



# CRIMES IN BURMA

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THE INTERNATIONAL HUMAN RIGHTS CLINIC @ HARVARD LAW SCHOOL

# Crimes in Burma

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A REPORT BY

IHRC

INTERNATIONAL HUMAN  
RIGHTS CLINIC AT  
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# PREFACE

For many years, the world has watched with horror as the human rights nightmare in Burma has unfolded under military rule. The struggle for democracy of Nobel Peace Prize Laureate Daw Aung San Suu Kyi and other political prisoners since 1988 has captured the imagination of people around the world. The strength of Buddhist monks and their Saffron Revolution in 2007 brought Burma to the international community's attention yet again.

But a lesser known story—one just as appalling in terms of human rights—has been occurring in Burma over the past decade and a half: epidemic levels of forced labor in the 1990s, the recruitment of tens of thousands of child soldiers, widespread sexual violence, extrajudicial killings and torture, and more than a million displaced persons. One statistic may stand out above all others, however: the destruction, displacement, or damage of over 3,000 ethnic nationality villages over the past twelve years, many burned to the ground. This is comparable to the number of villages estimated to have been destroyed or damaged in Darfur.<sup>1</sup>

Yet, for too many years, the world has done little to address these human rights abuses. Meanwhile, the ruling military junta, including its leader General Than Shwe, has avoided justice and accountability. The scale and severity of the violations require sustained effort—for the abuses continue.

We have served as Commissioners for this report prepared by the International Human Rights Clinic at Harvard Law School (the Clinic). Each of us has dealt directly with severe human rights abuses in the international system, and we have seen the painful consequences of inaction. We have seen how severe human rights abuses are not simply condemnable acts, but require concerted efforts to achieve some semblance of accountability and justice.

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<sup>1</sup> See U.S. State Department, Humanitarian Information Unit, “Using Village Destruction Information Responsibly, November 15, 2007,” available at <http://hiu.state.gov/index.cfm?fuseaction=public.display&id=c3462f1a-318a-445b-8ff9-78fc57de-8a1e> (indicating that as of October 2007 there had been 2,751 destroyed or damaged villages in the Darfur region).

The report's findings are both disturbing and compelling, especially in light of the Clinic's exclusive reliance on official UN documents for its research. We have been struck by the finding that for years the United Nations (UN) has been on notice of severe, indeed widespread and systematic abuses that appear to rise to the level of state policy. Over and over again, UN resolutions and Special Rapporteurs have spoken out about the abuses that have been reported to them. The UN Security Council, however, has not moved the process forward as it should and has in similar situations such as those in the former Yugoslavia and Darfur. In those cases, once aware of the severity of the problem, the UN Security Council established a Commission of Inquiry to investigate the gravity of the violations further. With Burma, there has been no such action despite being similarly aware (as demonstrated in UN documents) of the widespread and systematic nature of the violations.

Based on this report's findings and recommendations, we call on the UN Security Council urgently to establish a Commission of Inquiry to investigate and report on crimes against humanity and war crimes in Burma. The world cannot wait while the military regime continues its atrocities against the people of Burma. The day may come for a referral of the situation in Burma to the International Criminal Court or the establishment of a special tribunal to deal with Burma. Member States of the United Nations should be prepared to support such action. The people of Burma deserve no less.

**Justice Richard J. Goldstone (South Africa)**

*Retired member of the Constitutional Court of South Africa, and was the first prosecutor at both the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*

**Patricia M. Wald (United States)**

*Retired Judge on the U.S. Court of Appeals (D.C. Circuit), and former Judge at the International Criminal Tribunal for the former Yugoslavia*

**Sir Geoffrey Nice QC (United Kingdom)**

*Deputy prosecutor of the International Criminal Tribunal for the former Yugoslavia and the principal prosecution trial attorney in the case against Slobodan Milosevic in the Hague.*

**Judge Pedro Nikken (Venezuela)**

*Former President of the Inter-American Court of Human Rights, and  
Member of the Executive Committee of the International Commission of  
Jurists (Geneva)*

**Hon. Ganzorig Gombosuren (Mongolia)**

*Former judge at the Supreme Court of Mongolia*

May 2009





# EXECUTIVE SUMMARY

“These violations have been so numerous and consistent over the past years as to suggest that they are not simply isolated or the acts of individual misbehavior by middle- and lower-rank officers but are rather the result of policy at the highest level, entailing political and legal responsibility.”

- *United Nations Special Rapporteur on the situation of human rights in Myanmar, Rajsoomer Lallah, 1998*<sup>2</sup>

“As noted by the Special Rapporteur in his previous reports, the above-mentioned serious human rights violations have been widespread and systematic, suggesting that they are not simply isolated acts of individual misconduct by middle- or low-ranking officers, but rather the result of a system under which individuals and groups have been allowed to break the law and violate human rights without being called to account.”

- *United Nations Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, 2006*<sup>3</sup>

Burma has been facing a grave human rights situation for years. Many of the organs of the United Nations have repeatedly denounced the ruling military regime for failing to cooperate with the international

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<sup>2</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/53/364, ¶ 59 (Sept. 10, 1998). Mr. Lallah was Special Rapporteur from 1996-2000.

<sup>3</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/61/369, ¶ 32 (Sept. 21, 2006) (hereinafter Myanmar Rapporteur 2006 I). Mr. Pinheiro was Special Rapporteur from 2000-2008.

community and to take serious steps to end the ongoing grave violations of international law.

In light of the seriousness of allegations concerning the destruction or displacement of more than 3,000 villages (more than the number relocated in Darfur), this report set out to review UN documentation of reports of human rights and humanitarian law violations in Burma. Specifically, the report sought to evaluate the extent to which UN institutions have knowledge of reported abuses occurring in the country that may constitute war crimes and crimes against humanity in the country. The report finds that UN bodies have indeed consistently acknowledged abuses and used legal terms associated with these international crimes, including for example that violations have been widespread, systematic, or part of a state policy. This finding necessitates more concerted UN action. In particular, despite the recognition of the existence of these violations by many UN organs, to date, the Security Council has failed to act to ensure accountability and justice. In light of more than fifteen years of condemnation from UN bodies for human rights abuses in Burma, the Security Council should institute a Commission of Inquiry to investigate grave crimes that have been committed in the country.

This report evaluates Burma's breaches in light of the Rome Statute, which provides one of the available sets of international criminal standards. Part I of the report provides a brief history of Burma. Part II summarizes the applicable international criminal law under the Rome Statute. Part III traces the discussion in UN documents of grave human rights and humanitarian violations identified as occurring in eastern Burma since 2002. In this geographic sampling, the report details forced displacement, sexual violence, extrajudicial killings, and torture, especially against ethnic nationalities though the UN documents chronicle many other severe violations as well. The recent temporal focus was chosen because it is most relevant to the Rome Statute. Part IV identifies precedents for further UN action from its response to other humanitarian crises in the former Yugoslavia, Rwanda, and Darfur. Part V presents the report's conclusions.

## Findings

In light of the repeated and consistent reports of widespread human rights violations in Burma outlined in UN documents, there

is a *prima facie* case of international criminal law violations occurring that demands UN Security Council action to establish a Commission of Inquiry to investigate these grave breaches further.

- Multiple organs of the UN system have documented and/or condemned serious human rights abuses committed under the military regime, including the General Assembly, the Commission on Human Rights, the Human Rights Council, four consecutive Special Rapporteurs on the Situation of Human Rights in Myanmar, the International Labour Organization (ILO), and the Committee on the Elimination of Discrimination against Women (CEDAW Committee).
- In exposing the extent of violations such as forced displacement, the UN has recognized the existence of systematic and widespread human rights abuses. The recognition that many violations occurred in the context of armed conflict strongly suggests that these violations may amount to war crimes, as well as crimes against humanity in contravention of international criminal law. The four violations studied in detail in this report—forced displacement, rape (and sexual violence), extrajudicial killings, and torture—may all implicate international criminal law violations.
- The study of violations in eastern Burma highlights that ethnic nationalities are particularly vulnerable to the systematic abuses most often reportedly perpetrated by the Burmese military forces.
- The UN has emphasized the culture of impunity and inoperability of the Burmese judiciary that benefits the perpetrators of the widespread and systematic violations, thus legitimizing the intervention of the international community to seek redress.
- There is precedent for the creation of a Commission of Inquiry. The response of the UN Security Council to the humanitarian situations in the former Yugoslavia, Rwanda, and Darfur followed the same pattern. The UN Security Council determined

that the situation constituted a threat to international peace and security and then created such a Commission, whose mandate included investigating and documenting ongoing violations and making recommendations for future action.

- The international community has failed to place sufficient pressure on the Security Council to create a Commission of Inquiry. The Council is the only body that can take the action necessary to respond adequately to the crisis in Burma.

## Recommendations

In light of the *prima facie* case of the existence in Burma of grave violations of human rights and international humanitarian law, including contravention of the prohibitions against crimes against humanity and war crimes, the Security Council should:

- Declare that the situation in Burma constitutes a threat to international peace and security and initiate a formal investigation through a Commission of Inquiry to investigate crimes committed in Burma. Such a Commission should apply all relevant international criminal law standards to the evidence it gathers. While the focus of this report is eastern Burma, the Commission should investigate abuses throughout the country. Similarly, while this report focuses on four particularly severe violations, UN organs have condemned many others that are expressly forbidden by the Rome Statute and international criminal law.
- The international community, particularly the member countries of the United Nations, should make it clear to the Security Council that such action is needed.
- Further, the Security Council should be prepared to act upon findings and recommendations made by such a Commission, including a potential referral to the International Criminal Court, the permanent body established to investigate, try, and sentence those who commit war crimes and crimes against humanity.

# METHODOLOGY

A wide-range of human rights abuses and humanitarian law violations have been occurring in Burma for decades. Some abuses, such as widespread forced labor and the detention of political prisoners, including Nobel Peace Prize Laureate Daw Aung Saw Suu Kyi, have received significant attention. This report sought to determine the extent of UN knowledge of widely reported human rights abuses in Burma in light of principles of international criminal law. The report analyzes the terminology describing the violations employed by the UN itself. Terms used by UN actors, such as “widespread”, “systematic”, “policy”, and “impunity”, are relevant to the establishment of international crimes.

This report is the outcome of an intensive review of UN documents. It does not rely on NGO reports or accounts for its findings. The primary source materials are all UN documents, including, for example, UN General Assembly and Human Rights Commission resolutions, and the reports of a number of different Special Rapporteurs. To provide a deeper and more thorough analysis of the information included in UN documents, the report also adopted a particular subject matter, geographical, and temporal focus.

## Subject Matter

The Rome Statute of the International Criminal Court provides a measurement tool for evaluating international criminal law violations. The Rome Statute is a recent and important source of most of the major principles in this area of law, including prohibitions on both war crimes and crimes against humanity.<sup>4</sup> It also includes an articulation of the more

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<sup>4</sup> Such crimes are also violations of customary international law, which would provide an alternative basis for evaluation. Given the temporal and geographic foci of the report (that is post-2002), however, the Rome Statute was chosen to be the measurement tool. Customary international law would be relevant for pre- and post-2002 events. While there may be differences between the Rome Statute and customary international law, discussion of such distinctions is beyond the scope of this report. This report provides only a brief overview of international criminal law, war crimes, and crimes against humanity in Part II. It specifically outlines the key elements of these crimes that are relevant to establishing a *prima facie* case for further investigation. At this level, customary international law and the Rome Statute are in agree-

particularized crimes examined in this report: forced displacement, sexual violence, extrajudicial killings, and torture. These selected violations are both well-established and representative of the egregious nature of reported abuses in Burma.

### **Temporal Focus**

Though UN documents have included a range of human rights and humanitarian law violations since 1992, the report's temporal focus centers on events since 2002. Thus, this report examines a period of time *after* the UN had already acknowledged the existence of abuses for more than a decade. The more recent time-frame also allows for the use of the most up-to-date UN material. Finally, the Rome Statute is the evaluative tool of the report, and its temporal jurisdiction is limited to crimes committed after July 1, 2002.

### **Geographical Focus**

The geographical focus of the report is eastern Burma. This focus was chosen because it provides a representative sample of violations experienced by the different ethnic nationalities in the country. Additionally, Eastern Burma is an area that has experienced significant human rights violations for many years, which indicates the existence of a pattern of abuses. In addition, since 2002, there have been new, major operations by the Burmese army in the area against civilians, which provides an important sample of data for assessing whether international crimes may have been committed within the report's temporal focus.

# I. HISTORY OF BURMA

Modern Burmese history has been marked by decades of military rule, widespread human rights violations, and armed conflict. Since 1962, the Burmese military has repressed political opposition—whether in the country’s urban areas where political parties are most active or rural areas where ethnic nationality groups predominate. Human rights abuses by the military regime in both conflict and non-conflict zones have been commonplace, with attacks primarily aimed at students, political opponents, and ethnic nationalities. The rights abuses range from the suppression of civil and political rights, such as freedom of expression and assembly, to arbitrary detentions and problems associated with the lack of an independent judiciary. Violent abuses, such as extrajudicial killings, torture, and disappearances, along with epidemic levels of forced labor and discriminatory practices against women and ethnic nationalities have also been historically widespread. The UN has consistently acknowledged wide-ranging human rights violations since the early 1990s, highlighting the long-term pattern of abuses that have characterized Burma’s history.

## A. Early History and Independence in 1948

Prior to the nineteenth century, Burma<sup>5</sup> existed as a collection of territories ruled by different ethnic groups.<sup>6</sup> The Burman people are the largest ethnic group inhabiting the central areas of the modern state, with other major ethnic nationality and minority groups such as the Arakanese, Chin, Kachin, Karen, Karenni, Mon, and Shan, occupying

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<sup>5</sup> Burma’s military regime changed the name of the country to “Myanmar” in Jul. 1989. See Andrew Selth, *BURMA’S ARMED FORCES, POWER WITHOUT GLORY* xxxiii (2002). Burma’s democracy movement continues to use the term “Burma”. See Christina Fink, *LIVING SILENCE: BURMA UNDER MILITARY RULE* 5 (2001). Countries throughout the world generally use one or the other. The European Union, for example, uses the terminology of “Burma/Myanmar”. See, e.g., European Council Common Position 2008/349/CFSP of 29 Apr. 2008 renewing restrictive measures against Burma/Myanmar, L 116/57.

<sup>6</sup> For a fuller explanation, see Selth, *supra* note 5, at 7; and Josef Silverstein, *BURMA, MILITARY RULE AND THE POLITICS OF STAGNATION* 3-5 (1977) (hereinafter Silverstein I).



border areas.<sup>7</sup> Historically, the relationship between central rule and the ethnic areas has varied significantly. Many ethnic nationalities have had kingdoms and principalities of their own at times, as well as different languages, culture, and political identities.<sup>8</sup>

In 1824, the British initiated a military campaign to gain control over Burma, which was ruled by the Konbaung Dynasty at the time.<sup>9</sup> Through a series of three wars, the British colonized the country in 1885.<sup>10</sup> The British first annexed Burma to British India, but made Burma a separate crown colony in 1937.<sup>11</sup> In ruling Burma's diverse population, the British were accused of favoring certain ethnic groups over others.<sup>12</sup>

During World War II, Japan took control of Burma with the help of the Japanese-trained Burma Independence Army, which was led by the country's independence hero General Aung San.<sup>13</sup> However, as the war went on many leaders of this group remained focused on establishing an independent state.<sup>14</sup> They created the Anti-Fascist People's Freedom League (AFPFL), and began to resist the Japanese with the help of the British.<sup>15</sup> The British and the AFPFL under General Aung San eventually liberated Burma from Japan in 1945.<sup>16</sup>

After the war, Burmese nationalists demanded independence for Burma from Britain.<sup>17</sup> The British initially resisted but then agreed after major demonstrations ensued and General Aung San sought the cooperation of Burma's ethnic nationalities in forming a federal union of Burma.<sup>18</sup> As a result, in early 1947 Aung San and many of Burma's ethnic nationality groups (though not all) established the Panglong Agreement. The agreement included a "principle of equality" between Burmans

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<sup>7</sup> For a fuller explanation, see Martin Smith, *BURMA, THE POLITICS OF ETHNICITY* 29-30 (1991).

<sup>8</sup> Silverstein I, *supra* note 6, at 4-6.

<sup>9</sup> Silverstein I, *supra* note 6, at 5-6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at viii; see also BBC News, *Timeline: Burma, A Chronology of Key Events*, Jul. 30, 2008, available [http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/1300082.stm](http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1300082.stm)

<sup>12</sup> Smith, *supra* note 7, at 44.

<sup>13</sup> Fink, *supra* note 5, at 21.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Timeline, *supra* note 11.

<sup>17</sup> Fink, *supra* note 5, at 21.

<sup>18</sup> *Id.* at 21-22.

and ethnic nationalities and laid the groundwork for a federal union with political autonomy for ethnic nationality areas.<sup>19</sup> On July 19, 1947, General Aung San and several other key leaders of Burma's independence movement were assassinated.<sup>20</sup> Despite the loss of many of its most respected and unifying figures, the course of the country's independence and the establishment of democracy continued.<sup>21</sup> A new constitution came into effect on September 2, 1947, and full independence was realized in 1948 with the creation of a parliamentary democracy.<sup>22</sup> States were considered autonomous, and certain ethnic nationalities had the constitutional right to secede from the union after ten years.<sup>23</sup> However, the trust that some ethnic nationality groups had placed in General Aung San, the architect of the Panglong Agreement, eroded under his successors.<sup>24</sup>

## B. Military Rule: 1962-1988

Despite a wealth of natural resources and the existence of a well-educated ruling class, Burmese democracy faced several challenges. First, disagreements and debate amongst the urban elite were common. Second, political tensions between Rangoon and some ethnic nationalities continued. Finally, Cold War politics also exacerbated the situation as the Communist Party of Burma (CPB) began fighting against the Government of Burma in 1948.<sup>25</sup> Many ethnic nationalities, fearing a loss of autonomy under the new government began to look for other political solutions. For example, Shan leaders and peoples debated whether to seek the right to gain independence granted to them in the constitution.<sup>26</sup> Some also formed their own armies, which either

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<sup>19</sup> Josef Silverstein, *BURMESE POLITICS AND THE DILEMMA OF NATIONAL UNITY*, 108 (1980) (hereinafter Silverstein II).

<sup>20</sup> Silverstein I, *supra* note 6, at 20.

<sup>21</sup> Silverstein II, *supra* note 19, at 126.

<sup>22</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar*, ¶ 4, U.N. Doc. E/CN.4/1994/57 (Feb. 16, 1994).

<sup>23</sup> *Id.*

<sup>24</sup> Silverstein II, *supra* note 19, at 155.

<sup>25</sup> Special Rapporteur, *supra* note 22.

<sup>26</sup> Fink, *supra* note 5, at 27.

collaborated with the CPB or separately pursued the struggle for ethnic autonomy.<sup>27</sup> By 1960, numerous groups were in armed conflict with the Tatmadaw—the Burmese Army.<sup>28</sup>

During the 1950s, military leaders began criticizing parliamentary rule and the constraints it placed on their powers.<sup>29</sup> They were concerned about “civilian influence” in their affairs, and the “disorderliness” of the parliamentary system.<sup>30</sup> In 1962, General Ne Win staged a coup that began the era of military rule, which still continues.<sup>31</sup> Ne Win dominated the country’s politics as a dictator until the late 1980s.<sup>32</sup> He created the “Burmese Way to Socialism,” a program that formed a single-party system controlled by his Burmese Socialist Program Party (BSPP).<sup>33</sup> Ne Win also isolated the country by remaining neutral during the Cold War and leaving the non-aligned movement in 1979 in protest against Soviet “machinations.”<sup>34</sup>

Starting in the 1960s, Ne Win’s regime also instituted the Four Cuts policy, aimed at cutting off armed ethnic nationalities groups from food, money, intelligence, and recruits.<sup>35</sup> The Four Cuts policy led to thousands of civilian deaths<sup>36</sup> and the destruction of food, crops, and numerous villages.<sup>37</sup> In the face of international criticism, the Burmese regime began in the late 1980s to deny the existence of the Four Cuts policy;<sup>38</sup> however, evidence suggests that it remains a policy and practice even today.<sup>39</sup>

Ne Win’s regime also suppressed political opposition in urban areas, including student-led uprisings in 1974.<sup>40</sup> In 1974, a new

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<sup>27</sup> *Id.* at 29; Smith, *supra* note 7, at 134-136 (section “The First United Fronts”).

<sup>28</sup> Special Rapporteur, *supra* note 22, at ¶ 4.

<sup>29</sup> Fink, *supra* note 5, at 27.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 29.

<sup>32</sup> Special Rapporteur, *supra* note 22, at ¶ 8.

<sup>33</sup> *Id.* at ¶ 5.

<sup>34</sup> Smith, *supra* note 7, at 201.

<sup>35</sup> Fink, *supra* note 5, at 48.

<sup>36</sup> Smith, *supra* note 7, at 220.

<sup>37</sup> *Id.* at 259.

<sup>38</sup> *Id.*

<sup>39</sup> For a history of the Four Cuts Policy, see *id.* at 258-72. For evidence of its ongoing practice, see *infra* Part III.

<sup>40</sup> Bertil Lintner, *BURMA IN REVOLT, OPIUM AND INSURGENCY SINCE 1948*, 232 (1994) (hereinafter Lintner I).

constitution officially transferred power to a People's Assembly but in reality Ne Win retained firm control.<sup>41</sup> Regionally-based ethnic nationality groups also continued to struggle against the Tatmadaw and Ne Win's rule. A coalition of nine such groups, including the Karen National Union (KNU), the Kachin Independence Organisation (KIO), and the New Mon State Party (NMSP), formed the National Democratic Front (NDF) that grappled with issues of territory, federalism, and the right of secession.<sup>42</sup> Coalition members of the NDF as well as the CPB and others groups held significant territory in Burma and fought against the Tatmadaw.<sup>43</sup>

Burma has vast natural resources—timber, gems, and agricultural lands—but poor economic management also characterized Ne Win's rule.<sup>44</sup> For example, in the 1950s, Burma was exporting three million tons of rice per year, but by 1988 rice exports had fallen to nearly zero.<sup>45</sup> Under the military rule such natural advantages were not developed, and the country's economy stagnated and regressed.<sup>46</sup>

### C. The 1988 Popular Uprising and Democratic Elections of 1990

By 1987, years of economic mismanagement had caused severe currency devaluation, and Burma's economy had collapsed, wiping out many peoples' savings.<sup>47</sup> In response to the economic situation as well as the suppression of civil and political rights since 1962,<sup>48</sup> large student-led demonstrations emerged, culminating in major peaceful protests calling for democracy in August 1988.<sup>49</sup> Hundreds of thousands marched in the streets.<sup>50</sup> The regime responded violently, with the army killing thousands

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<sup>41</sup> Fink, *supra* note 5, at 35-36.

<sup>42</sup> Smith, *supra* note 7, at 294.

<sup>43</sup> *Id.* at 272.

<sup>44</sup> Special Rapporteur, *supra* note 22, at ¶ 6.

<sup>45</sup> Smith, *supra* note 7, at 120.

<sup>46</sup> Special Rapporteur, *supra* note 22, at ¶ 6.

<sup>47</sup> Bertil Lintner, *OUTRAGE: BURMA'S STRUGGLE FOR DEMOCRACY*, 192 (1990) (hereinafter Lintner II).

<sup>48</sup> Special Rapporteur, *supra* note 22, at ¶ 4.

<sup>49</sup> *Id.* at ¶ 8.

<sup>50</sup> Lintner I, *supra* note 40, at xi.

of civilians, including women and children.<sup>51</sup>

Conservative estimates indicate that at least 3,000 people were killed in August 1988 alone.<sup>52</sup> In response, the military leadership re-organized itself and took power as the State Law and Order Restoration Council (SLORC).<sup>53</sup> The new regime declared martial law and arrested demonstrators.<sup>54</sup>

Despite the crackdown in 1988 calls for democracy continued, and in May 1990, the regime held multi-party elections.<sup>55</sup> Though many opposition leaders had been placed under house arrest or imprisoned at the time, the military suffered a massive defeat in the elections.<sup>56</sup> By this time Daw Aung San Suu Kyi, the daughter of General Aung San, had emerged as the leader of the National League for Democracy (NLD), the major opposition group. Her party won over 80% of the parliamentary seats in the 1990 elections.<sup>57</sup> However, the ruling SLORC refused to transfer power.<sup>58</sup> Instead, the SLORC created a military-led National Convention to draft a new constitution<sup>59</sup> and increasingly suppressed pro-democracy advocates, including elected members of parliament.<sup>60</sup> Daw Aung San Suu Kyi, for example, has been under house arrest for much of the past two decades,<sup>61</sup> and the military regime has arrested many politically active individuals during its rule.<sup>62</sup>

#### D. Military Rule Since 1988

The characteristics of the Ne Win period—political oppression,

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<sup>51</sup> *Id.*

<sup>52</sup> Special Rapporteur, *supra* note 22, at ¶ 8.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at ¶ 9

<sup>56</sup> *Id.* at ¶¶ 8-9.

<sup>57</sup> *Id.* at ¶ 9.

<sup>58</sup> *Id.*

<sup>59</sup> Council on Foreign Relations, BURMA, TIME FOR CHANGE, 8 (2003) (hereinafter Time for Change).

<sup>60</sup> *Id.*

<sup>61</sup> The Elders, “Aung San Suu Kyi”, at <http://www.theelders.org/elders/elders.asp?elder=kyi&more=page1>.

<sup>62</sup> See, e.g., Amnesty International, “Myanmar, Imprisonment of Students” (ASA 16/009/1997), available at <http://asiapacific.amnesty.org/library/Index/ENGASA160091997?open&of=ENG-MMR>.

lack of movement towards democracy, and violations of human rights—continued into the 1990s and 2000s. The military, retained tight control, with General Than Shwe leading the junta starting in 1992.<sup>63</sup> In 1997, the regime changed its name to State Peace and Development Council (SPDC), and Burma was admitted into the Association of Southeast Asian Nationals (ASEAN),<sup>64</sup> but human rights abuses continued.

With the end of the Cold War and the awarding of the Nobel Prize to Daw Aung San Suu Kyi in 1991,<sup>65</sup> however, the regime's record began to receive more scrutiny internationally.<sup>66</sup> In 1991, the UN General Assembly passed its first resolution on Burma,<sup>67</sup> and in 1992, the UN Commission on Human Rights similarly expressed concerns about the "seriousness of the human rights situation,"<sup>68</sup> including restrictions placed on political leaders<sup>69</sup> and the exodus of Muslim refugees to Bangladesh.<sup>70</sup> In 1993, the first Special Rapporteur on the situation of human rights in Myanmar reported on investigations made with regards to the country.<sup>71</sup> The report documented, among other violations, "[d]etentions without minimum guarantees for persons under custody, torture, cruel, inhuman or degrading treatment, disappearances and arbitrary execution have been carried out by the Myanmar authorities."<sup>72</sup> Subsequent yearly

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<sup>63</sup> Special Rapporteur, *supra* note 22, at ¶ 11. In 1992, General Than Shwe replaced General Saw Maung as SLORC Chairman, Prime Minister, and Defense Minister. See, e.g., Michael Leifer, *DICTIONARY OF THE MODERN POLITICS OF SOUTH-EAST ASIA* 270-271 (3<sup>rd</sup> ed.) (2001).

<sup>64</sup> *TIME FOR CHANGE*, *supra* note 59, at 9-10.

<sup>65</sup> *Aung San Suu Kyi Biography*, Nobel Peace Prize Foundation, at [http://nobelprize.org/nobel\\_prizes/peace/laureates/1991/index.html](http://nobelprize.org/nobel_prizes/peace/laureates/1991/index.html).

<sup>66</sup> See, e.g., The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Report on the situation of human rights in Myanmar, in accordance with Commission resolution 1992/58*, U.N. Doc. E/CN.4/1993/37 (Feb. 17, 1993).

<sup>67</sup> *Situation in Myanmar*, G.A. Res. 46/132, U.N. Doc. A/RES/46/132 (Dec. 17, 1991) ("Noting with concern substantive available information indicating a grave human rights situation in Myanmar").

<sup>68</sup> *Situation of human rights in Myanmar*, Comm'n on Human Rights Res. 1992/58, U.N. Doc. E/CN.4/RES/1992/58, ¶ 2 (Mar. 3, 1992).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at preamble and ¶ 9.

<sup>71</sup> Special Rapporteur, *supra* note 66.

<sup>72</sup> *Id.* at ¶ 228.

reports have continued to detail such violations.<sup>73</sup>

In the aftermath of the 1988 uprising and failed elections, many Burmese students fled to Burma's jungles, some joining the armed struggle against the Tatmadaw.<sup>74</sup> Armed conflict continued throughout the 1990s as the Burmese army mounted attacks to gain control of border regions.<sup>75</sup> The military regime's offensives weakened the ethnic movements,<sup>76</sup> and many groups signed ceasefire agreements with the military regime during the early and mid-1990s.<sup>77</sup>

During the 1990s, the numerous military campaigns against ethnic nationality groups led to a litany of human rights violations, which included increased displacement—both inside the country and into neighboring countries. In early 1992, for example, a mass exodus took place, during which at least 250,000 Muslims from Burma (the Rohingya) fled to Bangladesh.<sup>78</sup> In 1995, after heavy shelling, the regime seized the KNU headquarters at Manerplaw, and thousands of refugees fled into the jungles and into neighboring Thailand.<sup>79</sup> In the mid- to late 1990s, the regime also launched major attacks against the Shan as well as other ethnic nationalities, which forced hundreds of villages to relocate and hundreds of thousands to flee their homes, including many to Thailand.<sup>80</sup> The Special Rapporteur reported that regime soldiers were committing numerous, severe human rights abuses against ethnic nationality civilians.<sup>81</sup> By the late 1990s, more than 100,000 refugees were in camps

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<sup>73</sup> See Chart C, *Human Rights Violations Listed by Reports of the Special Rapporteur on the situation of human rights in Myanmar*.

<sup>74</sup> Fink, *supra* note 5, at 62.

<sup>75</sup> Thailand Burma Border Consortium, "Programme Report, Jul. to December 2008", Appendix F, at 150-51 (hereinafter Programme Report.)

<sup>76</sup> *Id.*

<sup>77</sup> Taylor & Francis Group, *EUROPA WORLD YEAR BOOK 2*, 3014 (45<sup>th</sup> ed.) (2004).

<sup>78</sup> Special Rapporteur, *supra* note 22, at ¶ 10.

<sup>79</sup> *Burmese Expand Offensive*, Associated Press, Jan. 30, 1995.

<sup>80</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar*, U.N. Doc. A/53/364, ¶¶ 52, 54 (Sept. 10, 1998).

<sup>81</sup> See, e.g., The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Report on the situation of human rights in Myanmar, submitted in accordance with Commission resolution 1994/85*, U.N. Doc. E/CN.4/1995/65, ¶ 102, (Jan. 12, 1995).

in Thailand,<sup>82</sup> in addition to the many internally displaced persons within Burma itself.<sup>83</sup>

Forced labor was also occurring in epidemic proportions during the 1990s. The International Labour Organization (ILO), a UN agency, formed a Commission on Inquiry in 1997 that found in its 1998 report that there was a prolific use of forced labor in the country:

There is abundant evidence before the Commission showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks, none of which comes under any of the exceptions listed in Article 2(2) of the Convention.<sup>84</sup>

The Commission of Inquiry stated that its findings “reveal[ed] a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers.”<sup>85</sup> Yet, the use of forced labor has continued to be “widespread”, especially by the army,<sup>86</sup> and the ILO has

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<sup>82</sup> Programme Report, *supra* note 75 , at 150-51.

<sup>83</sup> *Id.*

<sup>84</sup> Governing Body, International Labour Organization, *Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), 2 Jul., 1998, Part V, Conclusions and Recommendations, 14 (3) Conclusions On the Substance of the Case, ¶ 528, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar5.htm#14.%20Conclusions%20and%20recommendations> (citations omitted).*

<sup>85</sup> *Id.* at 14 (5) Concluding observations, ¶ 543.

<sup>86</sup> International Labour Office, Governing Body, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Legal aspects arising out of the 95th Session of the International Labour Conference, GB.297/8/2, ¶ 23 (Nov. 2006), at <http://www.ilo.int/public/>*



noted that the systematic nature of the use of forced labor may constitute a crime against humanity.<sup>87</sup> In 2009, the ILO stated that the “overall forced labor situation remains serious in the country,” despite ongoing efforts to pressure the regime to end the practice.<sup>88</sup>

By the late 1990s, the SPDC had largely consolidated control over the country; however, political freedoms did not follow. The SPDC has continuously placed restrictions on Daw Aung San Suu Kyi and other politicians.<sup>89</sup> Hundreds of political prisoners have been held for years.<sup>90</sup> As with the events of 1988, brief periods where more political space has existed have been followed by clampdowns. A student uprising in 1996 led to a new round of arrests and imprisonments, for example.<sup>91</sup> As it has persecuted students, including closing the universities for much of the 1990s, the military has also targeted political parties. For example, in May 2003, during a time when Daw Aung San Suu Kyi had been released from house arrest and was attempting to organize NLD activities by traveling outside Rangoon, regime supporters attacked her supporters, resulting

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english/standards/relm/gb/docs/gb297/pdf/gb-8-2.pdf noting the “widespread” use of forced labor, “particularly by the army,” and that the ILO’s findings would be “relevant points of departure” for any investigation by the Prosecutor of the International Criminal Court).

<sup>87</sup> *Id.* at ¶ 24 (“The pattern established over time, including by the Commission of Inquiry, suggests a systematic course of conduct in the nature of a crime against humanity, since such acts have been committed multiple times, by military authorities or under military control, against the civilian population of Myanmar. The continuing lack of adequate compliance by Myanmar with certain of the recommendations of the Commission of Inquiry, together with the prosecution of individuals for lodging allegedly false complaints of forced labour, may point to a state policy to commit, and permit the commission of, such acts.”) (citations omitted).

<sup>88</sup> International Labour Office, Governing Body, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention*, 1930 (No. 29), GB.304/5/1 (Rev.) (Mar. 2009), at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_103631.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103631.pdf).

<sup>89</sup> Amnesty International, *Myanmar: Twenty Years On, More Than 2,000 Political Prisoners* (Aug. 3, 2008), available at <http://www.amnesty.org.au/news/comments/15973/>.

<sup>90</sup> *Id.*

<sup>91</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Report on the situation of human rights in Myanmar, submitted in accordance with Commission on Human Rights Resolution 1996/80*, U.N. Doc. E/CN.4/1997/64, ¶¶ 53-54 (Feb. 6, 1997).

in injuries and deaths.<sup>92</sup> The event has become known as the Depayin Massacre.<sup>93</sup>

As evidenced by the events of August and September 2007, the military persecutes not only students and politicians but other actors including religious institutions. For example, the military regime targeted Buddhist monks during the 2007 events,<sup>94</sup> which have become known as the Saffron Revolution (a reference to the color of the monks' robes).<sup>95</sup> The military regime's sudden removal of fuel subsidies in August 2007 triggered peaceful demonstrations, which led to the detention of several 1988 generation student activists, and the beating of several monks.<sup>96</sup> Throughout September 2007, demonstrations grew under the leadership of Buddhist monks and spread across the country.<sup>97</sup> The regime responded with a harsh crackdown, using the tools of violence, arbitrary detention, a curfew and the banning of public gatherings.<sup>98</sup> The UN Special Rapporteur reported fatalities and numerous arrests.<sup>99</sup> The UN Security Council responded by issuing its first ever-Presidential Statement on Burma that deplored the violence used against protestors, urged the release of all political prisoners, and called for the military regime to "create the necessary conditions for a genuine dialogue . . . with all concerned parties and ethnic groups."<sup>100</sup>

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<sup>92</sup> Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Report on the situation of human rights in Myanmar*, U.N. Doc. E/CN.4/2004/33, ¶¶ 12-21 (Jan. 5, 2004).

<sup>93</sup> Asian Legal Resource Center Press Release, "Statement on 'Myanmar: Massacre at Depayin' received by Commission on Human Rights", available at <http://www.alrc.net/pr/pdf/pl-alrc-20-2004.pdf>.

<sup>94</sup> See, e.g., Andrew Bancombe and Peter Popham, "Burma: Inside the Saffron Revolution", THE INDEPENDENT WORLD (Sept. 27, 2007), at <http://www.independent.co.uk/news/world/asia/burma-inside-the-saffron-revolution-403645.html>.

<sup>95</sup> See, e.g., U.S. Senate Committee on Foreign Relations, "Burma's Saffron Revolution" (Oct. 3, 2007), available at <http://foreign.senate.gov/hearings/2007/hr071003p.html>.

<sup>96</sup> See The Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar, mandated by resolution S-51 adopted by the Human Rights Council at its fifth Special Session*, U.N. Doc. A/HRC/6/14, ¶¶ 16-18 (Dec. 7, 2007).

<sup>97</sup> *Id.* at ¶¶ 20, 26.

<sup>98</sup> *Id.* at ¶¶ 30-62.

<sup>99</sup> *Id.* at ¶¶ 30-38, 41-52, 55.

<sup>100</sup> UN Security Council, *Statement by the President of the Security Council*, U.N. Doc.

The military regime ignored the UN Security Council, as it has other calls from the UN to protect civil and political freedoms. Instead, it has pursued its own course. In May 2008, one week after Cyclone Nargis hit Burma and left an estimated 134,000 dead,<sup>101</sup> the SPDC held a referendum on a new constitution, which would institutionalize its power after elections.<sup>102</sup> The international community, including UN actors, have condemned the new constitution and its drafting process for lacking real participation (as well as legitimacy and reconciliation).<sup>103</sup> For example, one of the reasons the Constitution is condemned is that those who criticize the process may be sentenced and imprisoned.<sup>104</sup> The continuation of political suppression is also evidenced by the fact that between June 2007 and late November 2008, the military nearly doubled the number of political prisoners in the country to over 2,100.<sup>105</sup>

## Conclusion

Burma has lived under autocratic and repressive military rule for more than four decades. The situation in Burma constitutes one of the world's worst human rights situations. The UN General Assembly and Human Rights Commission (now Human Rights Council) have passed repeated resolutions condemning Burma's military regime for human rights abuses every year since 1990 and 1992, respectively. UN Special Envoys and UN Special Rapporteurs have traveled to Burma over 40 times to discuss democratization and human rights, yet, they have achieved few sustainable goals. After years of resolutions at the General Assembly and Human Rights Commission had failed to produce any progress, the UN Security Council placed Burma on its permanent

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S/PRST/2007/37 (Oct. 11, 2007).

<sup>101</sup> IRIN Humanitarian News and Analysis, a project of the UN Office for the Coordination of Humanitarian Affairs, "Myanmar: Concerns over premature returns," (Apr. 16, 2009), at <http://www.irinnews.org/report.aspx?ReportId=78529>.

<sup>102</sup> Yash Ghai, *The 2008 Myanmar Constitution: Analysis and Assessment; The Special Rapporteur on the situation of human rights in Myanmar, Report of the Special Rapporteur on the situation of human rights in Myanmar, on the implementation of Council resolutions S-5/1 and 6/33*, U.N. Doc. A/HRC/8/12, ¶¶ 9-29 (Jun. 3, 2008).

<sup>103</sup> See, e.g., *id.* at ¶ 18.

<sup>104</sup> *Id.* at ¶ 22.

<sup>105</sup> Amnesty International Canada, "Human Rights in Myanmar: Overview," at [http://www.amnesty.ca/themes/myanmar\\_overview.php](http://www.amnesty.ca/themes/myanmar_overview.php).

agenda in 2006. The long-standing pattern of abuses in Burma provides the background for analyzing the violations in the country since 2002 focused on in this report.



## II. INTERNATIONAL CRIMINAL LAW FRAMEWORK

International law outlaws both crimes against humanity and war crimes, which are the focus of this report. This section outlines a very brief overview of these crimes and the key criteria for establishing their existence under the Rome Statute. The Rome Statute of the International Criminal Court, which was adopted in July 1998 and came into force in July 2002, is a useful articulation of many of modern principles of international criminal law.<sup>106</sup> While Burma is also obligated to comply with customary and other treaty obligations that extend beyond the Rome Statute,<sup>107</sup> it provides the legal framework that this report uses to analyze the ongoing violations in eastern Burma.

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<sup>106</sup> While the Rome Statute does not reflect all aspects of customary international law principles embodied in international criminal law, its recent adoption and wide ratification makes it a useful evaluative tool for this report. The Rome Statute of the International Criminal Court, *opened for signature* 17 Jul. 1998, UN Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (hereinafter Rome Statute).

<sup>107</sup> Burma is subject to certain international humanitarian obligations relating to armed conflict. For example, since August 1992, Burma has been a party to the four Geneva Conventions of 1949, which are also considered largely to constitute customary international law. See Dieter Fleck, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 28 (2<sup>nd</sup> ed) (2008). Thus, as a matter of customary international and treaty law, Burma's obligation is to carry out its military operations during armed conflict according to the minimum standards established in common Article 3 of the Geneva Conventions. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 75 U.N.T.S. 31 (hereinafter First Geneva Convention); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 75 U.N.T.S. 85, (hereinafter Second Geneva Convention); Convention (III) relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 (hereinafter Third Geneva Convention); Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter Fourth Geneva Convention). If Burma's leaders violate these minimum requirements, they may have committed war crimes. For customary norms, whether Burma has signed a specific treaty or not that includes such prohibitions, it is bound not to commit such violations. In such cases where an individual commits a crime against humanity, for example, another state would have the ability to prosecute that person based on the principle of universal jurisdiction.

After years of negotiations,<sup>108</sup> the Rome Statute established the first permanent international tribunal in charge of prosecuting war crimes, crimes against humanity, genocide, and crimes of aggression.<sup>109</sup> There are a number of specific means through which the International Criminal Court (“ICC”) can obtain jurisdiction over a particular situation:<sup>110</sup>

- The State where the conduct in question occurred is a State Party to the Statute;<sup>111</sup>
- The accused is a national of a State Party to the Statute;<sup>112</sup>
- A State accepts the jurisdiction of the ICC with respect to the crime in question,<sup>113</sup> or
- The UN Security Council, under its Chapter VII powers, refers the situation to the ICC.<sup>114</sup>

With regards to Burma, the UN referral is the most relevant

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<sup>108</sup> The ICC is the culmination of decades of legal developments, including the Nuremberg International Military Tribunal, which followed World War II and the Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda in the 1990s. For a fuller discussion of the history of the creation of the ICC, see, e.g., Robert Cryer, Hakan Friman, Darryl Robinson and Elisabeth Wilmhurst, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE*, Part C (2007).

<sup>109</sup> The crime of aggression is also formally within the jurisdiction of the ICC, but it is unable to exercise its jurisdiction unless and until the State Parties have agreed to both a definition and the conditions upon which there will be an exercise of such jurisdiction. Rome Statute, *supra* note 106, at art. 5(2).

<sup>110</sup> There are two additional elements governing jurisdiction under the Rome Statute. First, the ICC’s personal jurisdiction is limited to persons over the age of eighteen at the time the alleged offence was committed. Rules of Procedure and Evidence (hereinafter RPE), 9 Sept. 2002, rule 44(2), ICC-ASP/1/3. Second, there is a temporal jurisdictional requirement that prevents the ICC from exercising jurisdiction over offences committed before the entry into force of the ICC Statute on Jul. 1, 2002. Rome Statute, *supra* note 106, at art. 11(1).

<sup>111</sup> Rome Statute, *supra* note 106, at art. 12(a). Jurisdiction also arises in situations where the crime was committed on board a vessel or aircraft where the State of registration of that vessel or aircraft is a Party to the Statute. *Id.*

<sup>112</sup> *Id.* at art. 12(b).

<sup>113</sup> *Id.* at art. 12(3).

<sup>114</sup> *Id.* at art. 13(b). In the event of a referral by the Security Council the Court has jurisdiction even if none of the relevant States is a party to the Statute or gives its consent.

potential ground for jurisdiction because Burma is not a party to the Statute. However, the ICC cannot exercise jurisdiction unless there is a failure on the part of a national judicial system to act.<sup>115</sup> Thus, the ICC supplements and does not supplant national jurisdictions, a concept known as the principle of complementarity that is enshrined in Article 17 of the Rome Statute.<sup>116</sup> The ICC will be unable to exercise its jurisdiction if a national authority is investigating or prosecuting the case.<sup>117</sup> However, the ICC can gain jurisdiction if a State is unwilling<sup>118</sup> or unable genuinely<sup>119</sup> to carry out the investigation or prosecution.<sup>120</sup> A case must be sufficiently grave to justify the exercise of the ICC's jurisdiction.<sup>121</sup>

To establish the existence of a crime against humanity or war crime, there are several aspects to the legal analysis. First, there must be a "prohibited" (or "enumerated") act. Second, such a prohibited act must take place within a particular context, which is defined by the "chapeau" or common elements of a crime against humanity or war crime. For example, torture is a prohibited act, but not all acts of torture constitute a crime against humanity or war crime. If, however, torture takes places

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<sup>115</sup> Cryer, et al., *supra* note 108, at 127.

<sup>116</sup> Rome Statute, *supra* note 106, at art. 17; *see also* Cryer, et al., *supra* note 100, at 127.

<sup>117</sup> *See, e.g.*, Rome Statute, *supra* note 106, at art. 17(1)(c). An ICC case may not proceed if the person has already been tried for the relevant conduct.

<sup>118</sup> *Id.* at art. 17(2) (providing that a determination that a state is unwilling to carry out proceedings requires the existence of one or more of the following factors: first, the proceedings undertaken or ongoing or the national decision was made for the purpose of shielding the accused from being held criminally responsible for the crimes within the jurisdiction of the ICC; second, if there has been an unjustifiable delay in the proceedings that in the circumstances displays an intent that is inconsistent with bringing the accused to justice; third, whether proceedings undertaken or that are ongoing were not or are not being conducted independently or impartially, and that in the circumstances they were or are being conducted in a manner which is inconsistent with an intent to bring the person concerned to justice).

<sup>119</sup> *Id.* at art. 17(3) (providing that a determination that a state is unable to carry out proceedings the court will consider whether as a result of "a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.").

<sup>120</sup> *Id.* at arts. 17(1)(a) and (b); 17(2)-(3); *see also* Cryer, et al., *supra* note 108, at 128 (discussing how inaction by national authorities should alleviate concerns about the ICC exercising jurisdiction).

<sup>121</sup> *Id.* at art. 17(1)(d).



and the common elements of either a crime against humanity or war crime are present then such a crime has been committed. To establish that a crime against humanity or war crime has been committed, the act of torture must also meet the specific elements of this prohibited act.

Finally, although international criminal law is primarily concerned with individual responsibility, this report focuses on the overall situation in eastern Burma and the need for further investigations. This focus reflects the fact that a referral to the ICC by the UN Security Council under Article 13(b) of the Rome Statute refers an overall “situation.”<sup>122</sup> The referral process does not allow for a targeted referral of a specific individual or group. Further, the present analysis is aimed at establishing whether there is a *prima facie* case for further investigation. Thus, certain common elements of the crimes (such as whether they are widespread or systematic or taking place in the context of an armed conflict) are most relevant to this report’s analysis. Other elements (such as intent or knowledge of particular perpetrators) are more relevant to determinations of individual responsibility. Elements that are more relevant to individual responsibility would be determined at later stages of the process, meaning during and after the investigation of a Commission of Inquiry or during ICC proceedings following referral. What follows is a discussion of the crimes with a particular focus on the most relevant general criteria for establishing a *prima facie* case for further investigation.

### A. Crimes against Humanity: Chapeau or Common Elements

Article 7(1) of the ICC Statute provides that “crimes against humanity” means one of a number of prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Crimes against humanity can stem from a number of prohibited acts, including rape and torture by a given perpetrator. The chapeau or common elements of a crime against humanity are as follows: (1) there must be an “attack”;<sup>123</sup> (2) the attack

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<sup>122</sup> *Id.* at art. 13(b).

<sup>123</sup> See, e.g., International Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3(part II-B), *adopted* 9 Sept. 2002 (hereinafter Elements) (detailing elements related to torture in Article 7(1)(f)(4) and elements of rape in Article 7(1)(g)-1(3)).

must be “directed against”<sup>124</sup> a “civilian population”;<sup>125</sup> (3) the attack must be “widespread or systematic”;<sup>126</sup> (4) the conduct of the perpetrator must be “part of” such an attack;<sup>127</sup> and (5) the perpetrator must have “knowledge” that, or intended that, his or her conduct is part of such an attack.<sup>128</sup> Elements (4) and (5) focus on individual perpetrators, and as such are not the focus of analysis in this report, but they would ultimately need to be established through investigations for any prosecution to proceed. Thus, this report focuses on the first three of the chapeau elements. Important aspects of these elements for the purposes of this report are as follows:<sup>129</sup>

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<sup>124</sup> See, e.g., *id.* at 8 (detailing elements related to torture in Article 7(1)(f)(4) and elements of rape in Article 7(1)(g)-1(3)). Jurisprudence has expounded on the definition of “directed against”: “In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.” Prosecutor v. Kunarac, Kovac and Vukovic., ICTY Case No. IT-96-23 & IT-96-23/1-T, Appeals Chambers Judgment, ¶ 91 (Jun. 12, 2002).

<sup>125</sup> See, e.g., Elements, *supra* note 123, at 8 (detailing elements related to torture in Article 7(1)(f)(4) and elements of rape in Article 7(1)(g)-1(3)). The definition of “civilian population” is straightforward: “In other words, apart from members of the armed forces, everybody physically present in a territory is a civilian.” INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUN. 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 611 ¶ 1917 (1987).

<sup>126</sup> See, e.g., Elements, *supra* note 123, at 8 (detailing elements related to torture in Article 7(1)(f)(4) and elements of rape in Article 7(1)(g)-1(3)).

<sup>127</sup> See, e.g., *id.* at 8 (detailing elements related to torture in Article 7(1)(f)(4) and elements of rape in Article 7(1)(g)-1(3)); see also Prosecutor v. Naletilic and Martić.; ICTY Case No. IT-98-34-T, Trial Chambers Judgment, ¶ 234 (Mar. 31, 2003) (“The acts of the accused must not be isolated but form part of the attack. This means that the act, by its nature or consequence, must objectively be a part of the attack.”).

<sup>128</sup> See, e.g., Elements, *supra* note 123, at 8 (detailing elements related to torture in Article 7(1)(f)(5) and elements of rape in Article 7(1)(g)-1(4)); see also Prosecutor v. Kayishema and Ruzindana, ICTR Case No. ICTR-95-1-T, Trial Chamber Judgment, ¶ 134 (May 21, 1999), (“[P]art of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof.”).

<sup>129</sup> See *supra* the discussion in the methodology section of this report for the explana-

1. *There must be an “attack”.*

An “attack” means a course of conduct involving the multiple commission of prohibited acts.<sup>130</sup> An attack does not necessarily require the use of armed force, and can result solely from the mistreatment of the civilian population.<sup>131</sup>

2. *The attack must be “directed against” a “civilian population”.*

“A civilian population” envisions “any” relatively large body of victims and excludes isolated acts against individuals.<sup>132</sup>

3. *The attack must be “widespread or systematic”.*

The attack must be widespread *or* systematic; it does not need to be both widespread *and* systematic. “Widespread” generally means a large-scale attack with numerous victims,<sup>133</sup> while “systematic” denotes a “high degree of organization”<sup>134</sup> or “a pattern or methodical plan”.<sup>135</sup> This requirement applies to the general attack. This element does not require that the accused personally committed multiple offences. An accused is

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tion of this focus.

<sup>130</sup> Rome Statute, *supra* note 106, at art. 7(2)(a).

<sup>131</sup> See, e.g., Elements, *supra* note 123, at 5 (Introduction to Crimes Against Humanity); see also Prosecutor v. Kunarac, Kovac and Vukovic, ICTY Case No. IT-96-23 & IT-96-23/1-T, Trial Chamber Judgment, ¶ 415 (Feb. 22, 2001) (“An ‘attack’ can be described as a course of conduct involving the commission of acts of violence.”).

<sup>132</sup> Cryer, et al., *supra* note 108, at 192.

<sup>133</sup> See, e.g., Prosecutor v. Kunarac, Kovac and Vukovic, *supra* note 131, at ¶¶ 427-28 (“The attack must be either “widespread” or “systematic”, thereby excluding isolated and random acts. The adjective “widespread” connotes the large-scale nature of the attack and the number of its victims.”) (Footnotes omitted).

<sup>134</sup> *Id.* at ¶ 429 (Feb. 22, 2001) (“The adjective “systematic” signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes—that is the nonaccidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence.”) (Footnotes omitted).

<sup>135</sup> Prosecutor v. Tadić, ICTY Case no. IT-94-1-T, Trial Chamber Judgment, ¶ 648 (May 7, 1997).

criminally liable for a single inhumane act such as murder provided that the act was committed as part of the broader attack.<sup>136</sup>

## B. War Crimes: Chapeau or Common Elements

A war crime is a serious violation of international humanitarian law (IHL), or the laws of war, which can give rise to individual criminal responsibility under international law.<sup>137</sup> IHL seeks to regulate the conduct of armed conflicts.<sup>138</sup> Of the Rome Statute provisions on war crimes the most relevant to Burma are Articles 8(2)(c) and 8(2)(e), which cover serious violations in conflicts of a “non-international” (or internal) character.<sup>139</sup> A war crime can be committed in either an international armed conflict or one of internal character with some differences in the rules applicable to each. The situation in Burma falls into the latter category. To constitute a war crime in the context of an internal armed conflict, the act must be committed against persons taking “no active part in the hostilities.”<sup>140</sup> A war crime involves a perpetrator committing one of a number of prohibited acts, such as rape or torture, in a situation that meets certain common elements. The common elements relevant to the war crimes in this report are: (1) there must be an “armed conflict”;<sup>141</sup>

<sup>136</sup> See, e.g., Prosecutor v. Kordić and Čerkez., ICTY Case No. IT-95-14/2-A., App. Chamber Judgment, ¶ 94 (Dec. 17, 2004) (“The Appeals Chamber underscores that the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”).

<sup>137</sup> See, e.g., Brandon and Du Plessis, *THE PROSECUTION OF INTERNATIONAL CRIMES, A PRACTICAL GUIDE TO PROSECUTING ICC CRIMES IN COMMONWEALTH STATES* (2005); see also Cryer, et al., *supra* note 108.

<sup>138</sup> Cryer, et al., *supra* note 108, at 223.

<sup>139</sup> See Rome Statute, *supra* note 106, at arts. 8(2)(c) and 8(2)(e). Article 8(2)(e) of the Statute provides a list of “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.” *Id.*

<sup>140</sup> This includes “members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.” See Rome Statute, *supra* note 106., at art. 8(2)(c).

<sup>141</sup> See, e.g., Elements, *supra* note 123, at 34 (detailing elements related to murder in Article 8(2)(c)(i)-1(4)); *id.* at 39 (detailing elements of rape in Article 8(2)(e)(vi)-1-1(3)); see also Prosecutor v. Kunarac, Kovac and Vukovic, ICTY Case No. IT-96-23 and IT-96-23/1 ICTY, App. Chambers Judgment, ¶ 56, (Jun. 12, 2002) (“An ‘armed conflict’ is said to exist ‘whenever there is a resort to armed force between States or

(2) the armed conflict must be determined as either “international”<sup>142</sup> or “internal” in nature as each have different elements; (3) an “internal” conflict must be more than a “riot” or “disturbance”;<sup>143</sup> (4) certain criteria, such as age or civilian status, may also exist with regards to the victim (or object) of specific crime;<sup>144</sup> (5) the crime must have a “nexus” with the conflict;<sup>145</sup> and (6) the perpetrator “must have awareness of the factual circumstances that established the existence of an armed conflict.”<sup>146</sup> The final element—requiring the awareness of the particular perpetrator—would have to be determined by an investigation into their individual knowledge, and is therefore less relevant for this particular report. Important aspects of the remaining chapeau elements relevant to this report are as follows:<sup>147</sup>

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protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”)

<sup>142</sup> See, e.g., Elements, *supra* note 123, at 34 (detailing elements related to murder in Article 8(2)(c)(i)-1(4)); *id.* at 39 (detailing elements of rape in Article 8(2)(e)(vi)-1-1(3)). An international armed conflict exists if one state uses force against another state or cases of total or partial occupation. Common Article 2 to the Geneva Conventions of 1949 defines it through providing that the Conventions apply “to all cases of declared war on any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them. See, e.g., Dieter Fleck, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, 46 (2008).

<sup>143</sup> See, e.g., Elements, *supra* note 123, at 34 (detailing elements related to murder in Article 8(2)(c)(i)-1(4)); *id.* at 39 (detailing elements of rape in Article 8(2)(e)(vi)-1-1(3)).

<sup>144</sup> See, e.g., *id.* at 34 (detailing elements related to murder in Article 8(2)(c)(i)-1(2) specifying that the victim(s) were “either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.”)

<sup>145</sup> See, e.g., *id.* at 35 (detailing elements related to torture in Article 8(2)(c)(i)-4(5) which states the requirement that “the conduct took place in the context of and was associated with” an internal conflict); see also Prosecutor v. Tadić ICTY App. Chamber Decision, Case No. IT-94-1, ¶ 69 (Oct. 2, 1995) (“The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.”).

<sup>146</sup> See, e.g., Elements, *supra* note 123, at 35 (detailing elements related to torture in Article 8(2)(c)(i)-4(6)); *id.* at 150 (detailing elements of rape in Article 8(2)(e)(vi)-1(4)). The individual, however, is not required to be aware of whether the conflict is international or internal in nature. See *id.* at 39.

<sup>147</sup> See the discussion in the methodology section of this report for the explanation of this focus.

1. *There must be an internal armed conflict (chapeau elements (1)-(3)).*

The test of an armed conflict is an objective one; the denial of one or more of the parties of its existence is not determinative.<sup>148</sup> Article 8(2)(f) defines non-international (or internal) armed conflicts as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>149</sup> However, to be recognized as an internal armed conflict, a situation must meet a threshold requirement of intensity and organization of amounting to more than a mere internal disturbance or riot.<sup>150</sup>

2. *The specific criteria defining the victim or object of the crime.*

As noted above war crimes can only be committed, in the context of an internal armed conflict, against “persons taking no active part in the hostilities.”<sup>151</sup> However, some war crimes specify a particular victim within this category, for example children or a civilian population.<sup>152</sup>

<sup>148</sup> See, e.g., Prosecutor v. Akayesu, ICTR Trial Chamber Judgment, Case No. ICTR-96-4, ¶ 624 (Sept. 2, 1998) (the conditions governing the application of Additional Protocol II “have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict.”).

<sup>149</sup> Rome Statute, *supra* note 106, at art. 8(2)(f); see also Prosecutor v. Musema, ICTR Trial Chamber judgment, Case No. ICTR-96-13-T, ¶¶ 247-248 (Jan. 27, 2000) (“[N] on-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.”).

<sup>150</sup> See Rome Statute, *supra* note 106, at art. 8(2)(d) and (f) (stating that Articles 8(2)(c) and (e) do not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”); see also Prosecutor v. Kayishema and Ruzindana, *supra* note 128, at ¶ 171 (“Certain types of internal conflicts, which fall below a minimum threshold, are not recognised by Article 1(2) of Protocol II as non-international armed conflict, namely, ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.’”).

<sup>151</sup> Rome Statute, *supra* note 106, at art. 8(2)(c).

<sup>152</sup> See, e.g., Prosecutor v. Kayishema and Ruzindana, *supra* note 128, at ¶¶ 605-08 (The enumerated Articles of Protocol II would protect “interned or detained persons, deprived of their liberty for reasons related to the armed conflict,” “wounded, sick and shipwrecked persons,” “religious and medical personnel,” as well as the civilian

3. *There must be a “nexus” between the crime and the armed conflict.*

The nexus requirement makes clear that a prohibited act must be connected or “associated with” the armed conflict: this does not necessitate that such acts take place in battle or require a particularized geographic connection to the conflict; it requires only that they have an association with the conflict.<sup>153</sup>

In addition to the above elements, the Rome Statutes also includes a threshold requirement for the ICC to act in relation to war crimes. Article 8(1) of the Rome Statute provides that the ICC “shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.”<sup>154</sup> This is an indicator to the ICC as to how it should exercise its jurisdiction.<sup>155</sup> It is a direction to focus resources not on isolated war crimes but on the most serious of situations.<sup>156</sup> However, this is a “guide rather than a requirement.”<sup>157</sup> The ICC remains able to act with respect to isolated war crimes which attain a sufficient level of gravity such as crimes with a particularly grave impact.<sup>158</sup> The terms “large-scale” or “plan or policy” are at a minimum synonymous with and may be less demanding than the common elements under crimes against humanity, namely “widespread” or “systematically” respectively.<sup>159</sup>

### C. Enumerated or Prohibited Acts

Crimes against humanity and war crimes are distinct, though at times, a prohibited act may result in violations that display the requisite

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population and individual civilians.).

<sup>153</sup> See, e.g., Elements, *supra* note 123, at 35 (detailing elements related to torture in Article 8(2)(c)(i)-4(5) which states the requirement that “the conduct took place in the context of and was associated with” an internal conflict); see also Prosecutor v. Tadić, *supra* note 145, at ¶ 69.

<sup>154</sup> Rome Statute, *supra* note 106, at art. 8(1).

<sup>155</sup> Cryer, et al., *supra* note 108, at 241.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

elements of both crimes. They have distinct underlying chapeau or common elements, as discussed above. One key distinction is that war crimes occur in times of an armed conflict, whereas for crimes against humanity the act need not occur during an armed conflict. In addition to determining the necessary common elements of either a war crime or a crime against humanity, consideration is required of whether a particular act—such as murder, rape, or pillage—has been committed. This requires the evaluation of the specific elements that belong to that particular act. Only acts recognized as “prohibited” (or “enumerated”) can result in a crime against humanity or war crime. Finally, this report focuses on the elements of the prohibited acts that are relevant for the determination of whether there is a *prima facie* case that such violations are occurring. Thus, factors such as the establishment of whether the perpetrator had the required *mens rea* are not examined in this report.

This report focuses on the following four types of human rights violations: (1) forced displacement; (2) sexual violence; (3) extrajudicial killings, and (4) torture. The list that follows outlines the prohibited acts included in the Rome Statute that are most relevant to these four types of violations: (1) forced transfer of population; (2) rape and sexual violence; (3) murder, and (4) torture. These prohibited acts do not represent an exhaustive list of possible Rome Statute violations committed in Burma. Of note, the UN documents referenced in this report include many additional human rights abuses that may amount to prohibited acts under the Rome Statute or customary international law.<sup>160</sup> The four prohibited acts focused on this report are:

- 1) *Forced Transfer of Population*: Under Article 7(1)(d)<sup>161</sup> of the Rome Statute the crime against humanity of deportation or forcible transfer of population refers to the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present. This means that the displacement is committed in the absence of grounds permitted under international law for the removal or that the reason for the displacement is not the security needs of

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<sup>160</sup> See e.g., Chart D, *Human Rights Abuses Committed by Burma’s Military Regime, Already Documented by the United Nations and Prohibited by the Rome Statute*. Other examples of violations include arbitrary arrest and detention, forced labor and trafficking in persons.

<sup>161</sup> Rome Statute, *supra* note 106, at art. 7(1)(d) .



the given population.<sup>162</sup> The war crime of displacing civilians under Article 8(2)(e)(viii) of the Rome Statute<sup>163</sup> requires that the perpetrator ordered the displacement of a civilian population, and that this order was not justified by the security of the civilians or by military necessity.<sup>164</sup>

- 2) *Rape and Sexual Violence*: The Rome Statute prohibits two separate offences of sexual violence and rape as a crime against humanity in Article 7(1)(g),<sup>165</sup> and as war crime under Article 8(2)(e)(vi).<sup>166</sup> Rape as both a crime against humanity and as a war crime is defined as the perpetrator invading the body of the victim that results in the penetration, however slight, of any part of the victim or perpetrator's body with a sexual organ.<sup>167</sup> Alternatively, the perpetrator committed vaginal or anal penetration of

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<sup>162</sup> See Elements, *supra* note 123, at 7 (Article 7(1)(d)(1)-(2)); see also Prosecutor v. Blaskic, ICTY Case No. IT-95-14, Trial Chamber Judgment, ¶ 234 (Mar. 3, 2000) (“The deportation or forcible transfer of civilians [as a form of the crime of persecution] means ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’”). The final specific element is that “[t]he perpetrator was aware of the factual circumstances that established the lawfulness of such presence.” Elements, *supra* note 123, at 7 (Article 7(1)(d)(3)).

<sup>163</sup> Rome Statute, *supra* note 106, at art. 8(2)(e)(viii).

<sup>164</sup> See Elements, *supra* note 123, at 41 (Article 8(2)(e)(viii)(1)-(2)). The final specific element is that “[t]he perpetrator was in a position to effect such displacement by giving such order.” *Id.* at 41 (Article 8(2)(e)(viii)(3)); see also Prosecutor v. Naletilic and Martinovic, *supra* note 127, at ¶¶ 519-21 (“Forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing.” “In order [for] the Chamber to be satisfied [that] Article 2(g) of the Statute [has been proven], proof of the following is required: i) the general requirements of Article 2 of the Statute . . . ; ii) the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, lead[s] to the transfer of a person from occupied territory or within occupied territory; iii) the intent of the perpetrator to transfer a person.” “The Prosecution needs to prove the intent to have the person (or persons) removed, which implies the aim that the person is not returning.”).

<sup>165</sup> Rome Statute, *supra* note 106, at art. 7(1)(g).

<sup>166</sup> See *id.* at art. 8(2)(e)(vi).

<sup>167</sup> See Elements, *supra* note 123, at 8 (Article 7(1)(g)-1(1)); *id.* at 39 (Article 8(2)(e)(vi)-1(1)).

the victim's body with any object or any part of the body.<sup>168</sup> Sexual violence, as both a crime against humanity and a war crime requires that "[t]he perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature."<sup>169</sup> Both the crime against humanity and war crime of sexual violence must also meet a certain gravity threshold. This threshold requires that the act of sexual violence is of comparable gravity to other violations such as rape, enforced pregnancy, or enforced sterilization.<sup>170</sup> The key element of both the crime of rape and sexual violence is that there is a lack of consent, which requires assessing whether the act is committed by force, or by threat of force or coercion. Evidence of lack of consent can include: fear of violence, duress, detention, psychological oppression, or abuse of power against the victim or another person or by the perpetrator taking advantage of a coercive environment, or that the victim was incapable of giving genuine consent.<sup>171</sup>

- 3) *Murder*: The prohibited act of murder is found in the Rome Statute's Article 7(1)(a) as a crime against humanity,<sup>172</sup> and Article 8(2)(c)(i)<sup>173</sup> as a war crime in the context of an armed conflict not of an international character respectively. Either as a crime against humanity and as a war crime the prohibited act of murder refers to the unlawful (that is not resulting from a fair trial where the defendant has been found guilty) killing or causing the death of one or more person.<sup>174</sup>

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<sup>168</sup> *See id.*

<sup>169</sup> *See id.* at 10 (Article 7(1)(g)-6(1)); *id.* at 41 (Article 8(2)(e)(vi)-6(1)).

<sup>170</sup> *See id.*

<sup>171</sup> *See id.* at 8 (Article 7(1)(g)-1(2)); *id.* at 39 (Article 8(2)(e)(vi)-1(2)); *id.* at 10 (Article 7(1)(g)-6(1)); *id.* at 41 (Article 8(2)(e)(vi)-6(1)).

<sup>172</sup> Rome Statute, *supra* note 106, at art. 7(1)(a).

<sup>173</sup> *Id.* at art. 8(2)(c)(i).

<sup>174</sup> *See Elements, supra* note 123, at 5 (Article 7(1)(a)(1)) and fn.7 ("The term 'killed' is interchangeable with the term 'caused death'. This footnote applies to all elements which use either of these concepts."); *id.* at 33 (Article 8(2)(c)(i)-1(1)); *see also* Prosecutor v. Akayesu, *supra* note 148, at ¶ 589 ("The Chamber defines murder as the

- 4) *Torture*: Torture is prohibited as a crime against humanity in Article 7(1)(f)<sup>175</sup> and as a war crime in the context of an armed conflict not of an international character in Article 8(c)(i) of the Rome Statute.<sup>176</sup> Torture is the infliction of severe physical or mental pain or suffering.<sup>177</sup> For the act to constitute a crime against humanity the victim must have been in the custody or under the control of the perpetrator, and this pain or suffering caused must not be the inherent or accidental result of a lawful sanction.<sup>178</sup> To constitute a war crime the perpetrator must have inflicted the pain and suffering with the purpose of, for example, “obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of

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unlawful, intentional killing of a human being.”).

<sup>175</sup> Rome Statute, *supra* note 106, at art. 7(1)(f).

<sup>176</sup> *Id.* at art. 8(2)(c)(i).

<sup>177</sup> See Elements, *supra* note 123, at 8 (Article 7(1)(f)(1) and (3)); *id.* at 35 (Article 8(2)(c)(i)-4(1)). The final specific element of torture as a crime against humanity is that “[s]uch person or persons were in the custody or under the control of the perpetrator.” *Id.* at 8 (Article 7(1)(f)(2)). The final specific element of torture as a war crime in the context of an internal conflict is that “[t]he perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.” *Id.* at 35 (Article 8(2)(c)(i)-4(2)); see also Prosecutor v. Akayesu, *supra* note 148, at ¶¶ 593-95 and 681 (“The Tribunal interprets the word ‘torture’ . . . in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” “The Chamber defines the essential elements of torture as: (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes: (a) to obtain information or a confession from the victim or a third person; (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them; (c) for the purpose of intimidating or coercing the victim or the third person; (d) for any reason based on discrimination of any kind.); Prosecutor v. Kunarac, Kovac and Vukovic, *supra* note 141, at ¶ 142 (“The definition of torture has the following elements: “(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental . . . (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”).

<sup>178</sup> See Elements, *supra* note 123, at 8 (Article 7(1)(f)(2) and (3)).

any kind.<sup>179</sup> Under the Rome Statute, the perpetrator does not have to be a public official or other person acting in an official capacity.<sup>180</sup>

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<sup>179</sup> See *id.* at 35 (Article 8(2)(c)(i)-4(2)).

<sup>180</sup> See, e.g., Prosecutor v. Semanza, ICTR Trial Chamber Judgment, Case No. ICTR-97-20-T, ¶¶ 342-343, (May 15, 2003) (“In *Akayesu*, the Trial Chamber relied on the definition of torture found in the . . . Convention Against Torture. . . . The ICTY Appeals Chamber has since explained that while the definition contained in the Convention Against Torture is reflective of customary international law . . . , it is not identical to the definition of torture as a crime against humanity. [T]he ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the ‘public official’ requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity. Thus, the Chamber rejected the ‘public official’ requirement.”).



### III. HUMAN RIGHTS VIOLATIONS IN BURMA

This section traces the discussion in UN documents issued since 2002 of the violations of forced displacement, sexual violence, extrajudicial killings, and torture reported as occurring in eastern Burma. The information included in these documents displays both a consistent pattern of violations and highlights a deteriorating situation in eastern Burma. The pattern and manner of the reported violations strongly suggests that the violations discussed constitute international crimes. Thus, the analysis of the UN documents provides a *prima facie* case for the existence of such crimes, and justifies the establishment of a UN Security Council mandated Commission of Inquiry to investigate the situation further.

#### *Repeated and Long-Term UN Condemnation of Serious Human Rights Violations in Burma*

A number of actors within the UN system have consistently condemned the reports of grave human rights and humanitarian violations occurring across Burma as a whole. Since 1992 the Myanmar Rapporteur, General Assembly, and Commission on Human Rights have repeatedly noted the occurrence of such violations. *See* Charts A (Human Rights Violations Listed by General Assembly Resolutions), B (Human Rights Violations Listed by Commission on Human Rights and Human Rights Council Resolutions), and C (Human Rights Violations Listed by Reports of the Special Rapporteur on the situation of human rights in Myanmar). This underscores the long-term nature and broad pattern of grave humanitarian violations occurring throughout Burma, and the UN's awareness of the situation.

Various UN General Assembly resolutions issued between 1992 and 2008 have consistently identified a list of grave human rights violations occurring on Burmese territory, including forced displacement, sexual violence, extrajudicial killings, and torture. *See* Chart A. For example, in 1994, the General Assembly expressed itself to be gravely concerned about:

[T]he continued violations of human rights in Myanmar,

as reported by the Special Rapporteur, in particular summary and arbitrary executions, torture . . . and forced relocations, abuse of women . . . and the imposition of oppressive measures directed in particular at ethnic and religious minorities[.]<sup>181</sup>

More recent General Assembly resolutions allude to similar violations, and indeed, UN condemnation has continued through to the most recent resolution in 2008. *See* Chart A. In the 2007 Resolution 61/232, the General Assembly expressed grave concern about the ongoing human rights violations in Myanmar, including the:

[D]iscrimination and violations suffered by persons belonging to ethnic nationalities of Myanmar, including extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces; the continuing use of torture . . . and the prevailing culture of impunity; (b) The attacks by military forces on villages in Karen State and other ethnic States in Myanmar, leading to extensive forced displacements and serious violations of the human rights of the affected populations[.]<sup>182</sup>

The General Assembly has also moved from “strongly urg[ing]” in 2004,<sup>183</sup> to “call[ing] upon” in 2005<sup>184</sup> to “strongly call[ing] upon” in 2006<sup>185</sup> the Burmese authorities to take various specified steps to prevent further violations. The UN Commission on Human Rights has also echoed its concern for the same reported violations in its resolutions issued since 2002. For example, in 2005 the Commission expressed its

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<sup>181</sup> *Situation of human rights in Myanmar*, G.A. Res. 49/197, U.N. Doc. A/RES/49/197 (Dec. 23, 1994).

<sup>182</sup> *Situation of human rights in Myanmar*, G.A. Res. 61/232, U.N. Doc. A/RES/61/232 (Mar. 13, 2007).

<sup>183</sup> *Situation of human rights in Myanmar*, G.A. Res. 58/247, U.N. Doc. A/RES/58/247, ¶ 5 (Mar. 11, 2004).

<sup>184</sup> *Situation of human rights in Myanmar*, G.A. Res. 59/263, U.N. Doc. A/RES/59/263, ¶ 3 (Mar. 17, 2005).

<sup>185</sup> *Situation of human rights in Myanmar*, G.A. Res. 60/233, U.N. Doc. A/RES/60/233, ¶ 3 (Mar. 23, 2006).

grave concern about:

Extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces, continuing use of torture . . . forced relocation . . . disrespect for the rule of law and lack of independence of the judiciary[.]<sup>186</sup>

In March 2008, the Human Rights Council went further stating that it “[s]trongly deplores the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar[.]”<sup>187</sup> Against this backdrop of the repeated expression of concern about a wide-ranging list of human rights violations by UN actors, the remainder of this chapter evaluates the UN documentation of the situation in eastern Burma with respect to specific prohibited acts under the Rome Statute.

### A. Forced Displacement

The UN documentation of forced displacement creates a *prima facie* case for a UN investigation into its occurrence. The chronicling of such violations has not only been consistent since 2002 but has also highlighted deterioration in the situation since 2004. The UN has also raised particular concerns about the escalation of attacks in 2006. The long-term nature and severity of the violations reported, as well as their perpetration by military forces in order to control the ethnic nationality population, strongly suggests that the violations may constitute international crimes.

The UN has extensively documented the crisis of internal displacement in Burma. Since 1992, the Special Rapporteur on the situation of human rights in Myanmar (hereinafter Myanmar Rapporteur), General Assembly, and Commission on Human Rights have repeatedly noted the occurrence of such violations in relation to Burma as a whole. See Charts A, B, and C. This highlights the long-term pattern of forced displacement. The Myanmar Rapporteur has observed that the

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<sup>186</sup> *Situation of human rights in Myanmar*, Comm’n on H.R. Res. 2005/10, U.N. Doc. E/CN.4/RES/2005/10, ¶ 3 (Apr. 14, 2005).

<sup>187</sup> Mandate of the Special Rapporteur on the situation of human rights in Myanmar, Hum. Rts. Coun.Res. 7/31, U.N. Doc. A/HRC/RES/7/31, ¶ 1 (Mar. 28, 2008).



Burmese army has “approximately doubled” the number of battalions deployed across eastern Burma since 1995.<sup>188</sup> Ten years of military campaigns in ethnic nationality areas in eastern Burma targeting civilians has been considered connected with the widespread practice of land confiscation throughout the country.<sup>189</sup> This has resulted in numerous forced evictions, relocations, and resettlements as well as forced migration and internal displacement.<sup>190</sup> The attacks on villages have led to extensive forced displacements in Karen, Mon, Shan, and Karenni States.<sup>191</sup> Based on “reliable and independent sources,” the Myanmar Rapporteur documented reports of an estimated 3,077 separate incidents of destruction, relocation, or abandonment of villages in eastern Burma between 1996 and 2006.<sup>192</sup> During this time, it was “understood that over a million people” were displaced.<sup>193</sup> Further, he noted that “[a]s of November 2006, the total number of internally displaced persons (IDPs) who were forced or obliged to leave their homes and have not been able to return or resettle and reintegrate into society is estimated to be at least 500,000.”<sup>194</sup> In 2007, however, the government was noted to be refusing to recognize the existence of IDPs within its borders and was severely restricting UN and other humanitarian actors’ access to them.<sup>195</sup>

### 1. *The Scale of Forced Displacement*

UN documentation consistently provides reports of the Burmese army’s destruction of ethnic nationality villages and the subsequent flow of displaced persons. In addition, the level of concern emanating from the UN reports has increased. The reports of the Myanmar Rapporteur highlight a deteriorating situation from 2004 onwards. He stated that as

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<sup>188</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly, U.N. Doc. A/HRC/4/14, ¶ 54* (Feb. 12, 2007) (hereinafter Myanmar Rapporteur 2007).

<sup>189</sup> *Id.* at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at ¶ 54 (also noting displacements in Arakan State in western Burma).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

of the end of 2004:

[T]here were at least 526,000 internally displaced persons in eastern Myanmar alone, in Mon, Karen, [Karenni], Southern Shan states and [Tenasserim] and Eastern [Pegu] divisions. The Special Rapporteur is concerned about reports that allege that 365,000 people are in temporary settlements in ceasefire areas controlled by ethnic minority groups; 84,000 civilians are reportedly in hiding or temporary settlements, having been forcibly evicted from their homes; and a further 77,000 are understood to have been moved to relocation sites by Government troops. It is believed that at least 1 million people are internally displaced countrywide.<sup>196</sup>

The Myanmar Rapporteur observed further deterioration through 2005 and 2006.<sup>197</sup> This was a “direct result of systematic human rights abuses and the conflict between the military authorities and non-State armed groups.”<sup>198</sup> The Myanmar Rapporteur documented that “[o]ver a million people are understood to have been displaced from their homes during this time (between 1996 and 2006). As of November 2006, the total number of internally displaced persons (IDPs) who have been forced or obliged to leave their homes and have not been able to return or resettle and reintegrate into society is estimated to be at least 500,000.”<sup>199</sup> The Myanmar Rapporteur drew specific attention to reports of 3,000 people crossing the border to Thailand since the beginning of 2006 because of the military campaign in Karen State.<sup>200</sup> He reported a

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<sup>196</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/60/221, ¶ 83 (Aug. 12, 2005) (hereinafter Myanmar Rapporteur 2005).

<sup>197</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights*, U.N. Doc. E/CN.4/2006/34, ¶ 104 (Feb. 7, 2006) (hereinafter Myanmar Rapporteur 2006 II).

<sup>198</sup> *Id.* at ¶ 99.

<sup>199</sup> Myanmar Rapporteur 2007, *supra* note 188, at ¶ 54.

<sup>200</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 45.

“total of 540,000 internally displaced persons in eastern Burma who were described as having minimum prospects of return and resettlement.”<sup>201</sup> One particular incident that the Myanmar Rapporteur detailed occurred in Karen State in November 2005.<sup>202</sup> He reported that 900 people had fled the town of Thandaung, following an attack by government forces, which resulted in the burning of civilian dwellings and the laying of landmines.<sup>203</sup> According to the Rapporteur, as of the beginning of 2006, “these 900 civilians, many of whom were children, were in hiding without adequate food or shelter.”<sup>204</sup> The Myanmar Rapporteur also described receiving testimonies from villagers who had recently fled Toungoo District and eastern Pegu Division.<sup>205</sup> He observed that the testimonies from these villagers, who had been forcibly displaced on several occasions, verified the allegations that he had previously received in 2006 regarding the magnitude of the humanitarian and human rights situation in these areas.<sup>206</sup> He concluded that as a consequence of the increased number of military operations, “the number of communities in need, such as villagers facing food shortage, internally displaced villagers and refugees significantly increased in 2006.”<sup>207</sup>

In 2006, the Special Rapporteur on extrajudicial, summary or arbitrary executions, (hereinafter Executions Rapporteur) provided a similar description of forced displacement in a letter to the Burmese authorities regarding the situation of ethnic nationality villagers in northern Karen state and east of Pegu Division.<sup>208</sup> According to the information the Executions Rapporteur had received, the villagers were

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<sup>201</sup> *Id.*

<sup>202</sup> Special Rapporteur, *supra* note 197, at ¶ 104.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Press Release, Office of the High Commissioner for Human Rights [OHRCHR], UN Human Rights expert urged the Government of Myanmar to authorize access to affected areas by humanitarian actors (Feb. 23, 2007)(hereinafter Press Release 2007).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Addendum: Summary of cases transmitted to Government and replies received*, U.N. Doc. A/HRC/4/20/Add.1, 222-23 (Mar. 12, 2007) (including letter of allegation dated May 15, 2006 sent with the Special Rapporteur on the situation of human rights in Myanmar) (hereinafter Executions Rapporteur 2007).

at risk of human rights violations following a recent escalation in attacks against armed elements of ethnic nationality groups.<sup>209</sup> For several weeks, thousands of civilians had reportedly fled their homes to hide in the forest or seek asylum in Thailand.<sup>210</sup> In the ongoing military operations in Karen State, the Burmese military had reportedly attacked villages and ordered villagers to relocate.<sup>211</sup> The Executions Rapporteur noted that “[c]oncerns have been expressed that counter-insurgency operations will continue to intensify as the Burmese authorities reportedly stated in April 2006 that the government has taken ‘security measures’ against the KNU and that places where ‘destructive elements’ can hide were being cleared.”<sup>212</sup>

UN actors also issued a press release in 2006 about the reports of forced displacement and the concerns that they raised. A group of six UN Rapporteurs and experts released a joint statement in May 2006<sup>213</sup> about the targeting of civilians during operations against armed elements of ethnic nationality groups in the northern Karen and eastern Pegu areas.<sup>214</sup> The release stated that the operations had resulted in the forcible eviction and displacement of thousands of ethnic nationality villagers.<sup>215</sup> The experts raised “deep concern” regarding the “widespread violence that has continued to spiral for the last six months in the Thandaung and Papun townships of Karen state as well as Kyaukgyi and Shwegyin townships of Pegu Division.”<sup>216</sup> Further, homes had been demolished with no provision of alternate housing or compensation.<sup>217</sup>

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<sup>209</sup> *Id.* at 222.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Press Release, UN Human Rights Experts Call on Myanmar to End Counter-Insurgency Operations Targeting Civilians in Northern Karen State and Eastern Pegu Division (May 16, 2006) (hereinafter Press Release 2006). The experts included: Myanmar Rapporteur, Independent Expert on minority issues, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on adequate housing, the Special Rapporteur on the right to food and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. *Id.*; see also Special Rapporteur, *supra* note 3, at ¶ 46.

<sup>214</sup> Press Release 2006, *supra* note 213.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

For the period of 2006 to 2007, the Myanmar Rapporteur again raised concern over reports of human rights violations in Karen State, which included the forced displacement of civilians by the armed forces.<sup>218</sup> He documented reports that over 40,000 villagers had been internally displaced in Karen State and thousands rendered homeless in the “past months” referring to the recent military offenses.<sup>219</sup> Further, he stated the following:

Widespread violence increased in 2007 in mountain areas outside military control in the Toungoo, Nyaunglebin and Papun Districts and in eastern [Pegu] Division. For reliable observers, this is the worst humanitarian situation since the 1996-1997 military campaign.<sup>220</sup>

In October 2007, sources estimated that the total number of internally displaced persons in eastern Burma was 503,000.<sup>221</sup> These included 295,000 people in ceasefire zones, 99,000 in hiding in the jungle and 109,000 elsewhere in Burma, including in relocation sites.<sup>222</sup> It was based on these figures that the Myanmar Rapporteur again concluded that the situation was deteriorating.<sup>223</sup> As of the end of 2008, UN documents did not indicate that there had been an improvement in the situation. The Myanmar Rapporteur reported meeting with an unspecified number of civilians who had travelled to Thailand in April 2008.<sup>224</sup> The report states that their villages had been “burnt down during military offensives and they had lost their houses and livelihoods and had

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<sup>218</sup> The Special Rapporteur on the situation of human right in Myanmar, *Human Rights Situations that Require the Council's Attention: Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly, Human Rights Council*, U.N. Doc. A/HRC/7/18, ¶ 80 (Mar. 7, 2008) (hereinafter Myanmar Rapporteur 2008 I).

<sup>219</sup> *Id.* at ¶ 77.

<sup>220</sup> *Id.* at ¶ 80.

<sup>221</sup> *Id.* at ¶ 69.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at ¶ 72.

<sup>224</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/63/341, ¶ 57 (Sept. 5, 2008) (hereinafter Myanmar Rapporteur 2008 II).

therefore been forced to flee to Thailand for survival.”<sup>225</sup>

Overall, since 2002, the UN actors’ reports of forced displacement describe a grave situation with particularly significant incidents outlined in 2006. In reviewing displacement over several years, the Myanmar Rapporteur noted:

It is estimated that since October 2004, at least 87,000 people were obliged to leave their homes. As of late 2005, there were understood to be a total of 540,000 people displaced in eastern Myanmar alone, the area worst affected by armed conflict and systematic human rights abuses by government personnel.<sup>226</sup>

Finally, such forced displacement fits within a long-term pattern documented in eastern Burma; the Myanmar Rapporteur has provided a figure of the total of villages destroyed relocated or abandoned of villages as more than 3,000 villages since 1996.<sup>227</sup>

## 2. *The Reasons for Forced Displacement*

In his documentation of reports of forced displacement in eastern Burma the Myanmar Rapporteur has also discussed the reasons for the army’s forced displacement of civilians in the ethnic nationality areas. He has consistently linked forced displacement with the armed conflict in such regions.<sup>228</sup> Additionally, UN actors have often noted that the problem of internal displacement is a result of the military campaigns against armed elements of ethnic nationality groups and is deployed as part of the tactics aimed at breaking any connections between the armed opposition groups and the local civilian population.<sup>229</sup> Specifically, the Myanmar Rapporteur reported that the violence had been exacerbated by the “counter-insurgency policy”, known as the Four Cuts Policy, which aimed to close any means of funding that the armed groups might have.<sup>230</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> Myanmar Rapporteur 2006 II, *supra* note 197, at ¶ 101.

<sup>227</sup> Special Rapporteur, *supra* note 188, at ¶ 54.

<sup>228</sup> See, e.g., Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 72.

<sup>229</sup> See, e.g., Executions Rapporteur 2007, *supra* note 208, at 222.

<sup>230</sup> See, e.g., The Special Rapporteur of the Comm’n on Human Rights on the situation of human rights in Myanmar, Interim report of the Special Rapporteur of the

In 2008, the Myanmar Rapporteur stated that he was “very concerned” about the “intensified military campaigns” in ethnic nationality areas of eastern Burma.<sup>231</sup>

The Myanmar Rapporteur has also reasoned that the practice of land confiscation, which appears to be aimed at “anchoring military control, especially in ethnic areas” has also led to forced displacement.<sup>232</sup> Further stating that the particular vulnerability of ethnic nationalities is linked to historic trends:

After half-a-century of low intensity civil war, many ethnic minorities in Myanmar living along areas bordering with Thailand are highly vulnerable; most armed ethnic groups have either agreed to ceasefires with the Government or been reduced to exhausted remnants in the jungle.<sup>233</sup>

It is in this context that the Myanmar Rapporteur has also explained that the deteriorating situation from 2004 onwards was related to the increasing concentration of the army in eastern Burma. Reports received by the Myanmar Rapporteur stated that as of December 2007 there were 187 army battalions in Karen State, in three districts, with at least 120 to 150 soldiers in each battalion.<sup>234</sup>

### 3. *The Method of Forced Displacement*

The Myanmar Rapporteur has described the army’s methods of forced displacement. Members of the rural populations, sometimes on short notice, are moved from areas of suspected or real armed activity to areas under army control.<sup>235</sup> Villagers may be given only a few hours or days to pack essential items and move, and they are given

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Commission on Human Rights on the situation of human rights in Myanmar, delivered to the General Assembly, U.N. Doc. A/57/290, ¶ 17 (Aug. 9, 2002) (hereinafter Myanmar Rapporteur 2002; and Myanmar Rapporteur, 2006 II *supra* note 197, at ¶ 105.

<sup>231</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 72.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at ¶ 77.

<sup>235</sup> Myanmar Rapporteur 2002, *supra* note 230, at ¶ 17.

no compensation or material assistance.<sup>236</sup> Prohibitions are put in place for returning to their villages, and if caught they may be shot on sight.<sup>237</sup> In 2006, the Executions Rapporteur reported that a similar method of operation had been brought to his attention in recent months, stating that some individuals had been warned that the army would exercise a shoot-on-sight policy against those who attempt to return to their home areas.<sup>238</sup>

The Burmese army's effort to impoverish civilians is also a part of the forced displacement strategy. The Myanmar Rapporteur stated:

In areas of conflict, there appears to be no diminution in the Government's so-called "Four Cuts Policy" . . . The purposeful impoverishment and deprivation of civilians as a counter-insurgency strategy is exercised through severe travel restrictions, forced evictions, expropriation, the imposition of arbitrary taxes and the destruction of villages.<sup>239</sup>

The Myanmar Rapporteur has further described the reported conditions of those forcibly displaced, which included them being placed in "empty tracts of land" without any assistance to build shelters.<sup>240</sup> Similarly, IDPs "face severe food shortages and inadequate access to safe drinking water, health and education services. Infant and maternal mortality rates are reportedly higher among the displaced."<sup>241</sup>

#### 4. *UN Actors' Conclusions and Recommendations Regarding Forced Displacement*

In 2006, the Myanmar Rapporteur concluded that the situation was deteriorating in eastern Burma, which included the documented increase in the military's forced displacement of civilians.<sup>242</sup> Moreover, the Myanmar Rapporteur declared that based on independent

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See, e.g., Executions Rapporteur 2007, *supra* note 208, at 222

<sup>239</sup> See Myanmar Rapporteur 2006 II, *supra* note 197, at ¶ 105.

<sup>240</sup> Myanmar Rapporteur 2005, *supra* note 196, at ¶ 84.

<sup>241</sup> *Id.*

<sup>242</sup> Myanmar Rapporteur 2006 II, *supra* note 197, at ¶¶ 82-83.



information, he found signs leading him to believe that the practice was widespread and “part of a deliberate strategy.”<sup>243</sup> He further noted that “[t]he current government strategy of targeting civilians in the course of its military operations represents a willful abrogation of its responsibility under international humanitarian law.”<sup>244</sup> The Myanmar Rapporteur has also called upon the authorities to press for the cessation of the hostilities in Karen State, and for the authorities to provide full details of the alleged crimes in the area.<sup>245</sup> Finally, since 2002, UN actors have called on the government to take “urgent measures” to end the military operations, especially those that target civilians in specific ethnic nationality areas where there is armed conflict such as the northern Karen and eastern Pegu areas<sup>246</sup> but also more generally in relation to Burma as a whole.<sup>247</sup>

### 5. *Analysis of Forced Displacement*

The analysis of the UN documentation of reports of forced displacement in eastern Burma presents a *prima facie* case that the practice is taking place, and a UN Security Council constituted Commission of Inquiry should undertake further investigations. The evidence available strongly suggests that the military forces perpetration of prohibited acts of forced displacement in Burma constitute either crimes against humanity prohibited by Articles 7(1)(d) or war crimes prohibited by Article 8(2)(e)(viii) of the Rome Statute. Furthermore, the UN documents do not provide reports of accountability efforts for such actions as mandated by international law. Specifically, international law requires an independent and thorough investigation of particular incidents of abuse.

#### *Common Elements*

The requirement that there be “an attack directed against a civilian population” has been met on its face: the UN actors have consistently described the victims of the forced displacement as civilians and villagers

<sup>243</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 47.

<sup>244</sup> Myanmar Rapporteur 2006 II, *supra* note 197, at ¶ 106.

<sup>245</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 80.

<sup>246</sup> Press Release 2006, *supra* note 213.

<sup>247</sup> Human Rights Council, *supra* note 187.

from ethnic nationality areas, and there have also been reports of multiple acts referred to as being “targeted” against them.<sup>248</sup>

Further, for the forced displacement to constitute a crime against humanity there must be a widespread or systematic attack directed against a civilian population. The Myanmar Rapporteur has described forced displacement as occurring in a “widespread”<sup>249</sup> manner and as part of a “deliberate strategy”.<sup>250</sup> The use of the language of international crimes underscores the concern raised by the persistence of the violations coupled with the documented marked deterioration in the situation. Furthermore, the documentation of the military’s Four Cuts Policy and the Myanmar Rapporteur’s belief that forced displacement was “part of a deliberate strategy” provide evidence of a “systematic” violation.<sup>251</sup> In addition, the descriptions of the incidents of forced displacement suggest that such violations are both widespread *and* systematic, while a crime against humanity need only be widespread *or* systematic. The UN actors’ reports chronicled in the section indicate that more than 500,000 people may be experiencing ongoing forced displacement in eastern Burma alone, which amounts to “widespread” levels of the prohibited act.

Regarding the common elements of war crimes the UN documents strongly suggest that there is a situation of armed conflict in eastern Burma, and that the reported acts have the required nexus to an armed conflict. This can be established from references to “intensified military campaigns,” and that the transfers are occurring during armed conflict in ethnic minority areas,<sup>252</sup> or as part of “counter-insurgency”.<sup>253</sup> The situation is an internal rather than international armed conflict, and the language utilized in the UN documents noted above suggests that the reported violence attains a level beyond mere disturbances or riots. The UN documentation continuously references the military forces as the perpetrators of the violence. The victims are also civilians or villagers, and thus non-combatants, who may not be targeted under IHL.

As noted in the legal framework section above, under the Rome

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<sup>248</sup> See, e.g., *Myanmar Rapporteur 2006 II*, *supra* note 197, at ¶ 106.

<sup>249</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 72.

<sup>250</sup> Myanmar Rapporteur 2006 I, *supra* note 3 at ¶ 47 (expressing that “based on independent information, he found signs leading to believe that the forced displacement in eastern Burma, was widespread and “part of a deliberate strategy.”).

<sup>251</sup> *Id.*

<sup>252</sup> Myanmar Rapporteur 2007, *supra* note 188, at 4.

<sup>253</sup> See, e.g., Myanmar Rapporteur 2005, *supra* note 196, at ¶ 82.

Statute war crimes have a jurisdictional threshold that is not an element of the war crime in of itself. The Rome Statute indicates that war crimes that are committed as part of a “plan” or “policy” or part of a “large-scale commission” of prohibited acts are to receive particular attention. Though different terminology is used, these labels are analogous to, or less demanding than those of crimes against humanity’s elements of “widespread or systematic.” Thus, the above discussion of the elements of widespread and systematic suggests that the documented reports of forced displacement meet this threshold.

### *Elements of the Prohibited Act: Force and Coercion*

Force and coercion are essential legal elements in establishing that a transfer of a population is unlawful and a crime against humanity. A similar requirement of force and coercion is required for the displacement to amount to a war crime. The perpetrator must have ordered the displacement of a civilian population, which was not justified on the basis of the security of this population or by military necessity. The description of the forced displacement of civilians suggests that these elements of coercion and force are present in the UN documents. They describe reports of the forced displacement of hundreds of thousands of civilians or villagers.<sup>254</sup> They also outline the types of force reportedly used, such as the military issuing direct orders to civilians to flee their homes,<sup>255</sup> the burning or destroying of their homes,<sup>256</sup> indirectly as the result of the severity of military clashes, or as a result of a “deliberate strategy” aimed at separating “ethnic armed groups from their civilian populations.”<sup>257</sup> The Myanmar Rapporteur noted, for example, that it “has been considered by various observers to be a concerted policy aimed at denying people their livelihoods and food or forcing them to risk their lives when they attempt to return to their villages after having been forcibly evicted.”<sup>258</sup>

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<sup>254</sup> Myanmar Rapporteur 2007, *supra* note 188, at ¶ 54.

<sup>255</sup> Myanmar Rapporteur 2002, *supra* note 230, at ¶ 17.

<sup>256</sup> Myanmar Rapporteur 2006 II, *supra* note 197, at ¶ 104.

<sup>257</sup> Myanmar Rapporteur 2007, *supra* note 188, at ¶ 56.

<sup>258</sup> *Id.*

## *Impunity*

Finally, there is the issue of impunity. None of the UN actors suggest that there is accountability for the reported violations of forced displacement. The reports of the practice of forced displacement are instead linked to reports of other violations, such as the “shoot on sight” policy, which occur within what is described as the overall “culture of impunity” in Burma.<sup>259</sup> In sum, the UN documents create a strong *prima facie* case that the reported violations do constitute international crimes, which should require additional investigations.

### **B. Sexual Violence**

The UN reports of sexual violence occurring in eastern Burma also establish a *prima facie* case of potential crimes against humanity and war crimes that would justify further UN investigation into this form of abuse. Various UN actors have highlighted the long-term nature and severity of such violations, which the military forces commit as a means of controlling the civilian population in ethnic nationality areas. Additionally, these reported violations are perpetrated within a culture of impunity. Thus, the analysis of the UN documentation strongly suggests that the reported violations of sexual violence constitute international crimes.

#### *1. Levels of Sexual Violence*

UN reports have described the trend of sexual violence as “particularly alarming” because the figures provided to the Myanmar Rapporteur were “far lower than the reality.”<sup>260</sup> He observed that many women do not report incidents of sexual violence because of the trauma

<sup>259</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 58.

<sup>260</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Civil and Political Rights, Including the Questions of Torture and Detention: Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur: Addendum: Summary of information, including individual cases, transmitted to Governments and replies received, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights*, U.N. Doc. E/CN.4/2006/6/Add.1 (Mar. 21, 2006), 153-55 (from Dec. 1, 2004 to Dec. 15, 2005) (hereinafter *Torture Rapporteur 2006*).

attached to it, and some reports may have not reached him as he was dependent for information on human rights abuses in the ethnic nationality areas on that collected from refugees when they arrived at the Thai-Burmese border.<sup>261</sup>

Even prior to 2002, UN actors were reporting high levels of sexual violence. The long-term nature of sexual violence across Burma is underscored by the fact that the Myanmar Rapporteur, General Assembly, and Commission on Human Rights have repeatedly noted the occurrence of such violations in Burma as a whole since 1992. *See* Charts A, B, and C. For example, the Myanmar Rapporteur stated that between 1996 and 2001, he received reports of the rape of 625 women and girls in Shan State.<sup>262</sup> The Torture Rapporteur documented the same violations and observed that the allegations were made against soldiers from 52 different battalions.<sup>263</sup> On many occasions there was apparently no attempt to conceal the bodies of dead women who were raped and subjected to other acts of violence.<sup>264</sup> This trend continued in the period of 2002 to 2005 during which he received reports of 188 rape cases in Shan State.<sup>265</sup> The high levels of reported cases are not limited to Shan State but extend across eastern Burma.<sup>266</sup>

UN actors have consistently documented reports of high levels of sexual violence since 2002. The Myanmar Rapporteur noted that allegedly civilians in ethnic nationality areas such as Shan, Karen, Karenni, and Mon states had been particularly vulnerable to such violations.<sup>267</sup> For example, the Myanmar Rapporteur provided documented testimonies received up to August 2003 regarding sixteen rape incidents, involving 25 women, all of whom were ethnic nationalities (nineteen Shan, one Akha, one Palaung, and four Karen women).<sup>268</sup> Eight of these cases took place

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<sup>261</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30.

<sup>262</sup> *Id.*

<sup>263</sup> Torture Rapporteur 2006, *supra* note 260, at 153.

<sup>264</sup> *Id.* at 153-54.

<sup>265</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30.

<sup>266</sup> *Id.* (reporting 37 cases involving sexual violence against 50 women and girls in Mon areas between 1995 and 2004).

<sup>267</sup> *See, e.g.*, Myanmar Rapporteur 2005, *supra* note 196, at ¶ 72.

<sup>268</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/58/219, ¶ 58 (Aug. 5, 2003) (hereinafter Myanmar

in 2002.<sup>269</sup> In addition, one Shan girl testified that she had been forced to marry a Tatmadaw soldier.<sup>270</sup> All documented cases of rape received up until August 2003 had reportedly been committed by the Tatmadaw soldiers.<sup>271</sup>

In a joint letter to the Burmese authorities in October 2002, the Special Rapporteur on violence against women (hereinafter Women Rapporteur), the Executions Rapporteur, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (hereinafter Torture Rapporteur, raised concerns about specific examples of attacks that had taken place.<sup>272</sup> The letter listed examples of violence dating from 1996 onwards. The letter referenced seven separate cases involving one or more victims in 2002 alone. The cases highlight the culture of impunity attached to sexual violence committed by the military:

Naw Moo Lah Aing, aged 16, and Ma Chi Win, aged 18, were reportedly gang-raped on 11 February 2002 in Mae Thraw Kee Kawkareit Township, Karen State, by troops from IB No. 10 under LID No. 88. The troops allegedly took them outside of the village, tied them up and raped them. No action was reportedly taken.

On 22 July 2002, Thein Naing (Private ID No. 176399) and the three other soldiers from IB 62, based in

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Rapporteur 2003).

<sup>269</sup> *Id.* (the sources of information were victims themselves, friends, or relatives, and in some cases, people from another village had heard about the rape from the victims).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* (In most cases, victims could not identify a name or rank of perpetrators, or their unit number. In some cases, victims knew where the perpetrators were based. Information about names, ranks, and unit numbers was mostly compiled afterwards with the help of other sources).

<sup>272</sup> The Special Rapporteur on violence against women, its causes and consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Report of the Special Rapporteur on violence against women, its causes and consequences, submitted in accordance with Commission on Human Rights resolution 2002/52, delivered to the Human Rights Commission, General Assembly, U.N. Doc. E/CN.4/2003/75/Add.2* (Jan. 14, 2003) (hereinafter Women Rapporteur 2003).

Thanbyuzayat town reportedly shot and killed five Mon villagers in Thanbyuzayat Township, Mon State, southern Myanmar, after allegedly raping 16-year-old Mi Eat-Sar. The incident reportedly took place while Daw Aung San Suu Kyi was visiting Mon State. Upon arrival in Galen-Padaw village, the soldiers allegedly entered the house of the village headman, Nai Kun Tit, and reportedly raped his granddaughter Mi Eat Sar. Nai Kun Tit reportedly woke up while the soldiers were raping the girl. He tried to help her but was shot. It is reported that Mi Eat Sar and other members of her family were then executed.

Maw Lee Meh, a 17-year old Karenni girl, was reportedly raped on 25 August 2002 by a private Myint Lwin from SPDC LIB 530 in her house at about 12 p.m., in Daw Tamagyi village, Dee Maw So Township, [Karenni] State. According to reports, the parents reported the case to the responsible company commander, Major Myint Soe, but he allegedly dismissed the incident and threatened the parents.<sup>273</sup>

For the period between 2003 and 2004, the Executions Rapporteur transmitted specific cases to the Burmese authorities relating to rapes by security forces that had resulted in multiple deaths and other attacks.<sup>274</sup> These included the following reported cases:

Allegation sent with the Special Rapporteur on Violence against Women and the Special Rapporteur on torture, 21 September 2004. On 17 September 2003, Zaa Yi, aged 40 and originally from Nawng Hai village, Kho Lam village tract, [Shan State] but forcibly relocated

<sup>273</sup> *Id.* at ¶¶ 138, 143-44.

<sup>274</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur: Addendum: Summary of cases transmitted to Governments and replies received, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006)* (hereinafter Executions Rapporteur 2006).

to Kho Lam village relocation site in 1997, was taken away from his farm by a group of men believed to be State Peace and Development Council (SPDC) soldiers. Half an hour later, a patrol of approximately 50 SPDC troops from Infantry Battalion (IB) 246 came to the farm and interrogated his wife, Naang Kham, aged 30, about the whereabouts of her husband. When she told them that he had been abducted by unknown soldiers, she was accused of being the wife of a Shan soldier. She was reportedly beaten, kicked and gang-raped. She lost consciousness several times. After the troops left the farm, some villagers assisted her. As her condition worsened after this assault, she eventually fled to Thailand to receive medical treatment. She reportedly died on 29 March 2004 in Chiangrai provincial hospital, in Thailand. As far as the Special Rapporteurs have been informed, the whereabouts of her husband are still unknown.<sup>275</sup>

Ms. Naang Khin, aged 22, and her sister, Ms. Naang Lam, aged 19, were reportedly raped by a patrol of SPDC troops from Lai-Kha-based Light Infantry Battalion (LIB) 515 on 16 October 2003, when they were reaping rice at their farm in Wan Zing village tract [in Shan State]. Their father was tied up to a tree. Afterwards, the two sisters were taken to a forest by the troops. Their dead bodies were found by villagers some days later dumped in a hole.<sup>276</sup>

Ms. Naang Sa, aged 20, and her husband, Mr. Zaai Leng, aged 23, both originally from Zizawya Khe village in Wan Thi village tract, but relocated to Lai-Kha township [in Shan State] in 1997, were approached in their farm by about 40 SPDC troops from Co.3 of IB64 on 26 November 2003. Zaai Leng was reportedly tied up outside the farm and Naang Sa gang-raped by the troops.

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<sup>275</sup> *Id.* at ¶ 471.

<sup>276</sup> *Id.* at ¶ 474.



She was later taken with them. Zaai Leng and other villagers went to the base of IB64 to inquire about her but were not allowed to enter the base. Three days later, Naang Sa's dead body was found near the farm.<sup>277</sup>

In 2004, the Myanmar Rapporteur received reports of 125 cases of rape in Karen State alleged to have occurred over a year and a half period.<sup>278</sup> Regarding the following year of 2006, the Myanmar Rapporteur received information about 30 cases of rape against Chin women in western Burma.<sup>279</sup> UN Human Rights experts also jointly issued a 2006 statement about the “widespread violence” that had “continued to spiral” in townships of Karen State and Pegu Division.<sup>280</sup> The statement included concerns about the military's alleged excessive use of force and fire arms and reports from various sources about very serious allegations of unlawful killings, torture, rape, and forced labor.<sup>281</sup>

The 2008 report of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) underscored that high levels of attacked have continued throughout the period since 2002. The report expressed concerns about sexual violence in non-conflict zones.<sup>282</sup>

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<sup>277</sup> *Id.* at ¶ 475. *see also id.* at ¶ 476 (“Ms. Pa Ong, a 40- year-old woman with mental disability, originally from Khur Nim village but who had been forcibly relocated to Maak Laang village was forcibly seized by SPDC troops from LIB515 in late 2003 and was gangraped by the soldiers. She reportedly died four days later.”); *id.* at ¶ 477 (“Ms. Naan Zum, a 18-year-old woman living in the suburban area of Murng-Su town [in Shan State] was forcibly taken away from her residence to a nearby forest on 25 Apr. 2004 by about 15 State Peace and Development Council (SPDC) soldiers. She was allegedly gang-raped and stabbed to death by the soldiers.”).

<sup>278</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30.

<sup>279</sup> *Id.*

<sup>280</sup> Press Release 2006, *supra* note 213.

<sup>281</sup> *Id.*

<sup>282</sup> U.N. Comm. on the Elimination of Discrimination against Women [CEDAW], *Concluding observations of the Committee on the Elimination of Discrimination against Women: Myanmar*, U.N. Doc. CEDAW/C/MMR/CO/3, ¶ 22 (Nov. 7, 2008) (hereinafter CEDAW Committee 2008) (“[T]he Committee expresses concern at the high prevalence of violence against women and girls, such as widespread domestic violence and sexual violence, including rape. . . . The Committee is concerned that geographical areas of particular concern include the Northern [Arakan] State and those areas affected by Cyclone Nargis as well as other areas where women and girls are particularly vulnerable and marginalized.”).

With regards to areas of armed conflict, the report singled out abuses in eastern Burma as well as ongoing concerns with impunity:

[The CEDAW Committee] expresses its deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated by members of the armed forces against rural ethnic women, including, *inter alia*, the Shan, Mon, Karen, Palaung, and Chin. The Committee is also concerned at the apparent impunity of the perpetrators of such violence, although a few cases have been prosecuted, and at reports of threats, intimidation and punishment of the victims. The Committee regrets the lack of information on mechanisms and remedies available to victims of sexual violence as well as measures to bring perpetrators to justice.”<sup>283</sup>

Overall, various UN sources have identified sexual violence in eastern Burma as an area of major concern, especially because reports are likely to be below the real numbers of abuses.

## 2. *Purpose and Method*

UN sources also outline military forces apparent purpose for perpetrating sexual violence throughout the focus period. The Torture Rapporteur, for example, stated the following:

Women and girls are subjected to violence by soldiers, especially sexual violence, as “punishment” for allegedly supporting ethnic armed groups. The authorities sanction violence against women and girls committed by military officers, including torture, *inter alia*, as a means of terrorizing and subjugating the population, particularly those in the Shan state.<sup>284</sup>

The Myanmar Rapporteur stated specifically that all documented

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<sup>283</sup> *Id.* at ¶ 24.

<sup>284</sup> Torture Rapporteur 2006, *supra* note 260, at 153.

cases of rape received up until August 2003 had reportedly been committed by the Tatmadaw soldiers.<sup>285</sup> The Myanmar Rapporteur noted that a number of cases had been reported in which a victim had been raped by more than one soldier.<sup>286</sup> The Torture Rapporteur also reported that gang rape was a common practice.<sup>287</sup> Further, the Myanmar Rapporteur described that in most of these cases, the victims had allegedly been captured by a group of Burmese soldiers while they were working alone on their farms.<sup>288</sup> In some cases, they had been caught, for instance, while taking a bath; in others, women had been caught in their own village when the Tatmadaw troops had arrived and all the men had run away.<sup>289</sup> In two separate documented cases, a young girl had been raped at an army base.<sup>290</sup> In one case, a girl had been taken while she was doing forced labor and, in another, a young girl had been arrested together with twelve other villagers, all men, who had later been killed.<sup>291</sup> The Executions Rapporteur also reported incidents in the context of other abuses, including forced displacement and killings.<sup>292</sup>

### 3. *Culture of Impunity*

UN actors, particularly the Myanmar Rapporteur, have highlighted the culture of impunity around sexual violence perpetrated by the military as an area of serious concern.<sup>293</sup> In one report, the Myanmar Rapporteur observed that a “noteworthy illustration of the consistent and continuing pattern of impunity is the high number of allegations of sexual violence against women and girls committed by members of the military.”<sup>294</sup> He was also unaware of any initiatives by the Burmese government to look into such abuses in order to identify

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<sup>285</sup> Myanmar Rapporteur 2003, *supra* note 268, at ¶ 58.

<sup>286</sup> *Id.*

<sup>287</sup> Torture Rapporteur 2006, *supra* note 260, at 153; *see also* Executions Rapporteur 2006, *supra* note 274, at ¶ 477.

<sup>288</sup> Myanmar Rapporteur 2003, *supra* note 268, at ¶ 59.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Executions Rapporteur 2006, *supra* note 274, at ¶¶ 471, 475.

<sup>293</sup> *See, e.g.*, Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30; Myanmar Rapporteur 2006 II, *supra* note 197, at ¶ 78-79.

<sup>294</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30.

the perpetrators and bring them to justice.<sup>295</sup> In relation to the 625 cases of alleged rapes committed prior to 2002, the Torture Rapporteur stated that reports alleged that 83% of the rapes were committed by officers, often in front of their troops; and 61% of the rape incidents involved gang rapes.<sup>296</sup> In only one of these cases was the perpetrator punished by his commanding officer.<sup>297</sup>

In 2008, the CEDAW Committee observed:

The Committee is also concerned that such violence appears to be socially legitimized and accompanied by a culture of silence and impunity, that cases of violence are thus underreported and that those that are reported are settled out of court. It is also concerned at information that victims of sexual violence are forced, under the law, to report to the police immediately, prior to seeking health care, and as a consequence such victims choose to not seek health, psychological and legal support.<sup>298</sup>

The Myanmar Rapporteur has routinely and strongly condemned the trend of impunity, stating for example in 2006 that “the failure to investigate, prosecute and punish those responsible for rape and sexual violence has contributed to an environment conducive to the perpetuation of violence against women and girls in Myanmar.”<sup>299</sup> In 2007, the Myanmar Rapporteur again stated that an illustration of the “consistent and continuing pattern of impunity” in Burma was the high number of allegations of sexual violence committed by the military that had been regularly documented since 2002.<sup>300</sup>

UN actors have also identified risks to those who make allegations, which further hinders accountability efforts. The Myanmar Rapporteur stated that it was “wholly unacceptable” that victims lodging complaints to the authorities find no avenue for address, but are instead

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<sup>295</sup> *Id.*

<sup>296</sup> Torture Rapporteur 2006, *supra* note 260, at 153.

<sup>297</sup> *Id.*

<sup>298</sup> CEDAW Committee 2008, *supra* note 282, at ¶ 22.

<sup>299</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30.

<sup>300</sup> Myanmar Rapporteur 2007, *supra* note 188, at ¶ 41.

at risk of reprisals.<sup>301</sup> The Torture Rapporteur noted that those who do complain “are invariably instructed to accept meagre compensation under the threat that if they do not retract their complaint, they would be subjected to more violence.”<sup>302</sup> He has also documented reports of specific instances where the Burmese military were actively preventing external actors from investigating rape cases.<sup>303</sup> In October 2002, prior to the visit in Shan state of the Myanmar Rapporteur, the authorities threatened Shan villagers not to testify against their troops and sent out military intelligence officers to track down rape survivors.<sup>304</sup> The same warnings were sent to the population prior to the visit of a delegation from the ICRC in southern Shan State in late 2002.<sup>305</sup> Military officers threatened to cut the tongues and slit the throats of anyone who dared speak to the ICRC delegations about human rights abuses committed by the military troops.<sup>306</sup> The population was similarly threatened when a delegation from Amnesty international visited Burma in January 2003.<sup>307</sup>

The Burmese government’s response to the reported cases communicated to it by the Executions Rapporteur, outlined in the levels of sexual violence section above, also provides evidence of a culture of impunity.<sup>308</sup> In its response, the government claimed that “thorough investigations had been carried out by the authorities.”<sup>309</sup> The outcome of the investigation in all cases was that the person did not exist, the village did not exist, and/or the incident never happened.<sup>310</sup> In response, the Executions Rapporteur stated the following:

The Special Rapporteur accepts that many of the victims and villages no longer exist. However, the SR deeply regrets that the Government of Myanmar finds this to be a reason to deny that the alleged incidents occurred, given that the allegations are precisely that the deaths of the victims and the destruction of their villages were perpetrated by Government forces. The SR hopes that the Government will conduct good

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<sup>301</sup> Myanmar Rapporteur 2006 II, *supra* note 197, at ¶ 79.

<sup>302</sup> Torture Rapporteur 2006, *supra* note 260, at 154.

<sup>303</sup> *Id.* at 155.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Executions Rapporteur 2006, *supra* note 274, at 150.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 150-51.

faith investigations into future allegations.<sup>311</sup>

This suggests that the Special Rapporteur did not consider the response or investigations of the Burmese government to be sufficient. In light of this culture of impunity, the Myanmar Rapporteur also offered his services to the junta to undertake an independent investigation. In October 2004, he received information that the government was preparing to dispatch teams to investigate each alleged case. The Myanmar Rapporteur publicly stated his willingness to carry out an independent assessment and drew specific attention to the fact that he had made a similar offer to the Burmese authorities with respect to the allegations of sexual violence against Shan women, which the authorities failed to take up.<sup>312</sup> In later reports, the Myanmar Rapporteur repeatedly drew attention to the failure of the Burmese regime to accept his offer of an independent assessment.<sup>313</sup>

#### 4. *UN Actors' Conclusions and Recommendations Regarding Sexual Violence*

The Myanmar Rapporteur described the trend of sexual violence as “particularly alarming” because the figures he provided were likely to be “far lower than the reality”.<sup>314</sup> Many women do not report incidents of trauma, and the Myanmar Rapporteur also had limited access to areas where violence was reported to be occurring.<sup>315</sup> However, even in spite of this concern over low levels of reporting, the UN actors have described the levels of sexual violence as widespread and prevalent.<sup>316</sup> The Myanmar Rapporteur has specifically stated that he has received reports

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<sup>311</sup> *Id.* at 149.

<sup>312</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar: Report of the Special Rapporteur, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights*, U.N. Doc. E/CN.4/2005/36, ¶ 42 (Dec. 2, 2004) (hereinafter Myanmar Rapporteur 2004).

<sup>313</sup> See, e.g., *id.*

<sup>314</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30; Torture Rapporteur 2006, *supra* note 260, at 153-55.

<sup>315</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30

<sup>316</sup> See CEDAW Committee 2008, *supra* note 282, at ¶¶ 22, 24; Myanmar Rapporteur 2008, *supra* note 218, at ¶¶ 55, 58.

of “widespread and systematic” abuse, which included sexual violence.<sup>317</sup> Finally, in light of the recognition of a persistent culture of impunity, many UN actors have also called for the prompt, independent, and thorough investigation of these alleged violations.<sup>318</sup>

### 5. *Analysis of Sexual Violence*

An analysis of the UN documents that report on sexual violence in eastern Burma establishes a *prima facie* case of the existence of these abuses and should lead the UN Security Council to mandate the creation of a Commission of Inquiry mandated to further investigate the nature and extent of the violations. The UN has available evidence from its own actors that strongly suggests that the military forces perpetration of prohibited acts of sexual violence and rape in Burma constitute either crimes against humanity prohibited by Article 7(1)(g) or war crimes prohibited by Article 8(2)(e)(vi) of the Rome Statute. Indeed, UN actors describe violations that include the essential legal elements of both crimes against humanity and war crimes. Finally, the UN documents have particularly emphasized the lack of accountability in this context, further justifying UN action and investigation.

#### *Common Elements*

Firstly, crimes against humanity require that there is an “attack” which is “directed against a civilian population”. There is no suggestion that any of the reported victims were anything other than civilians. The second requirement is that the prohibited acts are either widespread or systematic and involve an attack on a civilian population. The CEDAW Committee has described the levels of sexual violence as “widespread”,<sup>319</sup> and the Myanmar Rapporteur has identified a “widespread and systematic” pattern.<sup>320</sup> The “widespread” nature of the abuse is reflected in the scale of the violations documented by the various UN actors. Furthermore, the reported figures are anticipated to be “far lower

<sup>317</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 58.

<sup>318</sup> See, e.g., Executions Rapporteur 2007, *supra* note 208, at 223.

<sup>319</sup> See CEDAW Committee 2008, *supra* note 282, at ¶¶ 22, 24.

<sup>320</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 58.

than the reality”.<sup>321</sup> In addition, the description of the purpose of such reported violence as a “punishment” and “as a means of terrorizing and subjugating the population, particularly those in the Shan state” suggests the “systematic” use of sexual violence in eastern Burma. Finally, the high levels of reporting strongly suggest that there have been multiple commissions of such prohibited acts resulting from armed force, or which at the very least amount to the mistreatment of the civilian population.

In terms of the common elements of war crimes the UN documents clearly suggest that there is an internal armed conflict and that it goes beyond the level of a disturbance or riot. The reports documented by the UN repeatedly attribute violations to members of the Burmese military. In some situations this is because the crime was known to have been committed at an army base, or because it was directly reported as committed by soldiers, whose names, ranks, and units were sometimes identified.<sup>322</sup> Moreover, the UN documents describe military members perpetrating sexual violence as a “punishment” for allegedly supporting ethnic nationality armed groups, and as a part of actions used to terrorize or subjugate the population.<sup>323</sup> These references and the consistent identification in the reports of Burmese military members as the violators clearly implies that some such acts may have taken place within the nexus of an armed conflict. In particular, the distinct conclusions drawn by the CEDAW Committee regarding sexual violence in armed conflict areas and non-conflict areas firmly suggests that such violations have occurred with a sufficient nexus to the armed conflict.<sup>324</sup>

As noted, under the Rome Statute the jurisdictional requirement of war crimes is that they must arise in situations where prohibited acts (such as rape) are committed as part of a “plan” or “policy” or there is a “large-scale commission” of the crime. As with the crimes against humanity analysis, the high levels of reported violations and the use of such acts as a means to suppress the ethnic minority population meets this jurisdictional threshold.

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<sup>321</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 30; Torture Rapporteur 2006, *supra* note 260, at 153-155.

<sup>322</sup> Myanmar Rapporteur 2003, *supra* note 268, at ¶¶ 58-59.

<sup>323</sup> Torture Rapporteur 2006, *supra* note 260, at 153.

<sup>324</sup> CEDAW Committee 2008, *supra* note 282, at ¶¶ 22, 24.



### *Elements of the Prohibited Act: Consent*

One of the key elements regarding both the crimes of sexual violence and rape is whether or not there was consent to the specific act. The UN reports refer to incidents of rape, itself a prohibited act, as well as gang rape and forced marriage (carrying with it the highly possible consequence of a forceful sexual encounter that may amount to acts of enforced prostitution or sexual slavery). Attaching terms such as rape suggests that consent was not present though an additional investigation is required to establish whether or not it was present in fact.

### *Impunity*

Additionally, the UN documents emphasize the culture of impunity surrounding the reported sexual violence by the military. See above section Culture of Impunity. This impunity has made sexual violence acceptable, and UN actors have specifically criticized the government for its failure to investigate and prosecute those responsible. In short, the UN documentation of reported sexual violence creates a *prima facie* case for further investigation into whether they in fact constitute international crimes.

## **C. Extrajudicial Killings and Torture**

As with forced displacement and sexual violence, the UN documentation of extrajudicial killings and torture creates a *prima facie* case that justifies a thorough UN investigation into such violations. UN actors have described the reported violations, predominantly committed by the military forces, as severe and long-term in nature and as part of an effort to control the civilian population in ethnic nationality areas since 2002. Of particular concern is that the reports note a significantly deteriorating situation regarding the level of such incidents. The UN actors also document that the reported violations are perpetrated within a culture of impunity. In conclusion, the analysis of the UN documentation strongly suggests that the reported violations of extrajudicial killings and torture constitute international crimes.

### 1. *Levels of Violence*

UN actors and institutions have long documented extrajudicial killings and torture in Burma: for example, the Myanmar Rapporteur, General Assembly, and Commission on Human Rights have noted the occurrence of such violations in Burma consistently since 1992. See Charts A, B, and C. The Myanmar Rapporteur has documented a large number of extrajudicial killings by the military forces in 2002.<sup>325</sup> The majority of victims were reportedly IDPs who were shot after being discovered by Tatmadaw soldiers.<sup>326</sup> The Myanmar Rapporteur documented reports of egregious cases involving groups of individuals stated to have taken place in the Shan and Karen States.<sup>327</sup> The reports also included cases of torture and arbitrary detention that appeared to indicate that the military has used these practices as a warning to others to follow orders.<sup>328</sup> In most reported cases, the torture victims were accused of being supporters of armed elements of ethnic nationality groups.<sup>329</sup> The Myanmar Rapporteur reported an example in May 2002 provided by a 50-year-old Karen man from the Kawkareik Township in Karen State.<sup>330</sup> The man reported that four Karen villagers had been accused of being KNU soldiers.<sup>331</sup> Villagers were called to see how the four men had been tied up and tortured (hit on their heads, even when they were bleeding and suffocated with a plastic sheet) at a place outside the village.<sup>332</sup> Following seven days of such treatment the four men had been taken to a military camp and were not seen afterwards. The witness presumed that they had been executed.<sup>333</sup>

In 2002, the Executions Rapporteur also sent letters to the Burmese authorities about cases where there had been an excessive use of force, under the guise of dealing with “terrorists,” against farmers and others who brought up social or economic issues.<sup>334</sup> The Executions

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<sup>325</sup> Myanmar Rapporteur 2003, *supra* note 268, at ¶ 57.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 56.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions, *Civil*

Rapporteur also intervened in 2003 with regard to summary execution cases committed by the military that involved ordinary peasants, including women and children, who were accused of supporting Shan soldiers.<sup>335</sup> The reports described scenes in which government soldiers summarily executed or tortured civilians, and gang raped women before shooting and killing them.<sup>336</sup> The Executions Rapporteur transmitted allegations to the government dealing with the period 2003 and 2004, including the following:

Naang Seng and Naang Long, two 17-year-old girls from Saai Murng quarter in Ta-Khi-Laek town [in Shan State], were stopped by a group of three SPDC troops near Ta-Khi-Laek town on 22 August 2003. They were severely kicked and beaten by the troops. The two girls were later found unconscious by some villagers and taken to a hospital. Naang Seng died that same night. A complaint was lodged with the SPDC authorities at Ta-Khi-Laek township officer. As far as the Special Rapporteurs have been informed, no action has been taken to investigate the case.<sup>337</sup>

Saang Zi-Na, a 45-year-old villager from Pang Sa, was shot dead by a patrol of SPDC troops from the 55th Division near Paang Sa village, Loi La village tract, Nam-Zarng township [in Shan State], on 23 August 2003, when he was fetching water on the bank of Nam Taeng river. On 26 August 2003, a column of the same SPDC

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*and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, summary, or arbitrary executions:*

*Report of the Special Rapporteur, delivered to the U.N. Econ. & Soc. Council [ECO-SOC], Comm'n on Human Rights pursuant to Resolution 2002/36, U.N. Doc. E/CN.4/2003/3, ¶ 32 (Jan. 13, 2003) (hereinafter Executions Rapporteur 2003 I).*

<sup>335</sup> *The Special Rapporteur on extrajudicial, summary or arbitrary executions, Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, summary, or arbitrary executions:*

*Report of the Special Rapporteur, delivered to the U.N. Econ. & Soc. Council [ECO-SOC], Comm'n on Human Rights, U.N. Doc. E/CN.4/2004/7, ¶ 41 (Dec. 22, 2003) (hereinafter Executions Rapporteur 2003 II).*

<sup>336</sup> *Id.*

<sup>337</sup> Executions Rapporteur 2006, *supra* note 274, at ¶ 472.

troops arrested Naang Non, his pregnant wife, in Paang Sa village and took her to Ta Zao Murng, a Nam Taeng river harbour. Another woman, Naang Zaam, found on their way, was taken with them. Once there, the two women were interrogated about boats in the area and severely beaten with bamboo sticks. They were also threatened with death. They were later released. As a result of the beatings, Naang Non suffered from internal injuries and had a miscarriage.<sup>338</sup>

In 2005, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples sent another communication of a specific allegation to the Burmese government, which described:

[A]n alleged raid by government soldiers on the village of Tagu Seik, Einme . . . had resulted in the death of one person. According to the information received, the army surrounded Tagu Seik on 7 July 2005, searching and ransacking the village on suspicion that the villagers had contacts with the Karen National Union (an armed opposition group) and were hiding weapons and explosives, though none were found. According to the source, an indigenous local schoolteacher called Stanford died during interrogation as a result of being tortured, including with electric shocks.<sup>339</sup>

These specific allegations fit within the context of a pattern of violations identified by other UN actors. Regarding the period between 2005 and 2006, the Myanmar Rapporteur stated that “[v]iolence against

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<sup>338</sup> *Id.* at ¶ 473.

<sup>339</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Indigenous Issues: Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum: Analysis of country situations and other activities of the Special Rapporteur, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights*, U.N. Doc. E/CN.4/2006/78/Add.1, ¶ 60 (Jan. 18, 2006) (hereinafter *Indigenous Peoples Rapporteur 2006*).

unarmed civilians by the Myanmar military is a very serious concern.<sup>340</sup> Additionally, he had received reports from “reliable and independent sources” alleging the militarization of refugee camps at the border that also put at risk the safety of civilians.<sup>341</sup> UN Human Rights experts also jointly issued a press release in 2006 that raised deep concern about the “widespread violence” that had “continued to spiral” in the previous six months in the Thandaung and Papun townships of Karen State as well as Kyaukgyi and Shwegyin townships of Pegu Division.<sup>342</sup> The military allegedly acted with excessive use of force and fire arms. Reports from various sources corroborated very serious allegations of unlawful killings, torture, rape, and forced labor.<sup>343</sup>

The Executions Rapporteur again wrote to the Burmese authorities with concerns about abuses in 2005 and 2006 and specifically raised concern over “the recent escalation in violence in counter-insurgency operations against the Karen National Union (KNU)—an armed ethnic minority opposition group.”<sup>344</sup> The operation was viewed to be affecting “ethnic minority villagers in northern Kayin (Karen) state and in the east of an area known as [Pegu] Division, in eastern Myanmar.”<sup>345</sup> Reports indicated that “several civilians, including women and children may have been extra-judicially killed.”<sup>346</sup> The army also reportedly tortured individuals as part of the operation.<sup>347</sup>

The Myanmar Rapporteur also raised concern about the situation in Karen State following military offenses there in 2006 to 2007, which resulted in a number of extrajudicial killings and other attacks on civilians by the Burmese military.<sup>348</sup> The widespread violence reportedly increased in 2007 in certain areas, and reliable observers considered it the worst humanitarian situation since the 1996-1997 military campaign.<sup>349</sup>

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<sup>340</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 48; Myanmar Rapporteur 2007, *supra* note 188, at ¶ 58.

<sup>341</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 47; Myanmar Rapporteur 2007, *supra* note 188, at ¶ 57.

<sup>342</sup> Press Release 2006, *supra* note 213.

<sup>343</sup> *Id.*

<sup>344</sup> Executions Rapporteur 2007, *supra* note 208, at 222.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> See, e.g., Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 80.

<sup>349</sup> *Id.*

The Myanmar Rapporteur also expressed concerns on various occasions over the “use of excessive force in the country linked to the alleged participation of groups, such as the Swan Ah Shin and other militias in violent attacks against civilians.”<sup>350</sup> In sum, UN actors have chronicled extrajudicial killings and torture in eastern Burma annually during the entire period since 2002.

## 2. *Purpose and Policy*

In 2006, the Myanmar Rapporteur reported that it was often a “deliberate strategy” in the military campaigns in ethnic nationality areas to carry out acts of violence such as killing and terrorizing civilians.<sup>351</sup> Of particular relevance to extrajudicial killings, the Executions Rapporteur and the Myanmar Rapporteur have both drawn attention to a “shoot on sight” policy often linked to the forced displacement of civilians.<sup>352</sup>

## 3. *Culture of Impunity*

The UN actors that reported extrajudicial killings and torture by the military forces in eastern Burma commonly understood the abuses to occur with impunity. In 2003, for example, the Executions Rapporteur specifically included Burma in a list of countries where the “military and special forces, in particular, are reported to use excessive force with impunity.”<sup>353</sup> In 2008, the Myanmar Rapporteur noted that violations, including extrajudicial killings and torture, have not been investigated and those responsible have not been prosecuted.<sup>354</sup> The result of this culture of impunity was that “victims have not been in a position to assert their rights and receive a fair and effective remedy.”<sup>355</sup> Referring to his previous reports that also noted the widespread and systematic nature of these serious human rights violations, the Myanmar Rapporteur concluded in 2008 that this suggested that such acts have not been isolated examples of individual misconduct by middle- or low-

<sup>350</sup> See, e.g., *id.*, at ¶ 61.

<sup>351</sup> Myanmar Rapporteur 2006 I, *supra* note 3 at ¶ 47. .

<sup>352</sup> Executions Rapporteur 2007, *supra* note 208, at 222; Myanmar Rapporteur 2002, *supra* note 230, at ¶ 17.

<sup>353</sup> Executions Rapporteur 2003 I, *supra* note 334, at ¶ 32.

<sup>354</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 58.

<sup>355</sup> *Id.*

ranking officers.<sup>356</sup> Rather the violations were the result of a system in which individuals and groups may break the law without being called to account.<sup>357</sup>

As discussed in the sexual violence section, the Executions Rapporteur transmitted reported cases of violations, included killings, occurring in 2003 and 2004 to the government.<sup>358</sup> He deemed the authorities' response inadequate.<sup>359</sup> In response, the Executions Rapporteur viewed the government's reasons for lack of evidence as flawed, and expressed his hope that any future allegation would be investigated in "good faith."<sup>360</sup> This interaction between the government and the UN supports the conclusion of a continuing pattern of immunity for grave IHL violations, including extrajudicial killings and torture.

The culture of impunity has persisted throughout the period under analysis. In his 2006 letter involving specific reports of violations in eastern Burma, the Executions Rapporteur again appealed to the government to ensure that all deaths that occurred in connection with military operations were promptly, independently, and thoroughly investigated in accordance with the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.<sup>361</sup> The Special Rapporteur requested the following information:

1. Are the facts reproduced in the above summary of the case accurate?
2. Please provide the details, and where available the results, of any investigation, medical examinations, and judicial or other inquiries carried out in relation to the killings occurred the in northern and eastern Myanmar.
3. Assuming that those responsible for the shootings have been or will be identified, please provide the full details of any prosecutions which have been undertaken, and of any other penal, disciplinary or administrative

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<sup>356</sup> *Id.* at ¶ 59.

<sup>357</sup> *Id.*

<sup>358</sup> See *supra* notes 274-277 and accompanying text.

<sup>359</sup> Executions Rapporteur 2006, *supra* note 274, at 149, Myanmar Rapporteur 2002, *supra* note 230, at ¶ 17.

<sup>360</sup> Executions Rapporteur 2006, *supra* note 274, at 149.

<sup>361</sup> Executions Rapporteur 2007, *supra* note 208, at 223.

sanctions imposed in this connection.

4. Please indicate whether compensation has been provided to the families of the victims.<sup>362</sup>

The Executions Rapporteur also noted in the letter that the Burmese government had “failed to cooperate” with his UN mandate.<sup>363</sup> This refusal to cooperate again reinforces that impunity has been an ongoing and persistent problem with regards to extrajudicial killings and torture in Burma.

#### 4. *UN Actors’ Conclusions and Recommendations Regarding Extrajudicial Killings and Torture*

The killing and terrorizing of civilians has been identified as often being part of a “deliberate strategy” engaged in by the military in ethnic nationality areas.<sup>364</sup> In 2008, the Myanmar Rapporteur included torture and summary executions in a list of reported violations described to be taking place on a “widespread and systematic basis.”<sup>365</sup> The conclusion that impunity has attached to the perpetration of such actions has also led to various UN actors to call on the government to investigate, punish, and prosecute those responsible for the reported violations.<sup>366</sup> For example, the Myanmar Rapporteur urged the authorities to provide full details of alleged crimes and to press for the cessation of hostilities by all parties during 2006 and 2007 military operations in eastern Burma.<sup>367</sup>

In 2006, the Executions Rapporteur made more specific recommendations after reminding the Burmese authorities that “shoot-on-sight policies” are a “deep and enduring threat to human rights-based law enforcement approaches.”<sup>368</sup> He urged the regime to instruct its security forces to immediately prohibit any such policy and comply with the UN Basic Principles on the Use of Force and Firearms by Law

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<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 222.

<sup>364</sup> See, e.g., Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 47; Myanmar Rapporteur 2007, *supra* note 188, at ¶ 56.

<sup>365</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 58.

<sup>366</sup> See, e.g., Executions Rapporteur 2007, *supra* note 208, at 224; Indigenous Peoples Rapporteur 2006, *supra* note 339, at ¶ 60.

<sup>367</sup> See, e.g., Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 80.

<sup>368</sup> Executions Rapporteur 2007, *supra* note 208, at 223.



Enforcement Officials.<sup>369</sup> The obligations highlighted were that the law enforcement officials should “as far as possible apply non-violent means before resorting to the use of force and firearms” and that “in any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”<sup>370</sup> Attention was also drawn in the letter to the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in 1979, which more succinctly stresses the limited role for lethal force in all enforcement operations.<sup>371</sup>

### 5. *Analysis of Extrajudicial Killings and Torture*

The analysis of the UN documents that include reports of extrajudicial killings and torture in eastern Burma presents a *prima facie* case that such violations have occurred and must be further investigated. The evidence available to the UN from its own actors strongly suggests that the perpetration of prohibited acts of extrajudicial killings and torture in eastern Burma may constitute either crimes against humanity prohibited by Article 7(1)(f) or war crimes prohibited by Article 8(2)(c)(i) of the Rome Statute. Along with a lack of accountability for such violations in Burma, the legal elements of crimes against humanity and war crimes as set out in international criminal law are present to justify the creation of a Commission of Inquiry to thoroughly investigate the scope and scale of violations.

#### *Common Elements*

The UN documentation strongly suggests that the reported extrajudicial killings and use of torture in eastern Burma are part of “an attack directed against a civilian population”, a critical element of establishing a crime against humanity. As discussed there have been numerous reports of multiple commissions of the prohibited acts of torture and extrajudicial killings as a consequence of the use of armed force. Moreover, the UN documents consistently refer to the victims as civilians. A particular example is the statement by the Myanmar Rapporteur that “[v]iolence against unarmed civilians by the Myanmar

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<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

military is a very serious concern.”<sup>372</sup>

Establishing a crime against humanity also requires that attacks are “widespread or systematic.” The Myanmar Rapporteur has described killings and torture as both “widespread and systematic.”<sup>373</sup> The annual reports chronicled demonstrate the scale of violence and the persistent and “widespread” nature of the abuses. Furthermore, UN actors have exhibited particular concern during certain periods about what they described as an “escalation” in violence and also where violence “continued to spiral.”<sup>374</sup> “Systematic” violations involve policy: in regards to Burma, UN actors have described the Four Cuts Policy as a means of terrorizing the population. In particular, regarding extrajudicial killings there has been concern about the “shoot-on-sight policy” which exists in parts of eastern Burma.<sup>375</sup> The evidence available meets the threshold for establishing a *prima facie* case that crimes against humanity have been taking place in Burma.

The UN documents also strongly suggest the existence of the common elements of war crimes: there is a situation of internal armed conflict in eastern Burma, and the reported acts may have the required nexus to an armed conflict. References to ethnic nationality armed groups and the constant identification in the UN reports of Burmese military members as perpetrators of such violence indicate that IHL should apply to the situation. Moreover, the persistent reference to the victims as civilians suggests that they are non-combatants, mandating certain IHL protections.

The special jurisdiction requirement for war crimes under the Rome Statute that extrajudicial killings and torture are part of a “plan” or “policy” or are committed on a “large-scale” is also present on its face. The above analysis in relation to crimes against humanity again informs the case here. The scale of reported violations and the use of such acts as a means to suppress the ethnic minority population may meet the criteria of a “plan” or the acts being “large-scale.” Again, the use of the language of “widespread and systematic” suggests this conclusion, particularly as these requirements for war crimes are less demanding than those of the crimes against humanity’s elements of “widespread or systematic.”

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<sup>372</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶ 48; Myanmar Rapporteur 2007, *supra* note 188, at ¶ 58.

<sup>373</sup> Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 58.

<sup>374</sup> Press Release 2006, *supra* note 213.

<sup>375</sup> Executions Rapporteur 2007, *supra* note 208, at 223.

### *Elements of the Prohibited Act: Unlawfulness and the Intention to Inflict Severe Pain*

Extrajudicial killings constitute international crimes when they are unlawful, meaning that they are not committed in accordance with fair trial and sentencing standards. The key element for torture is the infliction of severe pain against a person. The UN documents in no way suggest that the killings at issue occur with any procedural safeguards, as exemplified by the use of terms such as “extrajudicial killing” or “summary execution” and the existence of “shoot-on-site” policies. The torturous acts as described would clearly inflict severe pain. Further, the reports documented by the UN do not describe pain and suffering inherent or accidental resulting from a lawful sanction. A case by case determination would ultimately establish if these elements were present, but the UN documents strongly suggest that these elements of the individual prohibited acts do exist in order to establish a *prima facie* case that such crimes may have been committed.

### *Impunity*

Finally, the UN documents emphasize the culture of impunity surrounding the violence—including the military’s failure to investigate and prosecute the responsible parties. See above section on Culture of Impunity. Together, this analysis of extrajudicial killings and torture in the UN documentation establishes a *prima facie* case for the existence of such violations amounting to possible crimes against humanity and war crimes.

## **D. Legal Evaluation**

The analysis of each of the individual violations focused on in this report, forced displacement, sexual violence, extrajudicial killings and torture result in the conclusion that each separately creates a *prima facie* case for the existence of violations amounting to possible crimes against humanity and war crimes. These separate findings should mandate the UN Security Council to constitute a Commission of Inquiry into the extent and nature of each of these violations. However, these individualized findings regarding each category of violation also point to a broader pattern of violence. This is supported by the Myanmar

Rapporteur's generalized statements about violence in ethnic nationality areas, such as "the killing, terrorizing or displacement of civilians is often part of a deliberate strategy", and "violence against unarmed civilians by the Myanmar military is a very serious concern."<sup>376</sup>

For the international community to act, it must also be established that the government has failed to provide accountability for reported violations that have occurred within its borders.<sup>377</sup> As set out in the legal framework section, ICC jurisdiction in particular is not designed to supplant the national jurisdiction. Rather it is designed to supplement it in accordance with the principle of complementarity. The UN actors have strongly criticized the military regime on this front and emphasized the culture of impunity surrounding the violations examined in this report.<sup>378</sup> For example, the Myanmar Rapporteur has made numerous declarations about impunity surrounding sexual violence<sup>379</sup> as well as extrajudicial killings and torture.<sup>380</sup> Moreover, none of the UN actors suggest that there has been accountability for the reported violations of forced displacement. The violations are also interrelated: the reported forced displacements, for example, are linked to the "shoot-on-sight" policy that occurs within what is described as the overall "culture of impunity."<sup>381</sup> Furthermore, in the Myanmar Rapporteur's assessment, the entrenched impunity "cannot be attributed to lack of institutional capacity alone," given that often the violations, in spite of being known by the authorities, are not acted upon.<sup>382</sup>

The Myanmar Rapporteur has also stated that "the continued misuse of the legal system . . . denies the rule of law and represents a major obstacle to securing the effective and meaningful exercise of fundamental freedoms."<sup>383</sup> Further, he noted with regret that the "lack of independence of the judiciary has provided a 'legal' basis for abuses of power, arbitrary decision-making and the examination of those responsible for serious human rights violations."<sup>384</sup> The UN

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<sup>376</sup> Myanmar Rapporteur 2006 I, *supra* note 3, at ¶¶ 47-48.

<sup>377</sup> See *supra* Part II International Criminal Law Framework

<sup>378</sup> See *supra* Part III Human Rights Violations in Eastern Burma.

<sup>379</sup> See, e.g., Myanmar Rapporteur 2008 I, *supra* note 218, at ¶ 87.

<sup>380</sup> *Id.* at ¶ 58.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at ¶ 42.

<sup>383</sup> *Id.* at ¶ 62.

<sup>384</sup> *Id.*

General Assembly<sup>385</sup> and the Human Rights Council<sup>386</sup> have also issued recommendations to the military regime to initiate investigations and carry out fair trials in order to end the prevailing impunity. These recommendations and calls for the end of impunity have been consistent and repeated, the latest example being made in the General Assembly's 2009 resolution.<sup>387</sup> This cumulative evidence on impunity is substantial and unambiguous, and plainly justifies international action in this arena.

In conclusion, all of the necessary elements exist for the UN to act. Its own actors are aware of the reported violations and their documentation and description of them strongly suggests that they constitute international crimes. Its own actors have also found impunity. Thus, the analysis highlights the need for a UN Security Council mandated Commission of Inquiry into the situation in Burma, which would investigate both the reported violations as well as the documented failure of the military regime to provide accountability and justice.

Finally, while this section has focused on eastern Burma and four specific violations, any Commission should not limit its analysis to this region or these particular abuses. See generally Charts A, B, and C (tracing UN condemnation of violations since the 1990s). References to ceasefire and ethnic nationalities areas in UN documents are not restricted to eastern Burma alone. Thus, they must also be understood as raising concern of violations in other such areas. Moreover, though the civilian populations in ethnic nationality areas are reported to be particularly vulnerable, they are not the sole victims and abuses are reported elsewhere. Similarly, the findings made with reference to the specific violations—forced displacement, sexual violence, extrajudicial killings and torture—should not prevent the Commission of Inquiry from investigating the broader list of violations reported by the UN actors across Burma. Indeed, any Commission should investigate all possible international crimes as established in the Rome Statute.

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<sup>385</sup> General Assembly Resolution. 61/232, *supra* note 182; *Situation of human rights in Myanmar*, G.A. Res. 62/222, U.N. Doc. A/RES/62/222 (Feb. 28, 2008).

<sup>386</sup> *Situation of human rights in Myanmar*, Hum. Rts. Coun. Res. S-5/1, U.N. Doc. A/HRC/RES/S-5/1 (Oct. 2, 2007); *Follow-up to the report of the Special Rapporteur on the situation of human rights in Myanmar*, Hum. Rts. Coun. Res. 6/33, U.N. Doc. A/HRC/RES/6/33 (Dec. 14, 2007).

<sup>387</sup> *Situation of human rights in Myanmar*, G.A. Res. 63/245, U.N. Doc. A/RES/63/245 (Jan. 23, 2009).

## IV. PRECEDENTS FOR ACTION

The situation in eastern Burma, as documented by the UN, represents a grave human rights crisis taking place in a culture of impunity. The UN Security Council, however, has not taken concerted action to deal with the crisis. The Security Council has in the past responded to other crises after determining that they constitute a “threat to the peace”.<sup>388</sup> Specific examples of a response by the Security Council following such a determination have been the creation of ad hoc international criminal tribunals to prosecute grave violations of international humanitarian and human rights law regarding atrocities in the former Yugoslavia and Rwanda. Another example is the referral of Darfur to the ICC. The violations that have been reported in Burma are also sufficiently long-lasting and severe to merit similar Security Council action.

This section looks at three past instances—the former Yugoslavia, Rwanda, and Darfur—in which the Security Council has used its Chapter VII powers to act. In each of these three situations, the Security Council took the same general approach: (1) the United Nations took note of the violations occurring, condemned them through resolutions and recognized that the situation constituted a “threat to the peace”, then (2) the Security Council established a Commission of Inquiry to look further into and verify the violations, and finally (3) the Security Council established an international judicial mechanism, or made an ICC referral, to address the violations.

That the Security Council chose to take this sort of action signals an acknowledgement of the strengthening international norms supporting action by the international community in response to gross human rights and IHL violations. This section compares these situations to that in Burma in order to show that many violations that the UN has acknowledged as occurring in Burma have in the past been the cause for Security Council action. The section also shows that while the Security Council has acknowledged these violations in Burma, it has not yet gone further and taken the next step in its established process to address grave violations, the creation of a Commission of Inquiry.

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<sup>388</sup> U.N. Charter, at art. 39.

## A. The Security Council's Chapter VII Powers

The UN Security Council has the power under Chapter VII of the UN Charter to take measures “to maintain or restore international peace and security” when it determines “the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>389</sup> Article 41 of the Charter allows the Security Council to take action that does not involve the use of force.<sup>390</sup> As articulated in Article 33 of the Charter, whenever the Council “deems necessary,” at “any stage” of a dispute, it may intervene “to ensure prompt and effective action” to safeguard peace and security.<sup>391</sup> Although the Charter does not definitively limit the Security Council’s powers, until recently it was largely viewed that Chapter VII action would occur only in response to situations that had international ramifications, such as conflicts that had spillover effects beyond their borders.<sup>392</sup>

Prior to the 1990s, the Security Council rarely used its Chapter VII powers due to Cold War tensions.<sup>393</sup> It first used the power in 1965 to condemn the declaration of independence and minority rule by the “racist minority” of southern Rhodesia.<sup>394</sup> This eventually led to a sanctions regime.<sup>395</sup> The Security Council again acted in 1977 to impose sanctions on the apartheid regime of South Africa.<sup>396</sup>

With the end of the Cold War, the Security Council began to use its Chapter VII powers more frequently. For example, in 1991, Security Council Resolution 688 regarding the situation of the Kurds in Iraq stated that “repression of the Iraqi civilian population . . . threaten international peace and security in the region.”<sup>397</sup> Additionally, Security Council

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<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at art. 41. Article 42 also allows the Security Council to take further action that includes the use of force. U.N. Charter, art. 42.

<sup>391</sup> *Id.* at art. 33.

<sup>392</sup> Christopher J. Le Mon & Rachel S. Taylor, *Security Council Action in the Name of Human Rights: From Rhodesia to the Congo*, 10 U.C. DAVIS J. INT’L L. & POLY 197, 209 (2004) (hereinafter *Security Council Action*).

<sup>393</sup> *Id.*

<sup>394</sup> S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965); S.C. Res 217, U.N. Doc. S/RES/217 (Nov. 20, 1965).

<sup>395</sup> S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966).

<sup>396</sup> S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

<sup>397</sup> S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).

members began increasingly to suggest that human rights violations, even without international spillover effects, could prompt Chapter VII action.<sup>398</sup> For example, in Resolution 794 the Security Council unanimously authorized the use of force “to restore peace, stability, and law and order” in Somalia.<sup>399</sup> The resolution stated that, “the magnitude of the human rights tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.”<sup>400</sup> The resolution’s text made no mention of trans-border effects and the delegates present at the meeting framed the problem in Somalia almost exclusively as a humanitarian, or human rights one.<sup>401</sup>

The Security Council has taken action regarding Sierra Leone, Afghanistan, Haiti, Yemen, Liberia, Cambodia, Yugoslavia, Rwanda, and Sudan, among others.<sup>402</sup> The Security Council acted in each of these situations, relying on Chapter VII, once it had determined that the situations in each of these countries constituted a “threat to the peace” that required intervention to protect and preserve international stability.<sup>403</sup> To date, there is no precise definition of what constitutes a “threat to the peace” as the Security Council has responded to the totality of the situation that arose in each set of circumstances. However, according to the report *Threat to the Peace*, the Security Council has in the past taken into account the following factors to determine the existence of a “threat to the peace”: (1) the overthrow of a democratically-elected government; (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; (4) substantial outflow of refugees; and (5) other cross-border problems (for instance, drug trafficking).<sup>404</sup>

In the former Yugoslavia, Rwanda, and Darfur, which this report

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<sup>398</sup> Security Council Action, *supra* note 392, at 214.

<sup>399</sup> S.C. Res.794, U.N. Doc. S/RES/794, preamble, ¶ 14, (Dec. 3, 1992).

<sup>400</sup> *Id.* at preamble, ¶3.

<sup>401</sup> Security Council Action, *supra* note 392, at 216-17 (citing U.N. Doc s/PV.3145 (1992)).

<sup>402</sup> DLA Piper, *Threat to the Peace: A Call for the UN Security Council to Act in Burma*, September 20, 2005, available at <http://www.burmacampaign.org.uk/reports/Burmaansreport.pdf> (hereinafter *Threat to the Peace*).

<sup>403</sup> *Id.* (Executive Summary).

<sup>404</sup> *Id.*



examines, the Security Council took measures in order to combat grave IHL violations. Upon recognizing that grave violations were occurring and continued to occur, and after passing resolutions condemning these violations and calling upon the parties involved to stop the violence, the Security Council created a Commission of Inquiry.<sup>405</sup> The purpose of the Commission was to analyze the conflict and conduct fact-finding missions to determine and verify the probable extent of the violations. Upon completion of a Commission of Inquiry report, the Council determined what further action was necessary; in these three cases, the Council decided that international justice mechanisms were an appropriate tool.<sup>406</sup>

## B. The Former Yugoslavia

In 1992, the Security Council responded to reports of IHL violations in the former Yugoslavia, specifically reports of “mass forcible expulsion and deportation of civilians, imprisonment, and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property.”<sup>407</sup> In Resolution 771, The Security Council acted under Chapter VII to demand that “all military forces in Bosnia and Herzegovina, immediately desist from all breaches of international humanitarian law” and that international humanitarian organizations “be granted immediate, unimpeded and continued access to camps, prisons and detention centres within the territory.”<sup>408</sup> The Security Council also requested that states and humanitarian organizations “collate substantiated information . . . relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make

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<sup>405</sup> With regard to the Yugoslavia and Rwanda conflicts, the body was called a Commission of Experts. With regard to the Darfur conflict, the body was called a Commission of Inquiry. The mandates of these Commissions were largely equivalent.

<sup>406</sup> S.C. Res. 837, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR); S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Darfur to the ICC).

<sup>407</sup> S.C. Res. 771, U.N. Doc. S/RES/771 (Aug. 13, 1992).

<sup>408</sup> *Id.* at ¶¶ 3-4.

this information available to the Council.”<sup>409</sup> Because at the point when the former Yugoslav republics declared independence and subsequently became members of the UN, the conflict became international, the actions taken by the Security Council regarding the former Yugoslavia were within the Council’s usual assumption that actions they take must relate to an issue of an international character.<sup>410</sup>

The Security Council soon determined that further action was necessary, and with Resolution 780 established a Commission of Experts to investigate and gather evidence of “grave breaches of the Geneva Conventions and other violations of international humanitarian law” in the conflict in the former Yugoslavia.<sup>411</sup> The Council made special note of reports of “mass killings and the continuance of the practice of ‘ethnic cleansing.’”<sup>412</sup> The Commission conducted 32 missions, and focused on in-depth investigations of mass killing and destruction of property, treatment of prisoners and detainees, systematic sexual assaults, and “ethnic cleansing.”<sup>413</sup> After these investigations, the Commission reported to the Security Council its findings of “significant evidence of and information about the commission of grave breaches of the Geneva Conventions and other violations of international humanitarian law,” including practices of “ethnic cleansing,” sexual assault, and rape “carried out by some of the parties so systematically that they strongly appear to be the product of a policy.”<sup>414</sup> In addition, the Commission found evidence of murder, torture, attacking and targeting civilians, detention and deprivation of liberty, and destruction of cultural property, among other crimes.<sup>415</sup> In response to the Commission of Experts’ Report, the Security Council subsequently created the International Criminal Tribunal for the former Yugoslavia (ICTY) with Resolution 827.<sup>416</sup>

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<sup>409</sup> *Id.* at ¶ 5.

<sup>410</sup> Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, Annex:

Final Report of the Commission of Experts established pursuant to Security Council Resolution 780, (1992) ¶ 306 U.N. Doc. S/1994/674 (May 27, 1994) (hereinafter Commission of Experts Resolution 780 Report).

<sup>411</sup> S.C. Res. 780, U.N. Doc. S/RES/780, ¶ 2 (Oct. 6, 1992).

<sup>412</sup> *Id.*

<sup>413</sup> Commission of Experts Resolution 780 Report, *supra* note 410, at ¶ 24.

<sup>414</sup> *Id.* at ¶¶ 311-13.

<sup>415</sup> *See generally id.*

<sup>416</sup> The Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C.

The Security Council would replicate this approach to the situation in the former Yugoslavia in response to future situations. The Security Council first, upon taking note that violations were occurring, passed resolutions condemning the atrocities and determined that they constituted a threat to international peace and security. Seeing that this was insufficient, the Council set up a Commission of Experts to investigate and analyze the conflict and resultant violations. Finally, after receiving the Commission of Experts report confirming that such atrocities were occurring, the Security Council took further action and established an international judicial mechanism.<sup>417</sup>

### C. Rwanda

The subsequent establishment of the International Criminal Tribunal for Rwanda (ICTR) further solidified the norm of Security Council action under Chapter VII in response to grave violations of international humanitarian and human rights law. The creation of the ICTR took a similar route to that of the ICTY. After listening to Rwanda's Permanent UN Representative's plea for assistance, in March 1993 the Security Council passed Resolution 812, the first resolution passed on Rwanda, on the basis of its "[g]rave concern [over] the fighting in Rwanda and its consequences for international peace and security."<sup>418</sup> In July 1994, the Security Council responded to continuing "reports indicating that systematic, widespread and flagrant violations of international humanitarian law . . . [had] been committed in Rwanda."<sup>419</sup> In Resolution 935, it noted that "only a proper investigation can establish the facts in order to enable the determination of responsibility" and requested the Secretary-General to establish a Commission of Experts to provide "its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda,

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Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>417</sup> In the former Yugoslavia, at least three of the factors identified in *Threat to the Peace* were present: (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; (4) and, substantial outflow of refugees. See *Threat to the peace, supra* note 402, at 45; see also Commission of Experts Resolution 780 Report, *supra* note 410.

<sup>418</sup> S.C. Res. 812, U.N. Doc. S/RES/812 (1993).

<sup>419</sup> S.C. Res. 935, U.N. Doc. S/RES/935 (Jul. 1, 1994).

including the evidence of possible acts of genocide.”<sup>420</sup> In addition, the Commission examined “the question of the jurisdiction, international or national, before which such persons [those responsible for the crimes] should be brought to trial.”<sup>421</sup>

The Commission of Experts gathered information through field missions in Rwanda and neighboring countries as well as reports submitted by other UN bodies and outside organizations.<sup>422</sup> The Commission found overwhelming evidence that Hutus had committed genocide against Tutsis.<sup>423</sup> It also found significant evidence of crimes against humanity and other serious IHL violations, such as murder, torture and other cruel, inhuman, or degrading treatment, as well as the incitement of ethnically motivated hatred and violence, by individuals on both sides of the conflict.<sup>424</sup> The Commission found that many of these violations were committed in a preplanned, systematic fashion.<sup>425</sup> The Commission’s Preliminary Report of October 1994 recommended the establishment of a tribunal.<sup>426</sup>

Eighteen months after the adoption of Security Council Resolution 827, establishing the ICTY, the Council adopted Resolution 955 to establish the ICTR to prosecute those responsible for genocide and other serious IHL violations in Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states.<sup>427</sup> The Security Council relied upon its Chapter VII powers after determining that the situation in Rwanda constituted a “threat to the peace.”<sup>428</sup>

Security Council action in Rwanda followed the pattern set by Security Council response to violations in the former Yugoslavia.

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<sup>420</sup> *Id.*

<sup>421</sup> The Secretary-General, *Report of the Secretary-General on the establishment of the Commission of Experts pursuant to paragraph 1 of Security Council resolution 935*, U.N. Doc. S/1994/879, ¶ 10 (Oct. 4, 1994).

<sup>422</sup> Commission of Experts established in accordance with Security Council resolution 935, *Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935*, U.N. Doc. S/1994/1125, 5-11 (Oct. 4, 1994).

<sup>423</sup> *Id.* at ¶ 148.

<sup>424</sup> *Id.* at ¶¶ 146-47.

<sup>425</sup> *Id.* at ¶ 148.

<sup>426</sup> *Id.* at ¶ 150.

<sup>427</sup> S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>428</sup> *Id.*

Upon acknowledging the gravity and severity of the violations that were occurring in Rwanda the Security Council passed resolutions condemning the atrocities, which also determined that they constituted a threat to international peace and security and called on the parties in the conflict to cease committing these violations. The Council then set up a Commission of Experts to investigate and confirm the existence of ongoing violations. Once the Commission's Report was completed, which confirmed that such atrocities were occurring, the Security Council took further action and established another international judicial mechanism, the ICTR.<sup>429</sup>

#### D. Darfur

The Rome Statute and the ICC came into effect on July 1, 2002, providing an additional international justice mechanism by which the UN Security Council could act. A case can proceed to the ICC through a UN Security Council referral to the ICC prosecutor,<sup>430</sup> and the situation in Darfur became the first such referral in June 2005.<sup>431</sup>

In Resolution 1556 in July 2004, the Security Council condemned the violence in Darfur, specifically "all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension, and express[ed] its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children, internally displaced persons, and refugees."<sup>432</sup> The Council also noted the high outflow of refugees into neighboring Chad.<sup>433</sup> The Security Council determined the situation in Sudan to be a threat to international peace and security and to stability in the region.<sup>434</sup>

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<sup>429</sup> In Rwanda, three of the five factors identified by *Threat to the Peace* were present: (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; and, (4) substantial outflow of refugees. See *Threat to the peace*, *supra* note 402, at 45.

<sup>430</sup> Rome Statute, *supra* note 106, at art. 13(b).

<sup>431</sup> Press Release, United Nations Secretary-General, SG/SM/9797 AFR/1132 (Mar. 31, 2005).

<sup>432</sup> S.C. Res. 1556, U.N. Doc. S/RES/1556 (Jul. 30, 2004).

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

With Resolution 1564 in September 2004, the Security Council created a Commission of Inquiry “to investigate reports of violations of international humanitarian law and human rights law . . . to determine . . . whether or not acts of genocide have occurred, and to identify the perpetrators of such violations.”<sup>435</sup> The Secretary-General appointed a team of five international legal and humanitarian rights experts as members of the commission, and the Office of the High Commissioner for Human Rights appointed a legal research team and an investigative team composed of investigators, forensic experts, military analysts, and investigators specializing in gender violence.<sup>436</sup> The Commission conducted two missions to Sudan and visits to locations within neighboring Chad, Eritrea, and Ethiopia.<sup>437</sup> In its report, the Commission noted that it “found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.”<sup>438</sup> Because these “acts were conducted on a widespread and systematic basis,” they “may amount to crimes against humanity.”<sup>439</sup> The Commission noted that the “extensive destruction and displacement [had] resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held *incommunicado* for prolonged periods and tortured.”<sup>440</sup> The Commission noted that in particular instances of murder of civilians and pillage “may amount to war crimes.”<sup>441</sup>

The Commission did not find sufficient evidence of “genocidal intent” on the part of the Sudanese government to conclude that the government had pursued a policy of genocide.<sup>442</sup> However, in its report

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<sup>435</sup> S.C. Res. 1564, U.N. Doc. S/RES/1564, ¶ 12 (Sept. 18, 2004).

<sup>436</sup> International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Pursuant to Security Council Resolution 1564 of 18 September 2004 (January 25, 2005) (hereinafter *Darfur Report*).

<sup>437</sup> *Id.* at 13-14.

<sup>438</sup> *Id.* at 3.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 4.

<sup>442</sup> *Id.*

the Commission emphasized that the crimes for which it had found sufficient evidence “may be no less serious and heinous than genocide” and that the absence of a genocidal policy “should not be taken in any way as detracting from the gravity of the crimes perpetrated” in Darfur.<sup>443</sup> The Commission strongly recommended that the Security Council refer the situation in Darfur to the ICC.<sup>444</sup> In light of this report, the Security Council referred the situation in Darfur to the ICC prosecutor via Resolution 1593, and he opened a formal investigation into Darfur on June 1, 2005.<sup>445</sup> The ICC has issued three warrants of arrest subsequent to the referral, including one against the current President of the Republic of Sudan Omar Hassan Ahmad Al Bashir.<sup>446</sup>

As with the former Yugoslavia and Rwanda, the Council first recognized that grave violations were occurring, passed resolutions condemning the violations and determined that they constituted a threat to international peace and security. It then created a Commission of Inquiry to investigate, and finally, it decided to pursue an international justice approach by referring the situation of Darfur to the ICC prosecutor.<sup>447</sup>

## E. Burma

As noted in this report, the UN has repeatedly taken note of violations in Burma, especially in eastern Burma, since 1993. See generally Charts A, B, and C. In 1997, the ILO took further action after much criticism by the organization of Burma’s violations of the Forced Labour Convention. It established a Commission of Inquiry to look into violations of forced labor.<sup>448</sup> The 1998 report of the Commission, which

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<sup>443</sup> *Id.*.

<sup>444</sup> *Id.* at 5.

<sup>445</sup> S.C. Res. 1593 U.N. Doc. S/RES/1593 (March 31, 2005).

<sup>446</sup> ICC-02/05-01/09 Case The Prosecutor v. Omar Hassan Ahmad Al Bashir, Warrant for Arrest issued by Pre-Trial Chamber I, ICC-02/05-01/09 (Mar. 4, 2009). The other two warrants of arrest issued by Pre-Trial I in relation to the Situation in Darfur are as follows: ICC-02/05-01/07 Case The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammed Ali Abd-Al Rahman (May 2, 2007).

<sup>447</sup> In Darfur, at least three of the factors identified in *Threat to the Peace* were present: (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; and, (4) substantial outflow of refugees. See *Threat to the peace*, *supra* note 402, at 45.

<sup>448</sup> International Labour Organization, *supra* note 84, at Part I Establishment of the

was made up of three distinguished international jurists, concluded that “the obligation under Article 1, paragraph 1, of the Convention to suppress the use of forced or compulsory labour is violated in Myanmar in national law, in particular by the Village Act and the Towns Act, as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people of Myanmar.”<sup>449</sup>

In addition to the ILO, various UN actors have continued to note further violations, including those that occurred during 2002 and afterwards, and thus within the temporal jurisdiction of the Rome Statute. For example, General Assembly Resolution 60/232 of 2007 notes that the following crimes have been reported to occur in Burma:

[D]iscrimination and violations suffered by persons belonging to ethnic nationalities of Myanmar, including extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces . . . the confiscation of arable land, crops, livestock and other possessions; and the prevailing culture of impunity.<sup>450</sup>

Additionally, the Myanmar Rapporteur’s reports on Burma consistently highlight the problem of forced displacement by the military, and have noted a deteriorating situation on this front in recent years.<sup>451</sup> His submissions also document reports of numerous cases of rape and sexual violence<sup>452</sup> and multiple instances of extrajudicial killings and torture.<sup>453</sup> The situation has also notably led to a significant outflow of refugees.<sup>454</sup>

The recognition by actors within the UN system of the grave

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Commission, (1) Filing of the complaint, ¶ 1, *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm#Part%20I>

<sup>449</sup> *Id.* at Part V Conclusions and Recommendations, (3) Conclusions on the Substance of the Case, ¶ 536, *available at* [http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar5.htm#\(5\)%20Concluding%20observations](http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar5.htm#(5)%20Concluding%20observations).

<sup>450</sup> G.A. Res. 61/232, *supra* note 182.

<sup>451</sup> *See supra* Section III Human Rights Violations in Burma.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*



situation in eastern Burma is welcome.<sup>455</sup> Given the severity and long-term nature of the violations in Burma, however, the UN Security Council should set up a Commission of Inquiry as it did in previous situations. The scale of the forced displacement—which includes the destruction or displacement of 3,077 villages according to the Myanmar Rapporteur as of 2006—justifies such an approach for example.<sup>456</sup> Comparably numbers are estimated to have been destroyed or damaged in Darfur.<sup>457</sup> Despite its knowledge of such long-term systematic and widespread occurrence of violations such as these in Burma, the UN has failed to act through the Security Council in a similar manner to the situations discussed above. Following calls for action by the Security Council, it did, however, hold its first ever debate on Burma in December 2005.<sup>458</sup> In May 2006, the UN Security Council held a second briefing on Burma following a visit to the country by UN Under-Secretary-General for Political Affairs, Ibrahim Gambari.<sup>459</sup> The Security Council voted to include Burma on its agenda in September 2006.<sup>460</sup> That same month, the UN Security Council held its first formal discussion on Burma. However, in January 2007, China and Russia vetoed a resolution requiring the restoration of democracy to Burma.<sup>461</sup>

Since then the Security Council has continued to watch the political situation in Burma, however. In October 2007 the

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<sup>455</sup> These institutions, however, have limited institutional capacity to investigate violations. For example, the Special Rapporteur has limited resources and manpower that restricts his ability to investigate the situation in its entirety. One or two visits a year for a brief period cannot meet the needs to investigate the abuses that have persisted for a long number of years.

<sup>456</sup> Special Rapporteur, *supra* note 188, at 54.

<sup>457</sup> Darfur Report, *supra* note 436, at ¶ 236.

<sup>458</sup> The Burma Campaign UK, Press Release, *Havel & Tutu Praise Historic UNSC Debate* (Dec. 16, 2005), at <http://www.burmacampaign.org.uk/index.php/burma/news/Havel-Tutu-Praise-Historic-UNSC-Debate>.

<sup>459</sup> The Burma Campaign UK, Press Release, *Security Council Briefing Welcome, But Not Enough*, (Jun. 01, 2006) at <http://www.burmacampaign.org.uk/index.php/burma/news/Security-Council-Briefing-Welcome-But-Not-Enough>.

<sup>460</sup> Press Release, *United Nations Security Council, Security Council, In Procedural Action, Votes To Include Human Rights Situation In Myanmar On Its Agenda*, U.N. Doc. SC/8832 (Sept. 15, 2006).

<sup>461</sup> Press Release, *United Nations Security Council, Security Council Fails to Adopt Draft Resolution on Myanmar Owing to Negative Votes By China, Russian Federation*, U.N. Doc. SC/8939 (Jan. 12, 2007) .

Security Council issued a statement through its President Leslie Kajo Christian (Ghana), which deplored the violence used against peaceful demonstrators during the Saffron Revolution in Burma and emphasized the importance of the early release of all political prisoners and remaining detainees.<sup>462</sup> The Security Council further acknowledged that it remained “seized of the matter.”<sup>463</sup> It has also released press statements supporting the work of the Secretary-General’s Special Adviser to Myanmar, Ibrahim Gambari, focusing on the need for dialogue with Daw Aung San Suu Kyi, the fate of peaceful protestors, and the continuing detention of political prisoners.<sup>464</sup> In May 2008, the Security Council noted Burma’s announcement on its national referendum on the draft constitution for the country.<sup>465</sup> It further underlined the need for an inclusive process and participation of all political actors, and again noted that it remained “seized of the matter.”<sup>466</sup>

Yet, while Burma remains on the permanent UN Security Council agenda, it has not recognized that the situation in Burma constitutes a “threat to the peace”. In the report *Threat to the Peace* the authors concluded that the situation in Burma displayed all of the main characteristics that had prompted such a determination and subsequent action elsewhere, *inter alia* (1) the overthrow of a democratically-elected government; (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; (4) substantial outflow of refugees; and (5) other cross-border problems (for instance, drug trafficking).<sup>467</sup> With regards to Burma, this list includes factors that have resulted in spillover effects into other countries in the region, in particular external displacement

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<sup>462</sup> Presidential Statement, United Nations Security Council, *The Situation in Myanmar*, U.N. Doc. S/PRST/2007/37 (Oct. 11, 2007).

<sup>463</sup> *Id.*

<sup>464</sup> See Press Release, United Nations Security Council, *Security Council Press Statement on Myanmar*, U.N. Doc. SC/9171 15 November, 2007 and Press Release, United Nations Security Council, *Security Council Press Statement on Myanmar*, U.N. Doc. SC/9228 (Jan. 17, 2008).

<sup>465</sup> Press Release, *United Nations Security Council, Security Council Notes Myanmar’s announcement on May Referendum Elections in 2010; Underlines Need for Inclusive Process, Participation of all Actors*, U.N. Doc. SC/9320 (May 2, 2008).

<sup>466</sup> *Id.*

<sup>467</sup> *Threat to the peace, supra* note 402, see Executive Summary and at 50 *et seq.*

from Burma to Thailand, India, Bangladesh, and Malaysia.<sup>468</sup> Further, this reports establishment of the *prima facie* case of grave IHL and human rights violations should support a Security Council determination that the situation in Burma is a “threat to the peace”.

Additionally, the establishment of the *prima facie* case of grave IHL and human rights violations in this report should form the basis for the Security Council creating a Commission of Inquiry. The Myanmar Rapporteur has described the violations that have taken place in Burma as “widespread and systematic.”<sup>469</sup> The crimes noted by multiple UN organs to have taken place for more than a decade—killings, rape and other sexual violence, torture, and forced displacement—are all potential violations under the Rome Statute and justify further investigation.<sup>470</sup>

In conclusion, the comparison of the response of the Security Council to the previous three situations discussed above displays the need for it to move beyond mere discussion of the situation in Burma. The language used to describe the situation in Burma, such as “widespread” and “systematic” human rights and international humanitarian law violations echoes the language used to describe the situations in Yugoslavia, Rwanda, and Darfur. The Security Council adopted the same course of action in response to the grave violations occurring in each of these three situations. The Council first took note of serious violations and determined that they constituted a threat to international peace and security, then it created a Commission of Inquiry to investigate abuses further, and finally it took action in the form of creating an international tribunal or an ICC referral. The Security Council should initiate this process with respect to Burma.

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<sup>468</sup> *Id.* at 16 *et seq.*

<sup>469</sup> Special Rapporteur, *supra* note 218, at ¶ 58.

<sup>470</sup> *Threat to the Peace* notes that in Burma all of the factors that have in the past led to Security Council action under Chapter VII are present in eastern Burma: (1) the overthrow of a democratically-elected government; (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; (4) substantial outflow of refugees; and (5) other cross-border problems (for instance, drug trafficking). See *Threat to the Peace, supra* note 402, at 50.

# CONCLUSION

This report's conclusion, reached by analyzing UN documents alone, is that there has been a long-term awareness on behalf of the UN of the grave human rights and humanitarian violations occurring in Burma. Since 1992, the UN has consistently condemned a wide-range of violations in the country. This awareness is underscored by this report's in-depth study on eastern Burma since 2002 of forced displacement, sexual violence, extrajudicial killings, and torture. UN actors have described violations in this region as both "widespread" and "systematic," as well as part of a "policy". The Special Rapporteur whose mandate is to focus on the human rights situation in Burma has highlighted in particular the persistent nature of the violations and their "widespread and systematic" pattern. Moreover, he has come to the conclusion that these violations take place within a culture of impunity due to the military regime's failure to provide accountability and justice. These concerns are echoed by other UN actors, such as the thematic Special Rapporteurs, when acting within their specific focus areas.

In short, UN actors documenting of reported violations have been strongly suggesting these violations may constitute crimes against humanity and war crimes under international criminal law. This creates a strong *prima facie* case that such crimes have been occurring, and justifies intensified UN Security Council action to investigate the scope and scale of these potential crimes. However, unlike the situations in the former Yugoslavia, Rwanda, and Darfur, the UN Security Council has not acted to thoroughly investigate the situation in Burma. This deficit cannot be filled by other organs within the UN system, and requires a Commission of Inquiry given the scale of the reported violations and their longstanding nature.

If the international community and the UN Security Council fail to take action the evidence presented in this report suggests that the grave humanitarian situation in eastern Burma and elsewhere in the country will continue unchecked. The perpetrators of serious human rights and humanitarian violations will remain unaccountable. A culture of impunity will persist that is highly conducive to the continuance and escalation of violations.

To help prevent future violations, the UN Security Council should create a Commission of Inquiry mandated and sufficiently

resourced to investigate adequately the situation and make appropriate recommendations based on its findings. This Commission should apply all relevant international criminal and humanitarian law standards, in order to analyze whether or not the ongoing widespread and systematic violations may amount to crimes against humanity or war crimes. The international community, particularly the member countries of the United Nations, should make it clear to the Security Council that such action is needed. Finally, the Security Council should be prepared to act upon findings and recommendations made by such a Commission, including a potential referral to the International Criminal Court, the permanent body established to investigate, try, and sentence those who commit war crimes and crimes against humanity.

# APPENDIX

**Chart A: Human Rights Violations Listed by General Assembly Resolutions**

Year	Resolution?	Forced Displacement	Sexual Violence	Extrajudicial Killing	Torture	Arbitrary Detention
1991	✓ i	-	-	-	-	-
1992	✓ ii	✓ P*, 12*	-	✓ P	✓ P	✓ P, 8
1993	✓ iii	✓ P*, 14*	✓ P, 7	✓ P, 7	✓ P, 7	✓ P, 11
1994	✓ iv	✓ P, 10	✓ P, 10	✓ P, 10	✓ P, 10	✓ P, 4
1995	✓ v	✓ 11, 16*	✓ 11	✓ 11	✓ 11	✓ 5
1996	✓ vi	✓ 11, 16*	✓ 11	✓ 11	✓ 11	✓ 5
1997	✓ vii	✓ 12, 20*	✓ 12	✓ 12	✓ 12	✓ P
1998	✓ viii	✓ 10, 17*	✓ 10	✓ 10	✓ 10	✓ 5
1999	✓ ix	✓ 13, 16*	✓ 14	✓ 13	✓ 13	✓ 6
2000	✓ x	✓ 14*, 15	✓ 16	✓ 14	✓ 14	✓ 5
2001	✓ xi	✓ 18, 19*	✓ 18	✓ 20	✓ 18	✓ 7
2002	✓ xii	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 3
2003	✓ xiii	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 2
2004	✓ xiv	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 2
2005	✓ xv	✓ 2, 2*	✓ 2	✓ 2	✓ 2	✓ 2
2006	✓ xvi	✓ 2, 3*	✓ 2	✓ 2	✓ 2	✓ 2
2007	✓ xvii	✓ 2, 4*	x	✓ P	x	✓ P
2008	✓ xviii	✓ 2, 4*	✓ 2	x	✓ 2	✓ 2

P: Preface of resolution (before the numbered paragraphs start).

[#]: Paragraph number where the document mentions a certain crime by specific reference. Thus, if the resolution does not refer to the specific crime but refers to human rights or humanitarian violations in general, the table does not document this. The numbers provided are examples and are not necessarily documenting every instance a crime is mentioned.

\* For “displacement” The table provided examples of the document mentioning forced displacement and refugee flows to neighboring states. Those marked with an asterisk are refugee flows.

NB:

- Until 1998, the resolutions referred specifically to “abuse of women,” but didn’t refer to sexual violence more specifically. In 1998, the resolutions begin to refer to sexual violence more specifically, listing violations, e.g. rape.
- The date provided for the Resolution is the date upon which the General Assembly held the plenary meeting at which it adopted the resolution, this does not necessarily coincide with the date of general distribution.

Notes for Chart A:

- <sup>i</sup> GA. Res. 46/132. U.N. Doc. A/RES/46/132 (Dec. 17, 1991).
- <sup>ii</sup> GA. Res. 47/144 U.N. Doc A/RES/47/144 (Dec. 18, 1992).
- <sup>iii</sup> GA. Res. 48/150 U.N. Doc. A/RES/48/150 (Dec. 20, 1993).
- <sup>iv</sup> GA. Res. 49/197, U.N. Doc. A/RES/49/197 (Dec. 23, 1994).
- <sup>v</sup> GA. Res. 50/194 U.N. Doc. A/RES/50/194 (Dec. 22, 1995).
- <sup>vi</sup> GA. Res. 51/117 U.N. Doc. A/RES/51/117 (Dec. 12, 1996).
- <sup>vii</sup> GA. Res. 52/137 U.N. Doc. A/RES/52/137 (Dec. 12, 1997).
- <sup>viii</sup> GA. Res. 53/162 U.N. Doc. A/RES/53/162 (Dec. 9, 1998).
- <sup>ix</sup> GA. Res. 54/186 U.N. Doc. A/RES/54/186 (Dec. 17, 1999).
- <sup>x</sup> GA. Res. 55/112 U.N. Doc. A/RES/55/112 (Dec. 4, 2000).
- <sup>xi</sup> GA. Res. 56/231 U.N. Doc. A/RES/56/231 (Dec. 24, 2001).
- <sup>xii</sup> GA. Res. 57/231 U.N. Doc. A/RES/57/231 (Dec.18, 2002).
- <sup>xiii</sup> GA. Res. 58/247 U.N. Doc. A/RES/58/247 (Dec. 23, 2003).
- <sup>xiv</sup> GA. Res. 59/263 U.N. Doc. A/RES/59/263 (Dec. 23, 2004).
- <sup>xv</sup> GA. Res. 60/233 U.N. Doc. A/RES/60/233 (Dec. 23, 2005).
- <sup>xvi</sup> GA. Res. 61/232 U.N. Doc. A/RES/61/232 (Dec. 22, 2006).
- <sup>xvii</sup> GA. Res. 62/222 U.N. Doc. A/RES/62/222 (Dec. 22, 2007).
- <sup>xviii</sup> GA. Res. 63/245 U.N. Doc. A/RES/63/245 (Dec. 24, 2008).

**Chart B: Human Rights Violations Listed by Commission on Human Rights and Human Rights Council Resolutions**

Year	Resolution?	Forced Displacement	Sexual Violence	Extrajudicial Killing	Torture	Arbitrary Detention
1992	✓ i	✓ 9*	-	-	-	✓ 2
1993	✓ ii	✓ P*, 13*	✓ P, 6	✓ P, 6	✓ P, 6	✓ P, 9
1994	✓ iii	✓ 7, 16*	✓ 7	✓ 7	✓ 7	✓ 10
1995	✓ iv	✓ P*, 11	✓ 11	✓ 11	✓ 11	✓ 4
1996	✓ v	✓ 10, 17*	✓ 10	✓ 10	✓ 10	✓ 10
1997	✓ vi	✓ 2, 2*	✓ 2	✓ 2	✓ 2	✓ 2
1998	✓ vii	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 3
1999	✓ viii	✓ 4, 4*	✓ 4	✓ 4	✓ 4	✓ 4
2000	✓ ix	✓ 6, 6*	✓ 6	✓ 6	✓ 6	✓ 5
2001	✓ x	✓ 4, 4*	✓ 4	✓ 4	✓ 4	✓ 4
2002	✓ xi	✓ 5, 5*	✓ 5	✓ 5	✓ 5	✓ 5
2003	✓ xii	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 3
2004	✓ xiii	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 3
2005	✓ xiv	✓ 3, 3*	✓ 3	✓ 3	✓ 3	✓ 3
2006	x	x	x	x	x	x
2007	✓ xv	x	x	✓ 1	x	✓ 1
2008	✓ xvi	✓ 6	x	x	✓ 6	✓ 6

P: Preface of resolution (before the numbered paragraphs start).  
 [#]: Paragraph number where the document mentions a certain crime by specific reference. Thus, if the resolution does not refer to the specific crime but refers to human rights or humanitarian violations in general, the table does not document this. The numbers provided are examples and are not necessarily documenting every instance a crime is mentioned.  
 \* For “displacement” The table provided examples of the document mentioning forced displacement and refugee flows to neighboring states. Those marked with an asterisk are refugee flows.



NB:

- Until 2000, the resolutions referred specifically to “abuse of women,” but didn’t refer to sexual violence more specifically. In 2000 the resolutions begin to refer to rape and other forms of sexual violence.

Notes for Chart B:

- <sup>i</sup> Comm’n on H.R. Res. 1992/58, U.N. Doc. E/CN.4/RES/1992/58 (Mar. 3, 1992).
- <sup>ii</sup> Comm’n on H.R. Res. 1993/73, U.N. Doc. E/CN.4/RES/1993/73 (Mar. 10, 1993).
- <sup>iii</sup> Comm’n on H.R. Res. 1994/85, U.N. Doc. E/CN.4/RES/1994/85 (Mar. 9, 1994).
- <sup>iv</sup> Comm’n on H.R. Res. 1995/72, U.N. Doc. E/CN.4/RES/1995/72 (Mar. 8, 1995).
- <sup>v</sup> Comm’n on H.R. Res. 1996/80, U.N. Doc. E/CN.4/RES/1996/80 (Apr. 23, 1996).
- <sup>vi</sup> Comm’n on H.R. Res. 1997/64, U.N. Doc. E/CN.4/RES/1997/64 (Apr. 16, 1997).
- <sup>vii</sup> Comm’n on H.R. Res. 1998/63, U.N. Doc. E/CN.4/RES/1998/63 (Apr. 21, 1998).
- <sup>viii</sup> Comm’n on H.R. Res. 1999/17, U.N. Doc. E/CN.4/RES/1999/17 (Apr. 23, 1999).
- <sup>ix</sup> Comm’n on H.R. Res. 2000/23, U.N. Doc. E/CN.4/RES/2000/23 (Apr. 18, 2000).
- <sup>x</sup> Comm’n on H.R. Res. 2001/15, U.N. Doc. E/CN.4/RES/2001/15 (Apr. 18, 2001).
- <sup>xi</sup> Comm’n on H.R. Res. 2002/67, U.N. Doc. E/CN.4/RES/2002/67 (Apr. 25, 2002).
- <sup>xii</sup> Comm’n on H.R. Res. 2003/12, U.N. Doc. E/CN.4/RES/2003/12 (Apr. 16, 2003).
- <sup>xiii</sup> Comm’n on H.R. Res. 2004/61, U.N. Doc. E/CN.4/RES/2004/61 (Apr. 21, 2004).
- <sup>xiv</sup> Comm’n on H.R. Res. 2005/10, U.N. Doc. E/CN.4/RES/2005/10 (Apr. 14, 2005).
- <sup>xv</sup> Comm’n on H.R. Res. S-5/1, U.N. Doc. A/HRC/RES/S-5/1 (Oct. 2, 2007).
- <sup>xvi</sup> Comm’n on H.R. Res. 8-14, U.N. Doc. A/HRC/RES/8/14 (Jun. 18, 2008).

**Chart C: Human Rights Violations Listed by Reports of the Special Rapporteur on the situation of human rights in Myanmar**

Year	Resolution?	Forced Displacement	Sexual Violence	Extrajudicial Killing	Torture	Arbitrary Detention	Visit
1993	✓ <sup>i</sup>	✓ 76, 133*	✓ 77-8	✓ 71-5	✓ 97-100	✓ 117-199	Burma
1994	✓ <sup>ii</sup>	✓ 10* 49, 55	✓ 49, 55	✓ 53-5	✓ 48	✓ 68	Burma/ Thailand
1995	✓ <sup>iii</sup>	✓ 118-120	✓ 102, 114	✓ 95-103	✓ 114-6	✓ 104-106	Burma/ Thailand
1996	✓ <sup>iv</sup>	✓ 138	✓ 91,114	✓ 85-92	✓ 114-116	✓ 104-105	Burma/ Thailand
1997	✓ <sup>v</sup>	✓ 72-79	✓ 22, 85	✓ 20	✓ 22	✓ 105	No Access/ Thai
1998	✓ <sup>vi</sup>	✓ 74	✓ 65-66	✓ 24-27	✓ 49-52	✓ 28-48	No Access
1999	✓ <sup>vii</sup>	✓ 27-34	✓ 67	✓ 60	✓ 21, 37	✓ 60	No Access/ Thai
2000	✓ <sup>viii</sup>	✓ 38	✓ 50-2, 56	✓ 15-16	✓ 63	✓ 8, 58	None
2001 (a)**	✓ <sup>ix</sup>	✓ 71	-	✓ 64	✓ 64	✓ 44-55	Burma/Jap/ Mal
2001 (b)**	✓ <sup>x</sup>	✓ 98, 98*, 99*100	✓ 17	-	-	✓ 43	Burma
2002	✓ <sup>xi</sup>	-	✓ 10	✓ 11	✓ 26	✓ 11, 26	Burma
2003	✓ <sup>xii</sup>	✓ 46-9	✓ 58-9	✓ 44, 57	✓ 56	✓ 56	Thailand
2004	✓ <sup>xiii</sup>	✓ 44	-	✓ 44	✓ 40	✓ 24	Burma/ Thailand
2005	✓ <sup>xiv</sup>	✓ 82-85	✓ 65, 72	✓ 68	✓ 46, 51-3	✓ 94	No Access
2006	✓ <sup>xv</sup>	✓ 44-5	✓ 30	✓ 46-47	✓ 46	✓ 34	NoAccess/ Ind/Mal/ Thai/Ind
2007	✓ <sup>xvi</sup>	✓ 56	✓ 41	✓ 56	✓ 37	✓ 49	NoAccess/ Ind/Mal/ Thai/Ind
2008	✓ <sup>xviii</sup>	✓ 69, 71*	✓ 58, 78, 87	✓ 58, 80	✓ 58	✓ 43	Burma/ Thailand

P: Preface of document (before the numbered paragraphs start).

[#]: Paragraph number where document mentions certain crime.

Examples are included rather than every instance.

-Dates given are the dates the reports came out. So the “visit” section refers to whether there was a visit allowed in the making of the report, rather than whether there was a visit allowed that year. E.g. although

there was no visit allowed in 2004, rather in 2003, the 2004 report was based on a 2003 visit.

\* For “displacement” I counted both refugee flows and internal displacement. Those marked with an asterisk are refugee flows.

\*\* The rows 2001(a) and (b) are to be read together as 2001(a) was an interim report about a fact-finding mission the Special Rapporteur undertook in 2001. The report in 2001(b) was the full report later submitted about the fact-finding mission. .

NB:

The table does not document every report issued by the Special Rapporteur during this period. In the years where the Special Rapporteur issued more than one report only one is included as an illustrative example.

Notes for Chart C:

<sup>i</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights,*, in accordance with Commission resolution 1992/58, U.N. Doc. E/CN.4/1993/37 (Feb. 17, 1993).

<sup>ii</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights,* in accordance with Commission resolution 1993/73, U.N. Doc. E/CN.4/1994/57, (Feb. 16, 1994).

<sup>iii</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights,*, in accordance with Commission resolution 1994/85, U.N. Doc. E/CN.4/1995/65, (Jan. 12, 1995).

<sup>iv</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights,* in accordance with Commission resolution 1995/72, U.N. Doc. E/CN.4/1996/65, (Feb. 5, 1996).

Notes for Chart C, cont'd:

- <sup>v</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar*, in accordance with General Assembly resolution 51/117 and Economic and Social Council decision 1997/272, U.N. Doc. E/CN.4/1997/64 (Feb. 6, 1997).
- <sup>vi</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar*, delivered to the U.N. Econ. & Soc. Council [ECOSOC], *Comm'n on Human Rights*, submitted in accordance with Commission on Human Rights resolution 1997/64, U.N. Doc. E/CN.4/1998/70, (Jan. 15, 1998).
- <sup>vii</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar*, delivered to the U.N. Econ. & Soc. Council [ECOSOC], *Comm'n on Human Rights*, submitted in accordance with Commission on Human Rights resolution 1998/63, U.N. Doc. E/CN.4/1999/35, (Jan. 22, 1999).
- <sup>viii</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar*, delivered to the U.N. Econ. & Soc. Council [ECOSOC], *Comm'n on Human Rights*, submitted in accordance with Commission on Human Rights resolution 1999/17, U.N. Doc. E/CN.4/2000/38 (Jan. 24, 2000).
- <sup>ix</sup> The Special Rapporteur on the situation of human rights in Myanmar, Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, delivered to the General Assembly, U.N. Doc. A/56/312 (Aug. 20, 2001).
- <sup>x</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar*, delivered to the U.N. Econ. & Soc. Council [ECOSOC], *Comm'n on Human Rights*, in accordance with Commission resolution 2001/15, U.N. Doc. E/CN.4/2002/45 (Jan. 10, 2002).
- <sup>xi</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar*, delivered to the U.N. Econ. & Soc. Council [ECOSOC], *Comm'n on Human Rights*, in accordance with Commission resolution 2002/67, U.N. Doc. E/CN.4/2003/41 (Dec. 27, 2002).

Notes for Chart C, cont'd:

- <sup>xii</sup> The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, *Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/58/219, (Aug. 5, 2003).
- <sup>xiii</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of human rights in Myanmar, delivered to the U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights*, U.N. Doc. E/CN.4/2004/33 (Jan. 5, 2004).
- <sup>xiv</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/60/221, ¶ 83 (Aug. 12, 2005).
- <sup>xv</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/61/369, (Sept. 21, 2006).
- <sup>xvi</sup> The Special Rapporteur on the situation of human rights in Myanmar, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly*, U.N. Doc. A/HRC/4/14, (Feb. 12, 2007).
- <sup>xvii</sup> The Special Rapporteur on the situation of human right in Myanmar, *Human Rights Situations that Require the Council's Attention: Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly, Human Rights Council*, U.N. Doc. A/HRC/7/18, (Mar. 7, 2008).

**Chart D: Human Rights Abuses Committed by Burma's Military Regime, Already Documented by the United Nations and Prohibited by the Rome Statute<sup>i</sup>**

A) Human rights abuses listed Under Article 7, "Crimes Against Humanity"

- ✓ Murder
- ✓ Enslavement
- ✓ Deportation or forcible transfer of population
- ✓ Torture
- ✓ Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- ✓ Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
- ✓ 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;
- ✓ Enforced disappearance of persons
- ✓ Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

B) Human rights abuses listed Under Article 8, Section 2 (c) and (e), "War Crimes"<sup>ii</sup>

- ✓ Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ✓ Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- ✓ Intentionally directing attacks against the civilian population as such or

against individual civilians not taking direct part in hostilities;

- ✓ Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- ✓ Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- ✓ Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- ✓ Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict

Notes for Chart D:

<sup>i</sup> While this report focuses in particular on forced displacement, sexual violence, extrajudicial killings, and torture, the United Nations has documented each of the above mentioned human rights abuses. For each abuse, the elements of the crime and jurisdictional requirements must be met in order to qualify as a “crime”. The Commission of Inquiry should investigate all of these abuses.

<sup>ii</sup> Abuses listed in this section of the Rome Statute address “armed conflict not of an international character”, which describes the situation in Burma.

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## CRIMES IN BURMA

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Burma has been facing a grave human rights situation for years. Many of the organs of the United Nations have repeatedly denounced the ruling military regime for failing to cooperate with the international community and to take serious steps to end the ongoing grave violations of international law.

This report, commissioned by five of the world's leading jurists, examines the extent to which UN institutions have knowledge of reported abuses occurring in Burma that may constitute war crimes and crimes against humanity. The report finds that UN bodies have indeed consistently acknowledged abuses and used legal terms associated with these international crimes, including that violations have been widespread, systematic, or part of a state policy. The report uses this documentation to call for the UN Security Council to establish a Commission of Inquiry to investigate potential crimes against humanity and war crimes, much the same way the UN Security Council did with situations in Darfur, Rwanda and the former Yugoslavia.

## THE INTERNATIONAL HUMAN RIGHTS CLINIC @ HARVARD LAW SCHOOL

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The International Human Rights Clinic at Harvard Law School is a center for critical thought and active engagement in human rights. Each year, the Clinic undertakes several dozen projects focusing on fact-finding, litigation, legal and policy analysis, report drafting for international oversight bodies, and the development of advocacy strategies in partnership with organizations around the world.

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