¹⁸⁶ Interviews undertaken by *Human Rights Watch* confirm that families have been unable to access detained relatives nor information about their relatives’ location or well-being, and that this has heightened concerns about their safety.¹⁸⁷ Such reports are suggestive of the crime of enforced disappearance, which is defined in the Rome Statute as the “arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of law for a prolonged period of time”.¹⁸⁸ The “essence” of the crime has been articulated as “that the friends and families of the direct victims do not know whether the persons concerned are alive or dead”.¹⁸⁹ Although further information is needed to determine the extent of the crime, the existing evidence suggests that the crime of enforced disappearance has occurred in the course and aftermath of the coup.

Other inhumane acts

Reports suggest that the Tatmadaw has in various ways weaponised the pandemic in its crackdown on civil disobedience and that this has resulted in opponents to the Tatmadaw being disproportionately affected by COVID-19. Arguably, the relevant measures taken by the military herein—including the targeting of health care professionals and limitation of access to medical supplies and attention to opponents—may constitute crimes against humanity of “other inhumane acts”. To amount to this crime, acts must be (1) of “a similar character” to other prohibited acts; (2) cause “great suffering, or serious injury to body or to mental or physical health”; and (3) that injury must be intentional.¹⁹⁰ Detainees intentionally denied the appropriate medical care for treating COVID symptoms could fall within this category, although more information is needed to assess whether the requisite intention is present on the facts and whether the requisite degree of severity of suffering has been established.¹⁹¹ Similarly, it is unclear whether the diversion of medical supplies to military hospitals—resulting in deaths for those unable to access such supplies—has occurred with the specific intention of depriving opponents of access to oxygen supplies and other medical equipment. Although there is a persuasive argument to be made on the evidence available, more information is required to determine whether harm of a sufficient gravity and seriousness has been intentionally inflicted so as to constitute a crime against humanity. There are also other incidents on the evidence that may not satisfy the criteria of other specified acts that nonetheless are likely to constitute crimes against humanity under this residual category, for example reports of cruel and degrading treatment of detainees.¹⁹²

POTENTIAL WAR CRIMES

As a matter of international law, “war crimes” are those violations of International Humanitarian Law (‘IHL’) that attract international criminal responsibility.¹⁹³ As IHL only applies to situations that amount to ‘armed conflict’ under international law, the commission of a war crime presupposes the existence of an armed conflict. This is a wholly fact-dependent and case-by-case assessment; there is no requirement that parties involved declare or accept the situation as armed conflict for it to amount to such.¹⁹⁴ This means that the NUG’s declaration of a “people’s war” is not determinative of whether there is an armed

conflict. The situation in Myanmar is also complicated by numerous pre-existing protracted conflicts, which coalesce largely around ethnic divides, that have existed since Myanmar's independence in 1948. Violence relating to the 1 February coup must accordingly be distinguished from other armed violence occurring within the country, including in the context of the various pre-existing on-international armed conflicts ('NIACs'), which is not the focus of this report.¹⁹⁵

For coup-related armed violence in Myanmar to amount to a non-international armed conflict ('NIAC'),¹⁹⁶ it must meet two requirements under customary international law.¹⁹⁷ First, it must evince a certain degree of intensity, described as "protracted armed violence" ('sufficient intensity' requirement). Second, it must be between two or more "organised armed groups" ('sufficient organisation' requirement).¹⁹⁸ A determination of these requirements is not fixed; a situation that initially does not meet the threshold of armed conflict—a situation of civil unrest or "internal disturbances and tensions" only—may later evolve into armed conflict. This is well illustrated by the series of revolutions often described as the "Arab Spring" in which numerous regimes responded to unrest with violence but only in Yemen, Libya, and Syria was it eventually met with organised and armed opposition such that the situations triggered IHL.¹⁹⁹ As these cases illustrate, the line separating armed conflict from situations of "internal disturbance" can often be "blurred" and "not easily determined" in practice.²⁰⁰ This means that even if the situation in Myanmar arising out of the coup does not currently meet the threshold of armed conflict, that determination may change imminently.

Sufficient intensity

Under customary international law, the intensity threshold for classification of violence as non-international armed conflict is "protracted armed violence".²⁰¹ The focus is on the *intensity* of armed violence, not its duration.²⁰² International jurisprudence has illuminated a number of factors that may be relevant to assessment of intensity,²⁰³ including the:

- number, duration, and level of violent confrontations;
- type and distribution of weapons and equipment;
- number and calibre of munitions;
- number of persons and type of forces partaking in fighting;
- number of casualties;
- geographical spread of violence
- extent of material destruction;
- number of civilians fleeing combat zones; and
- potentially, the involvement of the Security Council.²⁰⁴

Reports indicate that early protests in opposition to the 1 February coup were largely peaceful in nature and that it was only later that opposition was *armed*. Of these later armed responses to security force violence—approximately 2% of demonstrations according to ACLED data²⁰⁵—armed violence *by* protesters appears to have been of a low level. Weapons used were predominantly tear gas canisters thrown initially by security forces or stones, or homemade weapons made and used without training or expertise.²⁰⁶ Reports of casualties have been almost entirely focused on protesters injured. This suggests that, for the most part, armed violence *between* protesters and the military has not been of the requisite degree of intensity.

The situation is increasingly less clear in relation to armed violence subsequently reported between people's defense forces and the Tatmadaw. In recent months, there have been reports of clashes between anti-coup militia and the military, including with significant casualties. For example, in August there were three reports of military convoys being ambushed by the "Yaw Defense Force" in Magwe Region, each more deadly than the last, culminating in allegedly more than 30 Tatmadaw troop deaths in the last incident on 23 August.²⁰⁷ On 9 September, there was reportedly fighting between Tatmadaw troops and local people's defense forces in Myin Thar and nearby villages that resulted in at least 15 deaths.²⁰⁸ There are reports of Tatmadaw soldiers being killed in similar incidents with other "people's defense forces",²⁰⁹ and in other incidents, of civilian casualties and residents fleeing their homes.²¹⁰ These incidents have involved intense fighting between individuals, as reflected in casualties, such that they likely meet the intensity threshold of armed conflict, notwithstanding disparities in the weapon capability of Tatmadaw and anti-coup militia. Reports of such incidents have, however, been relatively infrequent. The majority of anti-coup armed offensives appear to have been isolated and sporadic attacks on military targets that are more likely akin to "internal disturbances" than armed conflict.²¹¹ Of the reported violence that may meet the requisite degree of intensity, there is insufficient information to conclude other or most anti-military armed groups are engaging in similar violence. The information thus suggests that some instances of armed violence meet the intensity threshold of armed conflict, but that not all anti-coup armed groups have been engaged in such violence.

Sufficient organisation

Although the exact degree of organisation required of an armed group to satisfy this requirement remains "rather opaque", it seems that the threshold is not particularly exacting—international courts have referred to "some degree of organization" and armed forces that are "organized to a greater or lesser extent",²¹² while commentators have stressed "a modicum",²¹³ "minimum",²¹⁴ and "not to be exaggerated" level of organisation.²¹⁵ A number of factors have been highlighted in the jurisprudence that *may* be taken into account in determining whether an armed group evinces the requisite level of organisation for classification as a non-international armed conflict. These include:

- an official command structure;
- the existence of headquarters;
- control over territory;
- access to weapons, equipment, recruits, and training;
- uniforms;
- discrete roles and responsibilities;
- modes of communication;
- unified military tactics;
- internal regulations and disciplinary procedures;
- the ability to plan, coordinate, and execute military operations; and
- the ability to speak with "one voice", to negotiate and conclude agreements such as ceasefire agreements.²¹⁶

In relation to the situation in Myanmar, it is clear that the Tatmadaw meets the sufficient organisation requirement as an armed group. It is less clear, however, whether groups

engaging the Tatmadaw in violence meet the threshold such that clashes between them can be characterised as “armed conflict”. Reports indicate that of the small number of protests in which protesters engaged in armed violence, the protesters have been largely unorganised. Weapons used were predominantly tear gas canisters thrown initially by security forces or stones—suggesting a lack of premeditation—or homemade weapons made and used without training or expertise.²¹⁷ There is a lack of evidence to suggest coordination in armed violence by protesters in the sense required for the purposes of conflict classification under international law. On the information available, armed violence by protesters in response to security force crackdowns accordingly does not meet the sufficient requirement criterion of armed conflict.

Armed “defense forces” that have reportedly engaged in armed clashes with the Tatmadaw—principally NUG PDF fighters or local defense forces—bear more of the hallmarks of ‘organisation’ with individuals acting under the auspices of declared armed groups. For the NUG’s PDF, the NUG has published a detailed military structure and chain of command.²¹⁸ There is, however, a paucity of information about the command structure and operational capability of this group in practice. There is even less information available about the organisation of local defense forces. This makes assessment of the sufficient organisation criterion more difficult for these groups than for the Tatmadaw.

The sufficient organisation requirement is, however, sensitive to context—it is accepted that armed groups may operate as underground organisations such that their command structure may not be known.²¹⁹ More difficult in the case of the PDF and local people’s defense forces is insufficient information to conclude that, either between them or separately, there is coordination, responsible command, or significant operational capacity. Although the NUG has issued a call to arms for all those opposed to the military regime, there is no evidence to suggest that it currently has effective control over local defense forces such that those groups are accountable to it.²²⁰ There is also currently insufficient information to conclude responsible command exists *within* local defense forces. Furthermore, there is little evidence to date of coordination both within and between declared defense forces.²²¹

Although there is evidence to suggest individuals are being trained in established training camps, the currently available information does not establish the membership of those individuals to groups that possess internal structure.²²² The information that exists about clashes between armed groups and the Tatmadaw also suggests that they have been operating to date with minimal resourcing and a lack of training. For example, the Chinland Defense Force, the Chin local component of the PDF, has been reported as largely limited in access to makeshift weaponry such as slingshots and flintlock hunting ‘Tumee’ rifles.²²³ The local “people’s defense force” that reportedly acted in defence against Tatmadaw troops on September 9 and 10 in Myin Thar village in western Magway has been described as limited in weaponry to “handmade guns and percussion lock firearms” that are “useless” in rain.²²⁴ Other defense forces have largely limited offensives to hit-and-run assassinations, ambushes, and shadowy bombings, further suggesting a paucity of resourcing and capacity.²²⁵ Although some analysts have suggested more effective defense forces are now equipped with automatic weapons, this has not been confirmed.²²⁶

The dearth of evidence to suggest coordination, structure, and capability either between or within people’s defense forces (including the NUG’s), alongside the minimal evidence that

does exist, suggests that most—if not all—of these groups do not *currently* meet the requisite degree of organisation for characterisation of the situation as armed conflict. However, with reports of increasing cooperation with established ethnic armed organisations,²²⁷ even if only at the ground level at current,²²⁸ and indications that the NUG’s PDF is a prelude to a more organised “Federal Union Army”,²²⁹ there is ample evidence to suggest that these groups may in the very near future possess “sufficient organisation”.

Consequences

In a situation that meets the threshold of non-international armed conflict, IHL applies in addition to international human rights law. In particular, Common Article 3 of the Geneva Conventions and relevant rules of customary international law apply. Where the threshold is not met, international human rights law continues to apply, as does the law prohibiting the crimes of genocide and crimes against humanity.

Reports indicate that in recent months human rights abuses have occurred in the course of clashes between declared people’s defense forces and security forces. In several instances, there are accounts of the Tatmadaw retaliating to clashes with punitive reprisals against local communities that have led to killings or forced displacement. Incidents involving particularly intense violence have included:

- In **Sagaing Region**, the Tatmadaw in July 2021 reportedly killed dozens of individuals, some after arrest, some allegedly members of armed groups, with heavy weapons and guns.²³⁰ There are allegations that some of those killed were tortured.²³¹ Over 5,000 civilians have reportedly been displaced.²³² After recent raids of police stations by the local people’s defense force, the Tatmadaw reportedly burned down an entire village and shot at anyone attempting to put out fires or assist those attempting to escape.²³³
- In **Chin State**, there have been reports of villages being targeted by Tatmadaw artillery and the use of human shields. Civilian deaths have been reported, along with extensive damage to civilian buildings and significant displacement of the civilian population. Reportedly, the Tatmadaw has fired upon camps containing internally displaced persons marked accordingly.²³⁴
- In **Kayah State** and **southern Shan State**, there have been reports of the Tatmadaw deploying heavy weapons and conducting airstrikes in civilian areas in response to offensives by armed groups. Over 55 civilian deaths have been reported. Photo evidence of remains found after the strikes suggest at least 22 individuals were summarily executed. Accounts also indicate that civilian objects, including schools and religious sites, were occupied and destroyed by military forces and civilians killed. Over 108,000 civilians have reportedly fled. The Tatmadaw has allegedly restricted humanitarian access to these individuals.²³⁵
- **Across Myanmar**, there have been targeted killings of unarmed individuals, including NLD and other political activists, allegedly attributable to Pyu Saw Htee. Responsibility for other targeted killings and explosions near military structures has been claimed by anti-coup groups.²³⁶

The Office of the United Nations High Commission for Human Rights on the Situation of human rights in Myanmar on 16 September 2021 stated that the above incidents “involve violations and abuses of the rights to life, to liberty and security, of freedom from arbitrary arrest and detention, and to food housing, education and health, among others”.²³⁷ To the

extent that prohibited acts including murder, imprisonment, and torture have occurred, it is also likely that they constitute further crimes against humanity—committed in the context of the widespread and systematic attack identified earlier in this Paper.²³⁸

If, notwithstanding the above analysis, the situation can be said to meet the threshold of armed violence such that IHL applies, incidents like and including these may also constitute violations of IHL and amount to war crimes. If the situation is to be characterised as armed violence due to increased coordination and organisation of people's defense forces in coming months, these incidents raise serious concerns that war crimes may be committed.

Conclusion and recommendations

The public information currently available **strongly suggests** that atrocity crimes have occurred and continue to occur in the aftermath of the military coup in Myanmar on 1 February 2021 as follows:

- i. **Crimes against humanity**—the military’s crackdown on civil disobedience has involved violence amounting to the crimes against humanity of:
 - a. **murder**;
 - b. **imprisonment or other severe deprivation of physical liberty**;
 - c. **torture**; and
 - d. **enforced disappearance**.

The information available also suggests that the following crimes against humanity should be further investigated:

- e. **rape and other sexual violence**;
 - f. **persecution**; and
 - g. **other inhumane acts**.
- ii. **War crimes**—the vast majority of violence in response to the coup has *not* met the threshold required for characterisation as armed conflict such that International Humanitarian Law (‘IHL’)—and the law of war crimes—is not applicable. This is, however, a fact-specific determination and recent reports of violence between newly formed militias, including with the cooperation of established ethnic armed organisations, suggests that this characterisation of the situation may change in the near future.

The information outlined in this Briefing Paper raises concerns that not enough is being done to prevent and punish the perpetration of atrocity crimes in Myanmar post-coup.

UN Member States should:

- **actively identify possible fora for legal proceedings** that could rely on the evidence that has already been collected across Myanmar;
- **adequately resource in-country organisations** to collect evidence of atrocity crimes;
- provide **training for in-country organisations** collecting evidence;
- use formal and informal mechanisms—like Arria-formula meetings—at UN Headquarters to **draw attention specifically to the ongoing risk of atrocity crimes** in the context of the coup;
- **include language in UN documents** actively identifying and responding to the significant risk of atrocity crimes to civilians in protesting against the military coup.

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- ¹ UN Special Rapporteur on the Situation of Human Rights in Myanmar, [“Statement by Thomas H. Andrews to the United Nations Human Rights Council”](#) (7 July 2021).
- ² National Unity Government of Myanmar, [“Acting President of the National Unity Government, Republic of the Union of Myanmar, Duwa Lashi La’s Emergency Speech to the Public on Current Military Crisis”](#) (7 September 2021).
- ³ Armed Conflict Location & Event Data Project (‘ACLED’), *Myanmar’s Spring Revolution* ([online](#), 2021).
- ⁴ Reuters, [“Arrests made at Myanmar anti-coup protest in Mandalay – activists”](#) (4 February 2021); Human Rights Watch (‘HRW’), [“Myanmar: End Crackdown on Media, Communications”](#) (5 February 2021).
- ⁵ Radio Free Asia (‘RFA’), [“Anti-Coup Protests Draw Thousands in Myanmar Cities as Junta Cuts Internet, Mobile Connectivity”](#) (6 February 2021).
- ⁶ See, eg, HRW, [“Myanmar: Arrests Mount as Protests Expand”](#) (13 February 2021); The Irrawaddy, [“Myanmar’s Military Arrests Doctors for Joining and Supporting Civil Disobedience Movement”](#) (12 February 2021);
- ⁷ See, eg, Joshua Carroll, [“How Myanmar’s popular uprising aims to topple military rulers”](#), *Aljazeera* (13 February 2021); Tommy Walker, [“How Myanmar’s Civil Disobedience Movement Is Pushing Back Against the Coup”](#), *VOA* (27 February 2021); John Reed, Patricia Nilsson, and Katrina Manson, [“Protesters playing ‘dangerous game’ with Myanmar’s economy, warn businesses”](#), *Financial Times* (17 March 2021).
- ⁸ Armed Conflict Location & Event Data Project (‘ACLED’), *Myanmar’s Spring Revolution* ([online](#), 2021).
- ⁹ *Ibid.*
- ¹⁰ See, eg, Amnesty International, [“Analysis of 50+ videos from Myanmar crackdown shows battlefield arsenal & notorious troops deployed”](#) (11 March 2021).
- ¹¹ See, eg, BBC, [“Myanmar coup: Six-year-old shot ‘as she ran into father’s arms’”](#) (1 April 2021). See generally Assistance Association for Political Prisoners (Burma) (‘AAPP’), *Recent Fatality List*.
- ¹² See, eg, RFA, [“Arrests, Journalist Beatings as Myanmar Junta Faces Relentless Protests Rejecting Army Rule”](#) (18 February 2021); HRW, [“Myanmar: Security Forces Arrests Defense Lawyers”](#) (2 July 2021).
- ¹³ See, eg, RFA, [“Five-Year-Old Forced to Endure Stress Positions During Two-Week Detention by Myanmar’s Junta”](#) (8 July 2021); RFA, [“Villagers Lament ‘Honest Farmer’ Tortured to Death by Myanmar Junta”](#) (16 June 2021); HRW, [“Myanmar: Teenager Describes Torture, Mock Burial”](#) (22 June 2021). See generally AAPP, *Recent Fatality List*.
- ¹⁴ See, eg, HRW, [“Myanmar: Stop Holding Family, Friends Hostage”](#) (14 June 2021); RFA, [“No Holds Barred: Myanmar Junta Grabs Family Members to Get at Wanted Protesters”](#) (6 May 2021); RFA, [“Myanmar Security Forces Arresting Relatives of Anti-Coup Activists They Can’t Nab in Raids”](#) (7 June 2021). See generally AAPP, *Under Detention List*.
- ¹⁵ See, eg, The Irrawaddy, [“More Than 110 People Abducted by Myanmar Junta This Week”](#) (23 April 2021).
- ¹⁶ See, eg, Luke Harding, [“Outrage in Myanmar after activist allegedly tortured to death”](#), *The Guardian* (15 March 2021); The Irrawaddy, [“Villager Dies After Being Abducted and Tortured by Myanmar Junta Forces”](#) (28 April 2021); RFA, [“Torture Suspected in Death of Myanmar Poet Called a Voice of Resistance”](#) (11 May 2021).
- ¹⁷ See RFA, [“Myanmar Dissidents Deaths in Custody, Unapproved Autopsies Prompt Calls For Probe”](#) (11 June 2021); RFA, [“Torture Suspected in Death of Myanmar Poet Called a Voice of Resistance”](#) (11 May 2021); Robin McDowell and Margie Mason, [“AP Investigation: Myanmar’s junta using bodies to terrorize”](#), *Associated Press* (26 May 2021).
- ¹⁸ See Robin McDowell and Margie Mason, [“AP Investigation: Myanmar’s junta using bodies to terrorize”](#), *Associated Press* (26 May 2021). See further Julia Hollingsworth and Akanksha Sharma, [“Myanmar’s military is charging families \\$85 to retrieve bodies of relatives killed in crackdown”](#), *CNN* (12 April 2021);
- ¹⁹ See, eg, Associated Press, [“Myanmar protesters injured as police escalate use of force”](#) (26 February 2021); Myanmar Now, [“Student protester maimed in attack by soldiers left out of prison release”](#) (1 July 2021).
- ²⁰ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Thomas H. Andrews, [UN Doc A/HRC/46/56](#) (4 March 2021) [88]-[96]. See further, eg, Myanmar Now, [“KIA attacks police bases in Hpakan”](#) (18 March 2021); Myanmar Now, [“Karen National Liberation Army has ‘killed more than 180 junta soldiers’ since June”](#) (23 July 2021); Kachin News Group, [“KIA Attack Checkpoint On Bridge Linking Myitkyina to Waingmaw”](#) (25 June 2021); Myanmar Now, [“Dozens more junta soldiers killed amid intense fighting in Karen State”](#) (24 August 2021).
- ²¹ See, eg, The Irrawaddy, [“Ceasefire Signatories KNY and RCSS Condemn Myanmar Coup”](#) (2 February 2021); The Irrawaddy, [“Ethnic Armed Groups Unite With Anti-Coup Protesters Against Myanmar Junta”](#) (30 April 2021).

- ²² See Sudha Ramachandran, "Myanmar Militant Opposition Divided in Fight Against Tatmadaw" (2021) 19(13) *Terrorism Monitor* ([online](#)).
- ²³ See, eg, Shan Herald Agency for News, "[Villagers Want Rival Shan EAOs To End Conflict in Southern Shan State](#)" (8 June 2021).
- ²⁴ See Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Thomas H. Andrews, [UN Doc A/HRC/46/56](#) (4 March 2021) [94]-[95].
- ²⁵ See, eg, Sam Kiley, "[Inside the Myanmar mountain camp where rebels train to fight for freedom from the junta](#)", *CNN* (8 July 2021).
- ²⁶ The Irrawaddy, "[Myanmar's Shadow Government Forms People's Defense Force](#)" (5 May 2021).
- ²⁷ See Anthony Davis, "[Prospects for a people's war in Myanmar](#)", *Asia Times* (6 August 2021); David Scott Mathieson, "[The necrometrics of Myanmar's spreading war](#)", *Asia Times* (31 August 2021).
- ²⁸ See Sudha Ramachandran, "Myanmar Militant Opposition Divided in Fight Against Tatmadaw" (2021) 19(13) *Terrorism Monitor* ([online](#)); David Scott Mathieson, "[The necrometrics of Myanmar's spreading war](#)", *Asia Times* (31 August 2021); Anthony Davis, "[Prospects for a people's war in Myanmar](#)", *Asia Times* (6 August 2021).
- ²⁹ *Ibid.*
- ³⁰ Armed Conflict Location & Event Data Project ('ACLED'), *Myanmar's Spring Revolution* ([online](#), 2021).
- ³¹ *Ibid.*
- ³² See, eg, Patrick Winn, "[Souring on peace marches, Myanmar protesters seek weapons](#)", *The World* (2 June 2021); Emily Fishbein, Vahpual, and Nu Nu Lusan, "[Our only option': Myanmar civilians take up arms for democracy](#)", *Aljazeera* (15 June 2021).
- ³³ See, eg, The Irrawaddy, "[Around 40 Myanmar Junta Troops Killed in Kayah State](#)" (23 May 2021); The Irrawaddy, "[Myanmar Junta Forces and KIA in Fresh Fighting in Northern Myanmar](#)" (31 May 2021); Anthony Davis, "[Prospects for a people's war in Myanmar](#)", *Asia Times* (6 August 2021); David Scott Mathieson, "[The necrometrics of Myanmar's spreading war](#)", *Asia Times* (31 August 2021).
- ³⁴ National Unity Government of Myanmar, "[Acting President of the National Unity Government, Republic of the Union of Myanmar, Duwa Lashi La's Emergency Speech to the Public on Current Military Crisis](#)" (7 September 2021).
- ³⁵ See, eg, Grant Peck, "[Rights experts express regret over Myanmar uprising call](#)", *Associate Press* (8 September 2021); France 24, "[Myanmar cell towers attacked after shadow government 'war' call](#)" (8 September 2021); Myanmar Now, "[Junta forces torch Sagaing village after PDF raid on police station](#)" (13 September 2021).
- ³⁶ See, eg, Grant Peck, "[Myanmar: reports of 15 or more killed after nationwide uprising call](#)" (11 September 2021), *Associated Press* (published broadly, including in sources such as [The Guardian](#) and the [Washington Post](#)); Straits Times, "Myanmar junta troops clash with 'self-defence' forces, at least 10 dead" (10 September 2021).
- ³⁷ John Reed, "[Myanmar violence mounts after shadow government embraces 'war'](#)", *Financial Times* (14 September 2021).
- ³⁸ See, eg, The Irrawaddy, "[In Myanmar, Pro-Junta Vigilante Groups Wage Campaign of Violence, Disinformation](#)" (11 June 2021).
- ³⁹ See, eg, The Irrawaddy, "[Myanmar's Commercial Capital Yangon and Mandalay Rocked by Bomb Blasts](#)" (30 August 2021); Myanmar Now, "[Unidentified gunmen kill man outside Myingyan home in alleged 'hit' intended for his father](#)" (2 September 2021).
- ⁴⁰ See, eg, Myanmar Now, "[Two alleged members of Pyu Saw Htee groups shot dead in Dawei](#)" (1 September 2021).
- ⁴¹ See, eg, Radio Free Asia, "[Ten Killed as Militia Repels Surprise Attack by Junta Troops in Myanmar's Sagaing Region](#)" (25 June 2021); Myanmar Now, "[Residents in Sagaing find decapitated body following military rampage in nearby villages](#)" (16 August 2021); The Irrawaddy, "[More than 30,000 Villagers Flee Myanmar Junta Raids](#)" (1 September 2021).
- ⁴² UN Special Rapporteur on the Situation of Human Rights in Myanmar, "[Myanmar: UN expert warns of 'perfect storm' over COVID, calls for urgent international help](#)" (14 July 2021).
- ⁴³ See Hannah Ritchie et al, "[Myanmar: Coronavirus Pandemic Country Profile](#)", *Our World In Data* (University of Oxford, 2021, accessed 9 September 2021).
- ⁴⁴ See David Pierson, Andrew Nachemson and Kyaw Hsan Hlaing, "[Myanmar's political crisis is fuelling an 'uncontrolled outbreak of COVID-19'](#)", *Los Angeles Times* (27 July 2021).
- ⁴⁵ See, eg, The Irrawaddy, "[Myanmar Hospitals Run Out of Beds Amid COVID-19 Surge](#)" (8 July 2021).

⁴⁶ See, eg, Andrew Nachemson, "[Medics in Myanmar on strike against military amid COVID-19 crisis](#)" (3 February 2021).

⁴⁷ See Kristen Gelineau and Victoria Milko, "[In Myanmar, the military and police declare war on medics](#)", *Associate Press* (6 July 2021).

⁴⁸ See, eg, Frontier Myanmar, "[Fighting new COVID-19 variants amid turmoil and resistance](#)" (25 June 2021); Frontier Myanmar, "[Anti-military defiance slows COVID-19 vaccination to a trickle](#)" (7 April 2021).

⁴⁹ See Hannah Ritchie et al, "[Coronavirus \(COVID-19\) Vaccinations](#)", *Our World In Data* (University of Oxford, 2021, accessed 9 September 2021).

⁵⁰ There is also evidence suggesting securitisation of the pandemic by the military prior to the coup. See further Progressive Voice, *A Nation Left Behind: Myanmar's Weaponization of COVID-19* (June 2020, [online](#)).

⁵¹ See The Irrawaddy, "[Myanmar Suffering From Severe Shortage of Medical Oxygen as COVID-19 Cases Spike](#)" (12 July 2021); Hannah Beech, "[As Covid Rages in Myanmar, Army Hoards Oxygen, Doctors Say](#)", *New York Times* (15 July 2021).

⁵² See, eg, Coconuts Yangon, "[Soldiers Open Fire, Disperse Crowds Refilling Oxygen Tanks in Yangon](#)" (13 July 2021); Hannah Beech, "[As Covid Rages in Myanmar, Army Hoards Oxygen, Doctors Say](#)", *New York Times* (15 July 2021).

⁵³ See, eg, The Irrawaddy, "[Myanmar Hospitals Run Out of Beds Amid COVID-19 Surge](#)" (8 July 2021).

⁵⁴ Myanmar Now, "[Junta lures, arrests community doctors by posing as Covid-19 patients](#)" (20 July 2021).

⁵⁵ See Myanmar Now, "[Transport of food, medicine restricted despite temporary ceasefire extension in Mindat](#)" (10 July 2021).

⁵⁶ Myanmar Now, "[In the shadow of an uprising, Kalay battles another scourge](#)" (8 July 2021).

⁵⁷ See, eg, Hannah Beech, "[As Covid Rages in Myanmar, Army Hoards Oxygen, Doctors Say](#)", *New York Times* (15 July 2021);

⁵⁸ See generally AAPP, *Recent Fatality List*. See also Myanmar Now, "[In the shadow of an uprising, Kalay battles another scourge](#)" (8 July 2021).

⁵⁹ See, eg, Myanmar Now, "[In the shadow of an uprising, Kalay battles another scourge](#)" (8 July 2021).

⁶⁰ United Nations General Assembly, "[2005 World Summit Outcome](#)", UNGA Res. 60/1, 24 October 2005, [138]-[139].

⁶¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, Art 1; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (ICJ, 26 February 2007) [431].

⁶² Cf Sean Murphy, *First Report on Crimes Against Humanity*, UN Doc A/CN.4/680, 17 February 2015, pt V; International Law Commission (ILC), *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, UN Doc A/74/10 (adopted by the ILC at its 71st sess., 2019).

⁶³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* (ICJ, 28 May 1951) 23; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Judgment)* (ICJ, 3 February 2006) [64].

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (ICJ, 1996) [79]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (ICJ, 9 July 2004) [157]-[158].

⁶⁵ *Jus cogens* norms can only be set aside through the formation of a subsequent customary rule of international law of the same status: *Vienna Convention on the Law of Treaties*, Art 53. See generally James Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 581.

⁶⁶ See, for example, Brad Roth, 'Secessions, Coups and The International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 *Melbourne Journal of International Law* 393. The exertion of effective control over internal processes would mean the Tatmadaw similarly owes the obligations under international law of the Myanmar government previously constituted.

⁶⁷ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art 41. See also *South West Africa (Advisory Opinion)* (ICJ, 1971) [125]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (ICJ, 9 July 2004) [159]. Cf also James Crawford, *Brownlie's Principles of Public International Law* (9th ed, 2019) 583-584.

⁶⁸ *Prosecutor v Jean-Pierre Bemba Gombo (Decision on the admission into evidence of items deferred in the Chamber's 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute')* (ICC, Trial Chamber III, Case No ICC-01/05-01/08, 27 June 2013) [9].

⁶⁹ Independent Investigative Mechanism for Myanmar, [Statement to the Human Rights Council by Mr. Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar, on the 48th Regular Session of the Human Rights Council](#) (13 September 2021).

⁷⁰ Independent Investigative Mechanism for Myanmar, "[Information sharing](#)" (2021).

⁷¹ The definition contained in Article 7 has now received broad recognition and for the most part, is accepted as customary international law. As of mid-2019, the definition had been accepted by 122 State parties to the Statute, was used by many States when adopting or amending national laws, and has been adopted in case law of international and national courts and tribunals. Nonetheless, the definition and contours of terms used within it remain contested by some. See further: M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge, 2011) 361-364. The definition contained in Article 7 of the ICC Statute is generally that taken to be law in this Report, except where the customary status of particular aspects of the definition are particularly contested (in which case, the particular content of the law is further scrutinised).

⁷² Emphasis added. See also Article 7(2) of the ICC Statute, which provides relevant definitions of specific terms.

⁷³ See Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4th ed, 2019) 231; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (Oxford University Press, 4th ed, 2020) 380; Roger O'Keefe, *International Criminal Law* (Oxford University Press, First edition, 2015) 143.

⁷⁴ ICC Statute, Art 7(2)(a).

⁷⁵ *The Prosecutor v Germain Katanga (Judgment)* (ICC, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) 660, [1101]; *The Prosecutor v Jean-Pierre Bemba Gombo (Judgment)* (ICC, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) [149]; *The Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (ICC, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [75]; *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09, 31 March 2010) [80]; *Prosecutor v Dragoljub Kunarac et al (Judgement)* (ICTY, Appeals Chamber, Case No IT-96-23&IT-96-23/1-A, 12 June 2002) [86]; *Prosecutor v Charles Ghankay Taylor (Judgement)* (SCSL, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [506]; *The Prosecutor v Jean-Paul Akayesu (Judgement)* (ICTR, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [581].

⁷⁶ *Katanga*, ICC (Trial Chamber II), Judgment of 7 March 2014 (above n 75) [1097], [1101]; *Bemba*, ICC (Trial Chamber III), Judgment of 21 March 2016 (above n 75) [145]; *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (n 75) [75]; *The Prosecutor v Bosco Ntaganda (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda)* (ICC, Pre-Trial Chamber II, Case No ICC-01/04-02/06, 9 June 2014) [22].

⁷⁷ See, eg, Human Rights Watch, "[Myanmar Military Blocks Internet During Coup](#)" (2 February 2021); Radio Free Asia, "[Myanmar Junta Blocks Facebook, VPNs as The UN Security Council Voices 'Deep Concern'](#)"; Human Rights Watch, "[Myanmar: End Crackdown on Media, Communications](#)" (5 February 2021); Radio Free Asia, "[Anti-Coup Protests Draw Thousands in Myanmar Cities as Junta Cuts Internet, Mobile Connectivity](#)" (6 February 2021); Human Rights Watch, "[Myanmar: Lethal Force Used Against Protesters](#)" (9 February 2021).

⁷⁸ See pages 26–35 of this Report.

⁷⁹ Assistance Association for Political Prisoners (Burma), *Recent Fatality List for 15 September 2021* (15 September 2021) ('AAPP Fatalities Data Report').

⁸⁰ Assistance Association for Political Prisoners (Burma), *Detention List for 15 September 2021* (15 September 2021) ('AAPP Detention Data Report').

⁸¹ Assistance Association for Political Prisoners (Burma), *Bail Release and Warrants List for 15 September 2021* (15 September 2021) ('AAPP Bail Release and Warrants Data Report').

⁸² See pages 28 – 30 of this Report.

⁸³ See page 30 of this Report.

⁸⁴ *The Prosecutor v Laurent Gbagbo (Decision on the confirmation of charges against Laurent Gbagbo)* (ICC, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [209].

⁸⁵ *Bemba*, ICC (Trial Chamber III), Judgment of 21 March 2016 (above n 75) [149]; See further *Katanga*, ICC (Trial Chamber II), Judgment of 7 March 2014 (above n 75) [1101].

⁸⁶ *Prosecutor v Dragoljub Kunarac (Judgement)* (ICTY, Trial Chamber, Case No IT-96-23-T&IT-96-23/1-T, 22 February 2001) [421]; *Situation in the Republic of Kenya*, ICC (Pre-Trial Chamber II), Decision of 31 March 2010 (above n 75) [82]; *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (above n 75) [76].

⁸⁷ Werle and Jeßberger (n 73) 380.

⁸⁸ See, especially, Assistance Association for Political Prisoners (Burma), 'AAPP Fatalities Data Report' (above n 79).

⁸⁹ See *ibid.*

⁹⁰ See Assistance Association for Political Prisoners (Burma), 'AAPP Detention Data Report' (above n 80).

⁹¹ See, eg, Human Rights Watch, "[Myanmar: Lethal Force Used Against Protesters](#)" (9 February 2021); The Irrawaddy, "[Myanmar Regime Troops Ordered to 'Annihilate' Protesters, Internal Memos Show](#)" (24 April 2021); Helen Regan, Sandi Sidhu, Clarissa Ward and Salai TZ, "[Myanmar Protesters Describe Torture They Suffered in Detention](#)", *CNN* (28 April 2021).

⁹² See, eg, Radio Free Asia, "[No Holds Barred: Myanmar Junta Grabs Family Members to Get at Wanted Protesters](#)" (6 May 2021); Human Rights Watch, "[Myanmar: Stop Holding Family, Friends Hostage](#)" (14 June 2021).

⁹³ See, eg, Human Rights Watch, "[Myanmar: Hundreds Forcibly Disappeared](#)" (2 April 2021); Radio Free Asia, "[Myanmar Journalists Are 'Living in Fear' as Junta Curbs Freedoms](#)" (30 April 2021); Radio Free Asia, "[Two Journalists Arrested in Myanmar, Where Forces Kill 10 Anti-Coup Protesters](#)" (19 March 2021); Radio Free Asia, "[Half of Journalists Arrested Since Myanmar Coup Remain in Detention](#)" (15 July 2021); Radio Free Asia, "[Arrests, Journalist Beatings as Myanmar Junta Faces Relentless Protests Rejecting Army Rule](#)" (18 February 2021).

⁹⁴ See, eg, Radio Free Asia, "[More Than a Dozen Civilians Believed Killed by Myanmar's Military in Weekend Bloodshed](#)" (21 June 2021); Radio Free Asia, "[Myanmar Elderly Perish as Village Razed in Fire Blamed on Junta Troops](#)" (16 June 2021); Radio Free Asia, "[Two Youths Killed by Military While Retrieving Rice For Refugees in Myanmar's Kayah State](#)" (27 May 2021); Amnesty International, "[Five-Year-Old Boy among Nearly 100 Killed in Myanmar](#)" (27 March 2021).

⁹⁵ See, eg, Radio Free Asia, "[As Many as 70 Killed in Protests as Chinese Factory Torched in Myanmar's Bloodiest Day Since Coup](#)" (14 March 2021).

⁹⁶ See, eg, Amnesty International, "[Five-Year-Old Boy among Nearly 100 Killed in Myanmar](#)" (27 March 2021).

⁹⁷ See, eg, Amnesty International, "[Analysis of 50+ Videos from Myanmar Crackdown Shows Battlefield Arsenal & Notorious Troops Deployed](#)" (11 March 2021).

⁹⁸ Cf *Prosecutor v Tihomir Blaškić (Judgement)* (ICTY, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [114]; *Prosecutor v Milan Martić (Judgment)* (ICTY, Appeals Chamber, Case No IT-95-11-A, 8 October 2008) [154], [303].

⁹⁹ See further Werle and Jeßberger (n 73) 387–388; O'Keefe (n 73) 144; Cryer, Robinson and Vasiliev (n 73) 234. Cf *Akayesu*, ICTR (Trial Chamber I), Judgement of 2 September 1998 (above n 75) [580]; *Kunarac*, ICTY (Trial Chamber), Judgement of 22 February 2001 (n 75) [429]; *Kunarac*, ICTY (Appeals Chamber), Judgement of 12 June 2002 (above n 75) [94]–[104].

¹⁰⁰ *Prosecutor v Tadić (Opinion and Judgment)* (ICTY, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [653] ('*Tadić*, ICTY (Trial Chamber), Judgment of 7 May 1997'); See further Cryer, Robinson and Vasiliev (n 73) 234.

¹⁰¹ Cryer, Robinson and Vasiliev (n 73) 263.

¹⁰² *Prosecutor v Tihomir Blaškić (Judgement)* (ICTY, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [204]–[205]; *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (above n 75) [81].

¹⁰³ *Tadić*, ICTY (Trial Chamber), Judgment of 7 May 1997 (above n 100) [653]; *Blaškić*, ICTY (Trial Chamber), Judgement of 3 March 2000 (n 92) [204]; *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (above n 75) [81].

¹⁰⁴ *Prosecutor v Kupreškić et al (Judgement)* (ICTY, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [554]–[555].

¹⁰⁵ See also Amnesty International, "[Analysis of 50+ Videos from Myanmar Crackdown Shows Battlefield Arsenal & Notorious Troops Deployed](#)" (n 97).

¹⁰⁶ *Blaškić*, ICTY (Trial Chamber), Judgement of 3 March 2000 (n 102) [204]–[205]; *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (above n 75) [81].

¹⁰⁷ It has been well-documented in Tatmadaw operations against various ethnic insurgencies: see, eg, Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, 39th sess, Agenda Item 4, UN Doc No A/HRC/39/CRP.2 (17 September 2018) [1368]; International Human Rights Clinic at Harvard Law School, "Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar" (Harvard Law School, 2014) 6, 8, 25–27, 52, 56.

¹⁰⁸ Maung Aung Myoe, *Building the Tatmadaw: Myanmar Armed Forces Since 1948* (Singapore: Institute of Southeast Asian Studies, 2009) 25–26; Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (Dhaka: Dhaka University Press, 1st ed, 1991) 258.

¹⁰⁹ International Human Rights Clinic at Harvard Law School, "Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar" (Harvard Law School, 2014) 25–32; Myoe, *Building the Tatmadaw*, 31–32; Smith, *Burma: Insurgency and the Politics of Ethnicity*, 259; International Commission of Jurists, "[Achieving](#)

[Justice for Gross Human Rights Violations in Myanmar: Baseline Study](#)" (January 2015) 15; Ashley South, "'They Came and Destroyed Our Village Again': The Plight of Internally Displaced Persons in Karen State", *Human Rights Watch* (2005) 17; Anne Decobert, *The Politics of Aid to Burma: A Humanitarian Struggle on the Thai-Burmese Border* (Routledge, 2016) 55.

¹¹⁰ Andrew Selth, *Burma's Armed Forces: Power Without Glory* (EastBridge, 2002) 91-92 (emphasis added).

¹¹¹ See further Emily Fishbein, Nu Nu Lusan, and Vahpual, "[Myanmar military adopts 'four cuts' to stamp out coup opponents](#)", *Aljazeera* (5 July 2021).

¹¹² See further Robin McDowell and Margie Mason, "[AP Investigation: Myanmar's junta using bodies to terrorize](#)", *Associated Press* (26 May 2021).

¹¹³ See La Prensa Latina, "[Protests grow across Myanmar after junta warns of further 'loss of life'](#)" (22 February 2021).

¹¹⁴ Reuters, "Four killed in Myanmar protests; military warns of 'danger' of demonstrations" (26 March 2021).

¹¹⁵ Radio Free Asia, "[Myanmar Junta Kills Scores of Protesters in Bago, Decrees Death Penalty for 19 in Yangon](#)" (9 April 2021).

¹¹⁶ The Irrawaddy, "[Myanmar Regime Troops Ordered to 'Annihilate' Protesters, Internal Memos Show](#)" (24 April 2021).

¹¹⁷ Ibid.

¹¹⁸ *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (n 75) [81]; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the confirmation of charges)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 30 September 2008) [396].

¹¹⁹ *The Prosecutor v Laurent Gbagbo (Decision on the confirmation of charges against Laurent Gbagbo)* (ICC, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [222].

¹²⁰ *Nahimana et al v The Prosecutor (Judgement)* (ICTR, Appeals Chamber, Case No ICTR-99-52-A, 28 Nov 2007) [920]; *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [81]; *Taylor (Judgement)* [511]; *Prosecutor v Mrkšić et al (Judgement)* (ICTY, Trial Chamber II, Case No IT-95-13/1-T, 27 Sep 2007) [437]; *Kunarac (Judgement)* (above n 86) [429]. An attack of a "systematic" character "goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community": *Katanga (Judgment)* [111]-[112]. See further Cryer, Robinson and Vasiliev (n 73) 232.

¹²¹ Werle and Jeßberger (n 73) 386; O'Keefe (n 73) 143.

¹²² Assistance Association for Political Prisoners (Burma), 'AAPP Fatalities Data Report' (n 79); Assistance Association for Political Prisoners (Burma), 'AAPP Detention Data Report' (n 80).

¹²³ United Nations Human Rights Council, "[Special Rapporteur on the Situation of Human Rights in Myanmar Tells Human Rights Council That the International Community Is Failing the People of Myanmar](#)" (7 July 2021).

¹²⁴ This is relevant to assessment of the 'widespread' nature of the attack: see O'Keefe (n 73) 143.

¹²⁵ United Nations Office of the High Commissioner for Human Rights, "[Myanmar: Expert Calls for 'COVID Ceasefire'; Urges New UN Resolution](#)" (27 July 2021, News Release).

¹²⁶ Assistance Association for Political Prisoners (Burma), 'AAPP Fatalities Data Report' (above n 79).

¹²⁷ See *ibid.* See Assistance Association for Political Prisoners (Burma), *Recent Fatality List for Aug 5 2021* ([online](#), 2021).

¹²⁸ *Akayesu*, ICTR (Trial Chamber I), Judgement of 2 September 1998 (above n 75) [589]; *Kordić and Čerkez (Judgement)* (ICTY, Trial Chamber III, Case No IT-95-14/2, 26 February 2001) [236]; see further Cryer, Robinson and Vasiliev (above n 73) 243.

¹²⁹ See Assistance Association for Political Prisoners (Burma), *Recent Fatality List for Aug 5 2021* (above n 127).

¹³⁰ Ibid.

¹³¹ Ibid; See further, eg, Human Rights Watch, "[Myanmar: Lethal Force Used Against Protesters](#)" (9 February 2021); Radio Free Asia, "[At Least 18 Protesters Killed Across Myanmar as Junta Forces Fire on Crowds](#)" (28 February 2021); Radio Free Asia, "[At Least 26 Protesters Killed Across Myanmar as Security Forces Continue Bloody Crackdowns](#)" (3 March 2021); Amnesty International, "[Myanmar: Signs of 'Shoot to Kill' Strategy to Quell Opposition](#)" (4 March 2021); Radio Free Asia, "[Youths Slain in Mandalay Protests Underscore Dangers to Myanmar Children](#)" (22 March 2021); Richard C Paddock, "[Dozens Are Gunned Down in 'Day of Shame' for Myanmar](#)", *New York Times* (27 March 2021); Radio Free Asia, "[Myanmar Junta Kills Scores of Protesters in Bago, Decrees Death Penalty for 19 in Yangon](#)" (9 April 2021); The Guardian, "[Myanmar: More than 90 Reported Killed on 'day of Shame' for Armed Forces](#)" (28 July 2021).

¹³² See Assistance Association for Political Prisoners (Burma), *Recent Fatality List for Aug 5 2021* (n 110); See further, eg, BBC News, "[Myanmar Coup: Six-Year-Old Shot 'as She Ran into Father's Arms'](#)" (1 April 2021); Amnesty International, "[Five-Year-Old Boy among Nearly 100 Killed in Myanmar](#)" (27 March 2021).

¹³³ See further *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders 27 August to 7 September 1990) Provision 4 (law enforcement should “apply non-violent means before resorting to the use of force and firearms”); Human Rights Committee, *General Comment No 37 (2020) on the Right of Peaceful Assembly (Article 21)*, 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) (“Firearms are not an appropriate tool for the policing of assemblies, and must never be used simply to disperse an assembly... any use of firearms by law enforcement officials in the context of assemblies must be limited to targeted individuals in circumstances in which it is strictly necessary to confront an imminent threat of death or serious injury”).

¹³⁴ See Assistance Association for Political Prisoners (Burma), *Recent Fatality List for Aug 5 2021* (n 110); Radio Free Asia, [“As Many as 70 Killed in Protests as Chinese Factory Torched in Myanmar’s Bloodiest Day Since Coup”](#) (14 March 2021); Radio Free Asia, [“Myanmar Soldiers Burn Man Alive in Weekend Orgy of Junta Violence”](#) (28 March 2021); Radio Free Asia, [“Myanmar Elderly Perish as Village Razed in Fire Blamed on Junta Troops”](#) (16 June 2021);.

¹³⁵ See Assistance Association for Political Prisoners (Burma), *Recent Fatality List for Aug 5 2021* (above n 127).

¹³⁶ Ibid. See also Radio Free Asia, [“Ruling Party Official Suffers Grisly Torture Death in Myanmar’s Yangon Amid Violent Raids”](#) (7 March 2021); The Irrawaddy, [“Villager Dies After Being Abducted and Tortured by Myanmar Junta Forces”](#) (28 April 2021); Radio Free Asia, [“Torture Suspected in Death of Myanmar Poet Called a Voice of Resistance”](#) (11 May 2021).

¹³⁷ *The Prosecutor v André Ntagerura Emmanuel Bagambiki Samuel Imanishimwe (Judgement and Sentence)* (ICTR, Trial Chamber III, Case No ICTR-99-46-T, 25 February 2004) [702]; *Kordić and Čerkez*, ICTY (Trial Chamber III), Judgement of 26 February 2001 (above n 128) [302].

¹³⁸ See Werle and Jeßberger (above n 73) 409; Cryer, Robinson and Vasiliev (above n 73) 246.

¹³⁹ Werle and Jeßberger (above n 73) 409; Cryer, Robinson and Vasiliev (above n 73) 246 (noting that this form of confinement motivated inclusion of the language ‘other severe deprivation of physical liberty’ in the Rome Statute).

¹⁴⁰ *Prosecutor v Milorad Krnojelac (Judgment)* (ICTY, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [114].

¹⁴¹ Assistance Association for Political Prisoners (Burma), ‘AAPP Detention Data Report’ (above n 80).

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid; *Ntagerura*, ICTR(Trial Chamber III), Judgment of 25 February 2004 (n 137) [702]; see Bassiouni (above n 71) 444 (noting the clarificatory language of ‘in the violation of fundamental rules of international law’ in this regard in the Rome Statute).

¹⁴⁷ See [State Administrative Council Law No \(5/2021\) Law Amending the Penal Code and State Administrative Council Law No \(6/2001\) Law Amending the Code of Criminal Procedure](#) (dated 14 February 2021).

¹⁴⁸ Ibid.

¹⁴⁹ Although Myanmar is not a party to the International Covenant on Civil and Political Rights (‘ICCPR’), many of the provisions of the ICCPR and the Universal Declaration of Human Rights have been described as customary in status, including that to freedom of expression: see Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis, 2nd ed, 2010) 950.

¹⁵⁰ See further Human Rights Watch, [“Myanmar: Post-Coup Legal Changes Erode Human Rights”](#) (2 March 2021).

¹⁵¹ Assistance Association for Political Prisoners (Burma), *Recent Fatality List for Aug 5 2021* (n 127).

¹⁵² See, eg, The Irrawaddy, [“Myanmar Protesters Recall Regime’s Torture During Detention”](#) (10 March 2021); Aljazeera, [“Outcry in Myanmar as military airs images of ‘tortured’ detainees”](#) (19 April 2021); Radio Free Asia, [“Interview: Myanmar Police Take Unyielding Detainees in Handcuffs For “Beatings And Torture””](#) (22 April 2021); The Irrawaddy, [“Female Detainee Sexually Assaulted, Tortured During Interrogation: Former Cellmate”](#) (24 April 2021); The Irrawaddy, [“Myanmar Junta Forces Abduct and Torture Three More in Tamu”](#) (24 April 2021); Helen Regan, Sandi Sidhu, Clarissa Ward and Salai TZ, [“Myanmar Protesters Describe Torture They Suffered in Detention”](#), CNN (28 April 2021); Radio Free Asia, [“Torture Suspected in Death of Myanmar Poet Called a Voice of Resistance”](#) (11 May 2021); Myanmar Now, [“More than 30 youth sentenced in closed court hearing inside Myeik Prison”](#) (10 June 2021); Human Rights Watch, [“Myanmar: Teenager Describes Torture, Mock Burial”](#) (22 June 2021); Radio Free Asia, [“Five-Year-Old Forced to Endure Stress Positions During Two-Week Detention by Myanmar’s Junta”](#) (8 July 2021).

¹⁵³ ICC Statute, art 7; see Bassiouni (above n 71), 419.

¹⁵⁴ Kunarac, ICTY, Judgement of 22 February 2001, (above n 86) [476].

¹⁵⁵ *Bemba*, ICC (Pre-Trial Chamber II), Decision of 15 June 2009 (above n 75) [193].

¹⁵⁶ *Krnjelac*, ICTY, Judgement of 15 March 2002, (above n 140) [182]; *Prosecutor v Radoslav Brđanin (Judgement)* (ICTY, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [484].

¹⁵⁷ *Prosecutor v Kvočka et al (Judgement)* (ICTY, Trial Chamber, Case No IT-98-30/1, 2 November 2001) [144].

¹⁵⁸ See above n 152.

¹⁵⁹ See, eg, Umayma Khan, [“The women of Myanmar: ‘Our place is in the revolution’”](#), *Aljazeera* (25 April 2021); Radio Free Asia, [“Interview: Myanmar Police Take Unyielding Detainees in Handcuffs For ‘Beatings And Torture’”](#) (22 April 2021); Straits Times, [“Myanmar teen describes junta’s brutal treatment of detained women”](#) (14 May 2021); Manny Maung, [“Rights of Women Violated in Myanmar Prisons”](#), *Human Rights Watch* (8 June 2021); Myanmar Peace Monitor, [“Sexual Violence Against Women Rises After Burma’s Coup”](#) (3 July 2021).

¹⁶⁰ ICC Elements of Crimes, Art 7(1)(g)-6; cf *Akayesu*, ICTR (Trial Chamber I), Judgment of 2 September 1998 (above n 75) [688]. Rape and other forms of sexual violence are listed as crimes in Art 7 of the Rome Statute. However, as a matter of general international law they are likely better characterised as “other inhumane acts”: see Bassiouni (above n 71) 425. See also Werle and Jeßberger (above n 73) 422-423.

¹⁶¹ See ICC, *Elements of Crimes*, Art 7; *Kunarac*, ICTY (Appeals Chamber), Judgement of 12 June 2002, (above n 75) [102]; *Martić*, ICTY (Appeals Chamber), Judgement of 8 October 2008, (above n 98) [316]; *Prosecutor v Šainović et al (Judgement)* (ICTY, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [270]-[271].

¹⁶² See further Laurel Baig et al, “Contextualising Sexual Violence” in Baron Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP, 2016) 172-174.

¹⁶³ *Ibid.* See also *Prosecutor v Kvočka et al (Judgement)* (ICTY, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [689] (finding that the case law of the ICTY is clear that “crimes against humanity can be committed for purely personal reasons”).

¹⁶⁴ See *Prosecutor v Gavumbitsi (Judgment)* (ICTR, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006) [102]; *Kunarac*, ICTY (Appeals Chamber), Judgement of 12 June 2002, (above n 75) [96].

¹⁶⁵ *Kunarac*, ICTY (Trial Chamber), Judgement of 22 February 2001, (above n 86) [419].

¹⁶⁶ *Martić*, ICTY (Appeals Chamber), Judgement of 8 October 2008, (above n 98) [318].

¹⁶⁷ See, eg, Radio Free Asia, [“Interview: Myanmar Police Take Unyielding Detainees in Handcuffs For ‘Beatings And Torture’”](#) (22 April 2021); Straits Times, [“Myanmar teen describes junta’s brutal treatment of detained women”](#) (14 May 2021); Myanmar Peace Monitor, [“Sexual Violence Against Women Rises After Burma’s Coup”](#), *BNI Multimedia Group* (3 July 2021).

¹⁶⁸ See, eg, *Kunarac*, ICTY (Appeals Chamber), Judgement of 12 June 2002, (above n 75) [100].

¹⁶⁹ See, eg, Manny Maung, [“Rights of Women Violated in Myanmar Prisons”](#), *Human Rights Watch* (8 June 2021).

¹⁷⁰ See, eg, Radio Free Asia, [“Interview: Myanmar Police Take Unyielding Detainees in Handcuffs For ‘Beatings And Torture’”](#) (22 April 2021).

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¹⁷² Phyu Phyu Oo and Sara E Davies, [“Supporting the victims of sexual violence in Myanmar”](#), *The Interpreter* (28 June 2021).

¹⁷³ See Sophie Ryan, “When Women Become the War Zone: The Use of Sexual Violence in Myanmar’s Military Operations” (2020) 12 *Global Responsibility to Protect* 37-63.

¹⁷⁴ For instance, further evidence may indicate that sexual crimes have occurred but their nature is better reflected by characterisation as crimes against humanity of torture: see, eg, *Prosecutor v Anto Furundžija (Judgement)*, (ICTY, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998), [80]-[87], [264]-[267] (where the defendant was convicted of torture for interrogating a woman with sexual threats and assault).

¹⁷⁵ International Criminal Court, *Elements of Crimes*, Art 7(1)(h); Werle and Jeßberger (above n 73) 424.

¹⁷⁶ *Prosecutor v Mladen Natelcic and Vinko Martinovic (Judgement)* (ICTY, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [636]. See further Werle and Jeßberger (above n 73) 424.

¹⁷⁷ While the targeting on political, racial, national, ethnic, cultural, religious, and gender are listed expressly under Article 7(1)(h), persecution can occur ‘on other grounds that are universally recognized as impermissible under international law’. The targeting of medical facilities, supplies and personnel is recognised as impermissible under international human rights law.

¹⁷⁸ See, eg, Rebecca Ratcliffe, [“Doctors under fire as Myanmar military targets efforts to aid injured protesters”](#), *The Guardian* (10 April 2021); Kristen Gelinou and Victoria Milko, [“In Myanmar, the military and police declare war on medics”](#), *Associated Press* (6 July 2021); Bloomberg News, [“Doctors, Nurses Targeted in Brutal Myanmar Crackdown, UN Warns”](#) (30 July 2021).

¹⁷⁹ Insecurity Insight, [Threats and Violence Against Health Care in Myanmar v. August 2021](#) (Geneva, Switzerland, 2021) 1-2.

¹⁸⁰ Ibid.

¹⁸¹ See, eg, Brian Elmore, "[Medical Workers Targeted in Myanmar's Post-Coup Crisis](#)", *The Diplomat* (5 May 2021); Kristen Gelinau and Victoria Milko, "[In Myanmar, the military and police declare war on medics](#)", *Associated Press* (6 July 2021).

¹⁸² See, eg, Myanmar Now, "[Parents of striking medical workers summoned for meeting about 'supervising' their children](#)" (27 April 2021);

¹⁸³ See *The Prosecutor v Tihomir Blaškić (Judgment)* (ICTY, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [220] (emphasising these rights).

¹⁸⁴ See Werle and Jeßberger (above n 73) 424-426.

¹⁸⁵ AAPP, "[Enforced Disappearances by the Military Junta](#)" (30 August 2021).

¹⁸⁶ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Thomas H. Andrews, [UN Doc A/HRC/46/56](#) (4 March 2021) [20].

¹⁸⁷ [Human rights Watch, "Myanmar: Hundreds Forcibly Disappeared" \(2 April 2021\)](#); Human Rights Watch, "[Myanmar: Coup Leads to Crimes Against Humanity](#)" (31 July 2021).

¹⁸⁸ ICC Statute, Art 7(2)(i).

¹⁸⁹ Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd ed, Cambridge University Press: 2014) 260.

¹⁹⁰ ICC Statute, Art 7(1)(k).

¹⁹¹ Cf, eg, *Prosecutor v Krnojelac* (Judgment) (ICTY, Trial Chamber, IT-97-25-T, 15 March 2002), [133] (above n 140) (finding that "brutal and deplorable living conditions imposed upon... detainees" satisfied the threshold of a crime against humanity).

¹⁹² Eg, Manny Maung, "[Rights of Women Violated in Myanmar Prisons](#)", *Human Rights Watch* (8 July 2021).

¹⁹³ Werle and Jeßberger (above n 73) 442.

¹⁹⁴ See Dapo Akande, "Classification Of Armed Conflicts: Relevant Legal Concepts" in *International Law And The Classification Of Conflicts* (Oxford University Press, 2012) ([online](#)); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 155.

¹⁹⁵ There are reports indicating that since the coup conflict between well-established ethnic armed organisations such as the Kachin Independence Army and Karen National Liberation Army and the Tatmadaw has intensified: see above n 20. However, this violence is not addressed in this Paper, which is limited in scope to violence arising directly out of and in relation to the coup and that did not exist prior to it.

¹⁹⁶ There are two types of armed conflict under international law: international and non-international. International armed conflict requires the involvement of two *States* such that it is not relevant to the situation in Myanmar. See further Common Article 2 of the Geneva Conventions; *Tadić* jurisdiction [70].

¹⁹⁷ See *Akayesu*, ICTR (Trial Chamber I), Judgment of 2 September 1998 (above n 75) [625]-[626]; *Prosecutor v Thomas Lubanga Dyilo (Decision on Confirmation of Charges)*, (ICC, Pre-Trial Chamber, Case No ICC-01/04-01/06, 29 January 2007), [233]-[234]. A further—higher—NIAC threshold is contained in Additional Protocol II ('APII') which applies only to armed conflict taking place on the territory of a party 'between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [APII]': Art 1(1). Myanmar is not a party to APII. There is no requirement that governmental forces be involved in a Common Article 3 NIAC—a NIAC may occur between two or more organised armed groups—such that there is no need to determine whether the Tatmadaw meets the test of constituting Myanmar's *de jure* governmental forces.

¹⁹⁸ *Prosecutor v Tadić (Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction)* (ICTY, Trial Chamber, Case No IT-94-1-T, 2 October 1995) [70].

¹⁹⁹ See, eg, Claire Breen, "The Arab Spring: A Testing Time for the Application of International Humanitarian Law" (2013) 11 *New Zealand Yearbook of International Law* 159.

²⁰⁰ Inter-American Commission on Human Rights, *Abella v Argentina*, Rep No 55/97, Case No 11.127: Argentina, OEA/Ser/L/V/II.97, Doc 38, 18 November 1997, [619]-[620].

²⁰¹ *Tadić*, ICTY (Trial Chamber), Decision of 2 October 1995, (above n 198) [70].

²⁰² See Akande (above n 194); Sivakumaran (above n 194) 167.

²⁰³ Many of these are also relevant to assessment of sufficient organisation. See above.

²⁰⁴ *Tadić*, ICTY (Trial Chamber), Judgment of 7 May 1997 (above n 100) [565]-[566]; *Prosecutor v Ramush Haradinaj et al* (Judgment), (ICTY, Trial Chamber, Case No IT-04-84, 3 April 2008) [49]; *Prosecutor v Zejnir Delalic et al* (Judgment), (ICTY, Trial Chamber, Case No IT-96-21-A, 16 November 1998) [189]; *Prosecutor v*

Slobodan Milosevic (Decision on Motion for Judgment of Acquittal), (ICTY, Trial Chamber, Case No IT-02-54-T, 16 June 2004) [28]; *Lubanga*, ICC (Trial Chamber), Decision on Confirmation of Charges of 29 January 2007) (above n 197) [235]; *Prosecutor v Fatmir Limaj et al* (Judgment) (ICTY, Trial Chamber, Case No IT-03-66, 30 November 2005) [135]-[167]; *Prosecutor v Ljube Boškoski* (Judgment) (ICTY, Trial Chamber, Case No IT-04-82, 10 July 2008) [216]-[234].

²⁰⁵ Armed Conflict Location & Event Data Project ('ACLED'), *Myanmar's Spring Revolution* ([online](#), 2021).

²⁰⁶ *Ibid.*

²⁰⁷ See Myanmar Now, "[At least 30 junta soldiers reportedly killed in landmine attack on military convoy in Magwe](#)" (25 August 2021).

²⁰⁸ See Grant Peck, "[Fighting in Myanmar kills at least 15 after uprising call](#)", *Associated Press* (11 September 2021).

²⁰⁹ See, eg, The Irrawaddy, "[Around 40 Myanmar Junta Troops Killed in Kaya State](#)" (23 May 2021);

²¹⁰ See, eg, The Irrawaddy, "[Myanmar Resistance Fighters Continue to Battle Junta Troops in Sagaing](#)" (23 May 2021);

²¹¹ See further Sivakumaran (above n 194) 168-170.

²¹² *Limaj*, ICTY, Judgment of 30 November 2005, (above n 204) [89]; *Akayesu*, ICTR (TCI), Judgment of 2 September 1998 (n 75) [620].

²¹³ GIAD Draper, "The Geneva Conventions of 1949", (1965-I) 114 *Collected Courses of the Hague Academy of International Law* 63, 90.

²¹⁴ Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols" (1979-II) 163 *Collected Courses of the Hague Academy of International Law* 117, 147.

²¹⁵ Claus Kress, "The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes" (2002) 13 *Criminal Law Forum* 409, 416.

²¹⁶ *Haradinaj*, ICTY, Judgment of 3 April 2008, (above n 204) [60], [65]-[68], [86]; *Boškoski*, Judgment of 10 July 2008 (above n 204) [199]-[203], [269], [284]-[285]; *Prosecutor v Dordević* (Judgment) (ICTY, Case No IT-05-87/1-T, 23 February 2011) [1537]-[1575]; *Milošević*, ICTY, Decision on Motion for Acquittal of 16 June 2004 (above n 204) [23]; *Limaj*, ICTY, Judgment of 30 November 2005, (above n 204) [95]-[145].

²¹⁷ *Ibid.*

²¹⁸ National Unity Government, "[PDF Military Structure](#)" (2021).

²¹⁹ *Limaj*, ICTY (Trial Chamber), Judgment of 30 November 2005, (above n 204) [171].

²²⁰ See further Sivakumaran (above n 194) 174-175.

²²¹ Sudha Ramachandran, "Myanmar Militant Opposition Divided in Fight Against Tatmadaw" (2021) 19(3) *Terrorism Monitor* ([online](#)); Anthony Davis, "[Prospects for a people's war in Myanmar](#)", *Asia Times* (6 August 2021); David Scott Mathieson, "[The necrometrics of Myanmar's spreading war](#)", *Asia Times* (31 August 2021).

²²² See, eg, Zsombor Peter, "[Myanmar's Anti-Junta Protesters Turning to Rebel Armies for Military Training](#)", *VoA* (27 April 2021); Mazoe Ford, "[Having fled Myanmar's coup to the jungle, these young activists are now being trained in combat](#)", *ABC News* (7 June 2021); Sam Kiley, "[Inside the Myanmar mountain camp where rebels train to fight for freedom from the junta](#)", *CNN* (8 July 2021).

²²³ RFA, "[Fighters of Chin State Are No Strangers to Hardship, Repression in Myanmar](#)" (23 May 2021).

²²⁴ Grant Peck, "[Fighting in Myanmar kills at least 15 after uprising call](#)", *Associated Press* (11 September 2021).

²²⁵ See David Scott Mathieson, "[The necrometrics of Myanmar's spreading war](#)", *Asia Times* (31 August 2021).

See, eg, The Irrawaddy, "[Myanmar Regime Detains, Tortures Yangon Residents After Bombing of Govt Office](#)" (19 April 2021); The Irrawaddy, "[New Myanmar Junta-Owned Hospital Targeted by Bombs](#)" (5 May 2021); The Irrawaddy, "[Myanmar Junta Forces and KIA in Fresh Fighting in Northern Myanmar](#)" (31 May 2021); Myanmar Now, "[Anti-junta groups attack regime targets with bombings, shootings](#)" (9 August 2021).

²²⁶ John Reed, "[Myanmar violence mounts after shadow government embraces 'war'](#)", *Financial Times* (14 September 2021).

²²⁷ See, eg, The Irrawaddy, "[Dissidents Fleeing Myanmar Junta Find Shelter and Support with Ethnic Armed Groups](#)" (23 March 2021); Kocha Olarn and Paula Hancocks, "[At military camps in the Myanmar jungle, doctors and students learn how to fire guns](#)", *CNN* (5 May 2021); Patrick Winn, "[Souring on peace marches, Myanmar protesters seek weapons](#)", *The World* (2 June 2021); Mazoe Ford, "[Having fled Myanmar's coup to the jungle, these young activists are now being trained in combat](#)", *ABC News* (8 June 2021).

²²⁸ See further Sudha Ramachandran, "Myanmar Militant Opposition Divided in Fight Against Tatmadaw" (2021) 19(3) *Terrorism Monitor* ([online](#)).

²²⁹ See Reuters, "[Myanmar's anti-junta unity government says forming defence force](#)" (5 May 2021).

²³⁰ Human Rights Council, "[Written updates of the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar](#)", UN Doc A/HRC/48/67 (16 September 2021) [46].

²³¹ Myanmar Now, "[Junta soldiers massacred at least 28 people in resistance stronghold of Kani this month, say residents](#)" (30 July 2021).

²³² Human Rights Council, "[Written updates of the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar](#)", UN Doc A/HRC/48/67 (16 September 2021) (above n 230) [46].

²³³ Myanmar Now, "[Junta forces torch Sagaing village after PDF raid on police station](#)" (13 September 2021).

²³⁴ Human Rights Council, "[Written updates of the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar](#)", UN Doc A/HRC/48/67 (16 September 2021) (above n 230) [47]; Myanmar Peace Monitor, "[Displaced Civilians In Danger of Food Insecurity In Chin State](#)", *BNI Multimedia* (6 September 2021).

²³⁵ Human Rights Council, "[Written updates of the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar](#)", UN Doc A/HRC/48/67 (16 September 2021) (above n 230) [48]; The Irrawaddy, "[Regime Destroys Food and Medicine for Refugees in Southeastern Myanmar](#)" (11 June 2021).

²³⁶ Human Rights Council, "[Written updates of the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar](#)", UN Doc A/HRC/48/67 (16 September 2021) (above n 230) [49]-[50].

²³⁷ *Ibid* [51].

²³⁸ See above, especially pages 22 – 28 of this Paper.