

# Victims' Quest for Accountability of Aerial Bombardments in Burma:

A Common Plan for Eradication of the Military Dictatorship in Burma



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Legal Aid Network



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## **Legal Aid Network**

### **Victims' Quest for Accountability of Aerial Bombardments in Burma: A Common Plan for Eradication of the Military Dictatorship in Burma**

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## Chapter (1)

### Executive Summary

#### 1. Executive Summary

This report provides analysis of the indiscriminate aerial bombardments launched by the Tatmadaw<sup>1</sup> throughout the country—especially after the 2021 military coup—with a special focus on the recent bombardments in A Nang Pa, Hpakant township, Kachin State. Despite the stated bombardments seeming like a harbinger of death for civilian victims, they have, in turn, become the case for the senior military commanders, led by Min Aung Hlaing, who have been providing orders from their high command headquarters located in Nay Pyi Taw, the capital of Burma. How can it be a reality? In that regard, this report elaborates in detail.

For over 70 years, the civil war in Burma has proved that, if the Tatmadaw continues to exist as a major state institution, serious human rights violations amounting to the gravest crimes of international concern will never be deterred. Continued Tatmadaw rule would also mean no genuine peace—nor justice, freedom, or development for all ethnic nationalities—can ever be achieved. Lessons learnt from the roughly 60 years of ostensible peace-seeking processes starting in 1963 following the 1962 military coup vividly indicate that all so-called peace-related dialogues, including various types of ceasefires with the Tatmadaw, have unequivocally failed due to the lack of the rule of law. As far as Burma is concerned, the concept of institutional reform no longer suffices. This report therefore urges all stakeholders to exert efforts that support the emergence of a new Federal Union Army to replace the position of the Tatmadaw and ultimately uphold the rule of law.

Chapter 2 provides a general background of the country before and after the coup, focusing on aerial attacks against civilians. Then, chapter 3 details some of the worst aerial attacks launched by the Tatmadaw in other states/provinces and regions that have resulted in high civilian casualties. A brief case summary of the A Nang Pa airstrike, a contextual description of the situation of the site, and the nature of the object of the attack, which is the central focus of this report, are laid out in chapter 4.

Subsequently, chapter 5 addresses the legal issues that arose from the aerial bombings of A Nang Pa from the three perspectives: 1) whether the geographic feature of the site effectively contributed to military objectives, 2) whether the Tatmadaw had knowledge of the civilian presence in the vicinity, and 3) the systematic and widespread nature of the airstrike constituting crimes against humanity. While the

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<sup>1</sup> Tatmadaw is the term in the Myanmar language that represents the regular armed forces that have operated as a government army since the independence of the country.



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first legal question argues the legitimacy of the site as a military object by invoking the Geneva Conventions and customary rules of International Humanitarian Laws, the second question deals with the mental element, the perpetrators' behavior, and the means and methods used to carry out the airstrikes. The last legal question deals with the prerequisite elements of the crimes against humanity provided for in the Rome Statue of the ICC. Moreover, this chapter highlights notable previous decisions and judgements of the international courts potentially relevant to the case of Burma.

Under the title of a common plan to keep Min Aung Hlaing in power, chapter 6 contrasts the case of Laurent Gbagbo, the President of Ivory Coast, and the case of Min Aung Hlaing, the military coup maker in Burma. The former was acquitted by the ICC, while the latter is currently enmeshed in the process that leads to an ICC trial. In the case of Ivory Coast, the ICC prosecutor might have failed to prove that President Laurent Gbagbo committed such crimes.

Chapter 7 offers a conclusive analysis of all related societal, political, and legal factors that have influenced Burma, focusing on impunity and immunity issues from the perspective of international law. In addition, the rationale behind Min Aung Hlaing orchestrating the illegal coup and desperately trying to retain power to avoid criminal accountability is somewhat covered. The chapter indicates too that, to achieve stability and long-term peace, Burma must still carefully address people's rights to self-determination. Such actions will lead to the emergence of a federalism suited to Burma with the underpinning of the rule of law. In addition, responsibility of states to comply with international law, transitional justice related issue and national defense authorization act – NDAA, 2022, (USA) are also scrutinized.

Chapter 8 covers the major recommendations of our LAN, inter alia, that, despite maintaining ethnic nationalism leading to the emergence of a federalism suited to Burma, the protection of human rights with the underpinning of the rule of law must be a prime priority. Such protection of rights must be undertaken, at a minimum, in line with the Geneva Convention, also known as the law of war, even in a non-international armed conflict. To this end, in connection with the 2020 election results, constitutionalism that focuses on limited government concepts must be activated. Finally, a strong national legal order – which is essential for a just, peaceful and prosperous society – is recommended highlighting the core and distinguishing feature of law.

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## Chapter (2)

### Background

Burma has been plagued by civil war since its independence, with millions of people across the ethnic states being victims of violence by the Tatmadaw, who has enjoyed constant impunity. In 2011, the fighting between the Kachin Independence Army (KIA) and the Tatmadaw resumed, resulting in the intensifying commission of heinous crimes. The successive military regimes, including the then quasi-military Thein Sein administration, has shown little or no respect for international treaty obligations, particularly the 1949 Geneva Conventions, to which Burma is a party.

Over seven decades of deadly civil war, the Tatmadaw has only occasionally used its air force. For example, whenever an Ethnic Resistance Organization (ERO) attacks a military base occupied by the Tatmadaw, the latter retaliates with aerial bombings and airstrikes at the respective ERO's designated area. In this regard, the Independent International Fact-Finding Mission for Myanmar (IIFMM), formed by the UN, reports on the Tatmadaw's consistent use of not only aerial bombardment via combat helicopters, fighter jets, and artillery, but also ground-armored vehicles. The Tatmadaw has committed widespread atrocities using these weapons of war during 2011–2019, especially in Kachin, Shan, Rahkine, and Chin States.<sup>2</sup>

Moreover, especially after the coup, the Tatmadaw has extensively relied on its air and navy forces to mobilize troops and supplies and conduct bombing raids as the military council loses control over the middle and upper part of the country. There, anti-junta resistance groups, locally known as Peoples' Defense Forces (PDF), have been active.<sup>3</sup> According to NUG figures, between October 2021 and September 2022, the military council launched 268 air strikes that killed 155 civilians. More than 8,000 people were also displaced, and 138 houses, including religious buildings, were destroyed.<sup>4</sup> This year, since the monsoon season has ended, the use of aerial warfare has sharply increased. The military

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<sup>2</sup> UNHRC, "Enabling Atrocities: UN Member States' Arms Transfers to the Myanmar Military" (22 February 2022) UN Doc A/HRC/49/CRP.1, para 37-39. <<https://www.ohchr.org/en/documents/thematic-reports/ahrc49crp1-conference-room-paper-special-rapporteur-enabling-atrocities>> accessed November 23, 2022.

<sup>3</sup> Kachin News Group, "The military council deploys air and navy forces for military advances" (November 2, 2022) <<https://burmese.kachinnews.com/2022/11/02/zm1-23/>> accessed November 23, 2022.

<sup>4</sup> NUG Ministry of Defence, Notice Statement on the Airstrikes mounted by the Military (17 November 2022) <<https://www.facebook.com/modNUG/photos/pcb.428357512829983/428357436163324>> accessed Nov 25, 2022.

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council carried out a total of 57 airstrikes in Kachin, Sagaing, Magway, Karen, and Rahkine in October 2022 alone, killing more than one hundred civilians.<sup>5</sup>

Among the hundreds of aerial attacks by the military council, the recent assault in Kachin's A Nang Pa village was the deadliest yet, and more air raids in Let Yet Kone village in the Sagaing Region followed. This report concentrates particularly on the A Nang Pa airstrike due to the intensity of the incident and the high number of civilian casualties. Further, this case offers a prime example of the Tatmadaw's institutionalized culture of disregard for civilian lives and international law. A legal analysis is therefore made based on international humanitarian law, human rights laws, and other applicable international legal doctrines with the underpinning of the rule of law.

### **Chapter (3)**

## **Tatmadaw's Aerial Bombardments and Airstrikes**

As the Tatmadaw has intensified military operations against EROs, including the newly formed PDF resistance groups operating in the same area, the suffering of civilians has significantly increased. The growing use of airpower in those operations has resulted in heavy civilian casualties and the destruction of civilian infrastructure and buildings, including schools. Specifically, the Tatmadaw has used aerial bombings—along with airstrikes using combat helicopters, jet fighters, and surveillance drones—to carry out indiscriminate attacks.

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<sup>5</sup> ISP-Myanmar, 'ISP Data Matters' (collection of charts about the conflict in Burmese language) 22 November 2022) <<https://ispmyanmar.com/community/isp-data-matters/>> accessed 4 December 2022. See also Yuzana, "Losing the Ground Battle, Myanmar Junta Takes to the Skies" The Irrawaddy (28 October 2022) <<https://www.irrawaddy.com/news/burma/losing-the-ground-battle-myanmar-junta-takes-to-the-skies.html>> accessed November 25, 2022.



*Min Aung Hlaing inspecting a fighter jet (Photo: Myanmar Now)*

### 3.1 Karen State

The first airstrike after the February coup took place on 27 March 2021, in a village in Papun District, killing three Karen villagers.<sup>6</sup> A nighttime airstrike, the attack occurred soon after the seizure of a Tatmadaw outpost by the Karen National Liberation Army (KNLA) in Thi Mu Hta on the same day. More than 10,000 Karen villagers were forced to flee after the air attack.<sup>7</sup> Since then, the fighting between the KNU and Tatmadaw has again intensified. From late March to May, the Tatmadaw carried out at least 27 airstrikes, dropping 47 bombs into civilian-populated areas in Papun District.<sup>8</sup> The continuous aerial bombings in Karen State have targeted civilian infrastructures, including schools, monasteries, IDP camps, and healthcare facilities.<sup>9</sup>

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<sup>6</sup> The Irrawaddy, 'Three Karen Villagers Killed in Myanmar Military Airstrike' (28 March 2021) <<https://www.irrawaddy.com/news/burma/three-karen-villagers-killed-myanmar-military-airstrike.html>> accessed 8 December 2022.

<sup>7</sup> The Irrawaddy, '10,000 Karen Flee Myanmar Military Airstrikes' (29 March 2021) <<https://www.irrawaddy.com/news/burma/10000-karen-flee-myanmar-military-airstrikes.html>> accessed 8 December 2022.

<sup>8</sup> UN OHCHR 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (2 September 2021) UN Docs A/76/314 para.43-45 available at <[undocs.org/en/A/76/314](https://undocs.org/en/A/76/314)> accessed 8 December 2022

<sup>9</sup> Amnesty International, 'Bullets rained from the sky: War crimes and displacement in eastern Myanmar' (index n ASA 16/5629/2022, 31 May 2022) <<https://www.amnesty.org/en/documents/asa16/5629/2022/en/>> accessed 3 December 2022.

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Since December last year, the symbolic peace-town of Lay Kay Kaw has been at the center of clashes between Tatmadaw troops and the Karen National Liberation Army (KNLA). The Tatmadaw has employed light and heavy artillery, including aerial attacks with combat helicopters.<sup>10</sup> On 10 April 2022, two Tatmadaw combat helicopters indiscriminately attacked the area 22 times, destroying 30 houses, five being completely burnt down. A school for IDP children was also among the affected buildings.<sup>11</sup> In 2015, the town had been jointly established by the KNU and the USDP regime as a town of peace, with the Nippon Foundation as the main sponsor of the project. In other words, what was once designated as a town of peace has morphed into a war-torn zone where the whole population has been displaced.

### 3.2 Karenni (Kayah) State

Since late December 2021, intense fighting between local anti-coup armed groups and the Tatmadaw has been reported in the Loikaw, Demoso, and Phruso townships in Kayah State. On 31 December 2021, defeated on the ground, the Tatmadaw deployed two fighter jets during a fierce battle in Demoso, and around 100,000 residents were displaced.<sup>12</sup> Moreover, following the fighting in Demoso, the use of a helicopter gunship and two fighter jets was recorded in Loikaw, the capital of Kayah on 7 January 2022. Subsequently, on 11 January, two Tatmadaw fighter jets bombarded a residential area in Loikaw nine times, forcing 40,000 residents to flee their homes.<sup>13</sup> The Tatmadaw continued to attack the

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<sup>10</sup> UN OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (13 June 2022) UN Docs A/HRC/49/76 para.18 available at <[undocs.org/en/A/HRC/49/76](https://undocs.org/en/A/HRC/49/76)> accessed 13 December 2022. See also Myanmar Witness, 'Residents forced to flee the symbolic 'town of peace'' (17 August 2022) <[https://www.myanmarwitness.org/files/ugd/e8f7c0\\_d9adbb3a22ff40f5ac3cddb38b42e1.pdf](https://www.myanmarwitness.org/files/ugd/e8f7c0_d9adbb3a22ff40f5ac3cddb38b42e1.pdf)> accessed 3 December 2022.

<sup>11</sup> KIC, 'A School sponsored by Nippon Foundation in Lay Kay Kaw destroyed by air raids and heavy artillery' (Karen Information Center, Burmese Language, 11 April 2022) <<https://kicnews.org/2022/04/%e1%80%85%e1%80%85%e1%80%ba%e1%80%80%e1%80%b1%e1%80%ac%e1%80%84%e1%80%ba%e1%80%85%e1%80%ae%e1%80%9c%e1%80%b1%e1%80%80%e1%80%bc%e1%80%b1%e1%80%ac%e1%80%84%e1%80%ba%e1%80%b8%e1%80%94%e1%80%be%e1%80%84/>> accessed 4 December 2022.

<sup>12</sup> UN OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (13 June 2022) UN Docs A/HRC/49/76 para.18 available at <[undocs.org/en/A/HRC/49/76](https://undocs.org/en/A/HRC/49/76)> accessed 13 December 2022. See also The Irrawaddy, 'The Worst Myanmar Regime Airstrikes on Civilians' (18 January 2022) <<https://www.irrawaddy.com/news/burma/the-worst-myanmar-regime-airstrikes-on-civilians.html>> accessed 28 November 2022.

<sup>13</sup> The Irrawaddy, 'Myanmar Junta Airstrikes Continue in Kayah State' (12 January 2022) <<https://www.irrawaddy.com/news/burma/myanmar-junta-airstrikes-continue-in-kayah-state.html>> accessed 28 November 2022.

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IDP camp in Demoso on 16 and 17 January; six civilians, including a 7-year-old child and three medical workers, were killed in the attack.<sup>14</sup>

### 3.3 Sagaing Region

As mentioned above, in October 2022, the Tatmadaw conducted at least 57 air strikes in 15 townships in Kachin, Sagaing, Magwe, Rahkine, and Karen States. The Sagaing Region alone endured 26 attacks in a single month, and 12 of the airstrikes were launched in the region's Ban Mauk Township.<sup>15</sup> Collectively, the strikes resulted in at least 37 civilian casualties, the second highest number of fatalities after the A Nang Pa incident.

The saddest event took place on 16 September when two Tatmadaw combat helicopters opened fire on a school in Let Yet Kone village in Depayin Township, Sagaing Region. The aerial attack lasted for about an hour, ultimately killing nine children and six adults.<sup>16</sup> Schoolteachers and villagers said the helicopters shot at least three rockets and fired machine guns for nearly an hour, aiming straight at the school, located in the local monastery. A helicopter pilot who defected from the Tatmadaw assured that from above the pilot had a clear sight of the school in which children were running around.<sup>17</sup> Immediately following the airstrike, the Tatmadaw infantry troops attacked the monastery, killing two more children.<sup>18</sup>

### 3.4 Shan State

Shan State, particularly northern Shan, has been one of the most conflict-affected states in Burma. Between 2015 to 2018, the Tatmadaw waged a full-blown war using air and ground strikes against

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<sup>14</sup> The Irrawaddy, 'The worst myanmar regime airstrikes on civilians' (18 January 2022)

<<https://www.irrawaddy.com/news/burma/the-worst-myanmar-regime-airstrikes-on-civilians.html>>; see also The Irrawaddy, 'Girl, 7, Among Three Civilians Killed as Myanmar Junta Bombs Camp for War Displaced' (17 January 2022) <[https://www.irrawaddy.com/news/burma/girl-7-among-three-civilians-killed-as-myanmar-junta-bombs-camp-for-war-displaced.html?fbclid=IwAR3k\\_of90xohq6r8ncVr2gsO0\\_L6e0sRDu9BAeHQm3oJMM5duBDUjsMOVEY](https://www.irrawaddy.com/news/burma/girl-7-among-three-civilians-killed-as-myanmar-junta-bombs-camp-for-war-displaced.html?fbclid=IwAR3k_of90xohq6r8ncVr2gsO0_L6e0sRDu9BAeHQm3oJMM5duBDUjsMOVEY)> accessed 8 December 2022.

<sup>15</sup> ISP-Myanmar, 'ISP Data Matters' (collection of charts about the conflict in Burmese language) 22 November 2022) <<https://ispmyanmar.com/community/isp-data-matters/>> accessed 4 December 2022.

<sup>16</sup> The Irrawaddy, 'The World Must Act to Stop More Myanmar Children From Being Killed' (20 September 2022) <https://www.irrawaddy.com/opinion/the-world-must-act-to-stop-more-myanmar-children-from-being-killed.html> accessed 4 December 2022. See also UN OHCHR, 'Report of the Specila Rapporteur on the situation of human rights in Myanmar' (3 October 2022) UN Docs A/77/494 para.32 available at <[undocs.org/en/A/77/494](https://undocs.org/en/A/77/494)> accessed 8 December 2022.

<sup>17</sup> Khin Nadi, 'Myanmar Military Defector Reveals How Junta Killed Sagaing School Kids' (The Irrawaddy 23 September 2022) <https://www.irrawaddy.com/news/burma/myanmar-military-defector-reveals-how-junta-killed-sagaing-school-kids.html> accessed 8 December 2022

<sup>18</sup> Ibid.



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Northern Alliance forces in Mong Ko township, which borders China. The Tatmadaw has, through these actions and future ones, committed a series of outrageous human rights violations with blanket impunity.<sup>19</sup> On 12 May 2022, for example, the Tatmadaw launched a military campaign against the PDF in Pekhonn township in southern Shan State, in response to the PDF's attack of a Tatmadaw Checkpoint in Htiri village. The Tatmadaw launched indiscriminate airstrikes over the area during the clashes with the local PDF, and around 4,000 residents were forced to flee their homes.<sup>20</sup>

### 3.5 Chin State

In 2020, during a clearance operation in Rahkine State, the Tatmadaw used two fighter jets to bomb Messa 2 and Messa 3 villages in Petletwa (Paletwa) township, which borders Rahkine. The intense armed conflict between the Tatmadaw and AA spilled over into neighboring Chin State and largely affected Chin villagers. On 14 March 2020, 12 civilians were killed and 15 were injured due to the Tatmadaw's aerial attacks. Those attacks continued into the next day as well, killing eight and injuring 12 villagers in Wetma village in Petletwa township.<sup>21</sup>

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<sup>19</sup> Legal Aid Network, Seeking Accountability for Ending Impunity in Burma (June 2018) [https://www.legalaidnetwork.org/Reports LAN/Seeking Accountability for Ending Impunity.pdf](https://www.legalaidnetwork.org/Reports%20LAN/Seeking%20Accountability%20for%20Ending%20Impunity.pdf) accessed 3 December 2022.

<sup>20</sup> Progressive Voice, Over 100 houses burned, 4,000 displaced by SAC scorched earth operation east of Moebye lake, southern Shan State (27 July 2022) [Over 100 houses burned, 4,000 displaced by SAC scorched earth operation east of Moebye Lake, southern Shan State - Progressive Voice Myanmar](#) accessed 5 December 2022.

<sup>21</sup> Myanmar Peace Monitor, Tatmadaw airstrikes killed 21 and displaced more than 1,400 Petletwa residents (17 March 2020) <https://mmpacemonitor.org/2621/%E1%80%9C%E1%80%B1%E1%80%80%E1%80%BC%E1%80%B1%E1%80%AC%E1%80%84%E1%80%BA%E1%80%B8-%E1%80%85%E1%80%85%E1%80%BA%E1%80%86%E1%80%84%E1%80%BA%E1%80%9B%E1%80%B1%E1%80%B8%E1%80%80%E1%80%BC%E1%80%B1%E1%80%AC/> accessed 5 December 2022.

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In addition to other crimes committed against Chin civilians by Tatmadaw troops, fears continued to grow over the possibility of more persecution among civilians, especially after the coup. The military regime then subsequently conducted two more air strikes in Mindat Township on 2 July and 20 September, respectively, killing a total of three civilians, injuring more than 10 villagers, and destroying many civilian objects.<sup>22</sup>



*Tatmadaw Fighter jets in 2018 military drill (Photo: Myanmar Now)*

### 3.6 Kachin State

On 14 April 2021, the Tatmadaw deployed two fighter jets during the fighting with KIA in Moe Mauk township. The airstrike, the first in Kachin State after the military takeover, caused destruction to several villages in the area. The Tatmadaw made no efforts during the strike to target only members of the KIA. Moreover, the Tatmadaw continued to attack with brutal offensives in the same township, especially after a combat helicopter was reportedly shot down by the KIA on 3 May 2021. Using its air

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<sup>22</sup> Ayeyarwaddy Times, The Military Council increased aerial attack in Chin State more than ever (26 November 2022) <https://ayartimes.com/?p=10392> accessed 10 December 2022.

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force and heavy artillery, the Tatmadaw indiscriminately attacked Myo Thit, Kone Law, and Si Hatt village tracts, where a monk and a man in his 60s were killed and at least 10 villagers were injured.<sup>23</sup>

In July and August 2022, two months before the A Nang Pa airstrike, at least two clashes between the KIA and the Tatmadaw using aerial attacks occurred in Sezin village. The Tatmadaw conducted at least eight airstrikes during the July attacks, and the fights lasted four days.<sup>24</sup> In a single day, 19 July 2022, three houses were destroyed by the airstrikes. The Tatmadaw launched another nighttime airstrike on 9 August; fire grenades were dropped over the same village, destroying nearly 400 civilian houses and forcibly displacing the villagers. Local media reported that at least 30 villagers were targeted with some potential casualties.<sup>25</sup>

## **Chapter (4)**

### **A Nang Pa Airstrike: The Deadliest Aerial Bombing Heavily Inflicted on Civilians**

While the Tatmadaw's use of aerial warfare has grown sharply since the military takeover, the people of Burma have taken arms against the Tatmadaw in response to the illegal coup, aiming to restore democracy. The increased deployment of Tatmadaw's air force often results in casualties and the destruction of civilian objects, largely due to indiscriminate bombing and unlawful criminal attacks. On 23 October, the Tatmadaw launched its deadliest airstrike in A Nang Pa village, Hpakant township, Kachin State. The airstrike caused a very high death toll and many casualties, mostly among civilians, and thus amounts to a blatant breach of international humanitarian law and a war crime. After the incident, Legal Aid Network conducted six interviews with survivors and eyewitnesses. Their testimonies offer an account about what transpired on the ground, before and after the aerial bombardment. Reasonable ground exists to believe that the Tatmadaw intentionally attacked the concert, despite knowing about the presence of a high number of civilians, without any legitimate military reason.

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<sup>23</sup> Myanmar Now, The Military Council increased assaults after a helicopter was shot down (3 May 2021) <https://myanmar-now.net/mm/news/6669> accessed 5 December 2022

<sup>24</sup> Myanmar Now, The military council increased the use of air force in Kachin (20 July 2022) <https://www.myanmar-now.org/mm/news/12029> accessed 5 December 2022

<sup>25</sup> Mizzima, More than 400 houses were burned by the military council in Selzin village of Phakant township, residents affected and killed (10 August 2022) <https://www.mizzimaburmese.com/article/113093> accessed 5 December 2022.

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#### 4.1 Geographic Features of A Nang Pa Village (overview)

The concert was held at a site called A Nang Pa in jade-rich Hpakant Township, an area under the control of Brigade 9 of the KIO's armed wing, the Kachin Independence Army (KIA), and just two miles from the village of Ginsi (Kan Hsee).<sup>26</sup> A Nang Pa was previously a military training ground for the 6th Battalion of the KIA's U Ru Seng Maw Division. However, the battalion had abandoned the site while fighting with the Tatmadaw in this area in 2013. Around 2019–2020, the KIA then established the headquarters of Brigade 9 roughly 12.87 kilometers north of A Nang Pa, according to a retired local school teacher.<sup>27</sup> Thus, A Nang Pa is located approximately halfway between KIA's Brigade 9 and Ginsi (Kansee) village, which is also controlled by the Tatmadaw. The site can be reached by both car and motorcycle in all seasons. However, since no other roads reach the site, the public can only access it through the Kansee Checkpoint located on the main road to the village.

The site has served as a small trade center for locals, KIA members, and jade and gold miners from nearby mining-sites and villages. KIA members also use the site when they want to meet with businessmen, buy goods and supplies, and sometimes hold public gatherings.<sup>28</sup> Therefore, A Nang Pa has both civilians and KIA members present, even if the permanent residents are all civilians.

*A Nang Pa Village (Photo: General Gun Maw facebook)*



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<sup>26</sup> Legal Aid Network, interview with #1, Ginsi (Kansee) village, Hpakant Township, Kachin State (Myanmar 16 November 2022)

<sup>27</sup> Legal Aid Network, interview with #1, Ginsi (Kansee) village, Hpakant Township, Kachin State (Myanmar 16 November 2022)

<sup>28</sup> Legal Aid Network, interview with #4, Ginsi (Kansee) village, Hpakant Township, Kachin State (Myanmar 16 November 2022)

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## 4.2 Nighttime Airstrike on the Musical Concert

Before the 23 October concert, no fighting had occurred in Hpakant for more than two months. The last clashes recorded in Hpakant township prior to the A Nang Pa airstrike were in Sezin village in July and August 2022.<sup>29</sup> The concert was intended to commemorate the 62nd anniversary of the KIO. On 23 October, the KIO's U Ru Seng Maw Division organized a golf competition—in which some local businessmen, KIO officials, and their friends participated—followed by a nighttime concert. The celebration took about a week to arrange, and all the supplies (e.g., food, livestock, furniture, and electronic appliances) were brought in from Ginsi (Kansee) village. As one survivor described, the Tatmadaw soldiers at the checkpoint that day neither asked questions nor stopped the civilians coming into the site, but rather acted friendly.<sup>30</sup>

On 23 October, the tragic attack occurred in the middle of the music show, at around 8:40 pm local time. Three Tatmadaw fighter jets from Tada-U air base in the Mandalay region dropped six bombs, two from each fighter jet, right atop the concert.<sup>31</sup> The airstrike killed at least 69 people, including Kachin artists, KIA commanders, and local businessmen; counting the critically injured, as many as 100 casualties occurred. Approximately 300 people, including KIO/KIA members, attended the music show.<sup>32</sup>

In the aftermath of the airstrike, the Tatmadaw blocked access to the site at the Ginsi Checkpoint on 24 October. Volunteers, ambulances, social workers, religious leaders, and family members were stopped at the checkpoint, unable to retrieve bodies or look after the injured.<sup>33</sup> Most of the wounded were in critical condition and required immediate medical attention. Eventually, the death toll rose to 80, and many of the injured died due to bleeding since nobody could enter or leave the site. The survivors ultimately had to use a secret or hidden route through the forest to return home.<sup>34</sup> According to a retired local school teacher who helped rescue victims, rescuers had to transport the most severely wounded to

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<sup>29</sup> Mizzima, More than 400 houses were burned by the military council in Selzin village of Phakant township, residents affected and killed (10 August 2022) <https://www.mizzimaburmese.com/article/113093> accessed 5 December 2022.

<sup>30</sup> Legal Aid Network, interview with #5, Ginsi (Kansee) village, Hpakant Township, Kachin State (Myanmar 16 November 2022)

<sup>31</sup> Legal Aid Network, interview with #2, Hpakant, Kachin State (Myanmar 17 November 2022)

<sup>32</sup> Legal Aid Network, interview with #2, Hpakant, Kachin State (Myanmar 17 November 2022)

<sup>33</sup> Legal Aid Network, interview with #1, Ginsi (Kansee) village, Hpakant Township, Kachin State (Myanmar 16 November 2022)

<sup>34</sup> Interview with #5 (16 November 2022)



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the nearby Busardi village using boats and motorcycles to avoid the Tatmadaw troops.<sup>35</sup> The KIA imposed a curfew in Hpakant township, while the Tatmadaw continued to threaten the victims and healthcare workers with charges under Article 17(1) of the Unlawful Association Act.<sup>36</sup>



*Mass graveyard of the victims of A Nang Pa airstrike (Photo: Uru Shagan)*

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<sup>35</sup> Interview with #1 (16 November 2022)

<sup>36</sup> Maung Shwe Wah and Nyein Swe, A Nang Pa airstrike fatalities expected to rise as Myanmar military blocks victims' access to medical care, *Myanmar Now* (28 October 2022) <https://myanmar-now.org/en/news/a-nang-pa-airstrike-fatalities-expected-to-rise-as-myanmar-military-blocks-victims-access-to> accessed 4 December 2022



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## Chapter (5)

### Legal Issues

The bombing at the concert in A Nang Pa by the Tatmadaw was an appalling act. At the concert organized by the KIA, many civilians were among the concertgoers.<sup>37</sup> Locals and the media said that the Tatmadaw deliberately targeted the concert despite knowing about the presence of civilians. In its defense, the Tatmadaw denied all allegations regarding civilian casualties, claiming that the site was the KIA Brigade 9 headquarters and thus fell under a military operation area of the terrorist.<sup>38</sup> The Tatmadaw further stated that the airstrike was executed in compliance with the Rules of Engagement based on the four Geneva Conventions.<sup>39</sup> Therefore, the legal questions regarding whether the Tatmadaw complied with the rules of armed conflict stipulated in the 1949 Conventions and whether a series of bombardments alongside airstrikes constitute a war crime and crimes against humanity must be clarified beyond any reasonable doubt.

#### 5.1 Was A Nang Pa a location used in military actions?

Article 52 of Protocol I, additional to the Geneva Conventions, defines a military objective as follows:

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Any object that fulfills the criteria outlined in Article 52(2) may become a military object.

Notably, then, an object that is not military in nature can also become a military objective.

Article 52(2) recognises the changeable nature of objects in times of armed conflict, and how different objects may be put to different uses according to the dictates of military necessity. The “nature, location, purpose or use” categories can affect one another; for example, an object’s use may fundamentally alter its nature or purpose, thus changing its status from targetable to immune (or vice versa).<sup>40</sup>

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<sup>37</sup> Interview with #1 (16 November 2022)

<sup>38</sup> Information Team of the State Administrative Council, ‘Security forces follow Rules of Engagement-ROE in taking necessary security measures in Phakant area’ (Office of the Commander-in-Chief of Defence Services 24 October 2022) <<https://cincds.gov.mm/node/19908>> accessed 25 November 2022.

<sup>39</sup> Ibid.

<sup>40</sup> Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, Cambridge 2015) p.318.

This article strictly requires that the belligerent only target objects of a military nature and directly complements the distinction principle, one of the core principles of customary international humanitarian law.<sup>41</sup> Further, the elements contained in the above-mentioned article must be carefully observed to determine a military object.



*Birdseye view of A Nang Pa (Photo: General Gun Maw facebook)*

The “contribution” and “advantage” are cumulative requirements; both a military contribution and an advantage in destroying or neutralizing the object must exist. In addition, the two elements must be fulfilled simultaneously.<sup>42</sup> While an advantage in attacking an object might exist, the object is not a military objective without an effective military contribution.<sup>43</sup> Contribution means that an object renders

<sup>41</sup> International Committee of the Red Cross, ‘Customary IHL Database: Rule 1. The Principle of Distinction between Civilians and Combatants’ <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 28 November 2022.

<sup>42</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on Protocol I Additional to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts* (online edn, International Committee of the Red Cross and Martinus Nijhoff Publishers, Geneva 1987) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4>> accessed 28 November 2022.

<sup>43</sup> Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar publishing, Cheltenham 2014) p.157-164.

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services (has a usefulness) to the concrete conduct of military attack and defense operations; this definition means that the contribution must be directly linked to the performance of military operations. The word “effective” ensures that the contribution is not simply a potential, hypothetical, or speculative contribution.<sup>44</sup>

Applying the definition of military objectives, the geographic features of A Nang Pa, where the concert was being held, must be assessed. The site was used by the KIA as a training ground until 2013. However, A Nang Pa ceased being a military target after that time since the KIA had left.<sup>45</sup> Today, A Nang Pa has become a small marketplace with a line of shops along the same road where residents from nearby villages, miners, travelers, and KIA members buy and sell goods.<sup>46</sup>

At the time of the attack, the nature of the site had already been changed for about 9 years, having shifted to a civilian-populated area; the “location” might present strategic value for future use but did not at the time of the concert. The contribution was thus not effective; the A Nang Pa concert was intended to commemorate the 62nd anniversary of KIO; the appliances used in the celebration and the celebration itself were not “used” for military purposes, and a concert clearly is not a military activity. The concert therefore did not contribute to military operations. In other words, the concert posed no imminent threat to the nearby Tatmadaw military bases, so no definite advantage would come from bombing the location. Even in the event of an advantage, such as to weaken the adverse belligerent by killing its members, the concert made no effective military contribution at the time. Within this context, the element “in the circumstances ruling at the time” is relevant. Article 52(2) therefore surely applies when defining the village and the concert as not having any of the features of a military object.

## **5.2 Was the Tatmadaw aware of the presence and movement of civilians in the area?**

The Tatmadaw airstrike in A Nang Pa resulted in massive civilian casualties, as indicated above. This kind of attack by the Tatmadaw surely amounts to a war crime falling under the jurisdiction of the International Criminal Court (ICC) since the attack appeared to violate multiple core principles of the law of armed conflicts.<sup>47</sup> Here, then, the mental element in the Tatmadaw’s attack, whether it was executed intentionally or knowingly, is the main point in this analysis.

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<sup>44</sup> Ibid.

<sup>45</sup> Interview with #1 (16 November 2022).

<sup>46</sup> Interview with #2 (17 November 2022).

<sup>47</sup> The four essential IHL principles: distinction; military necessity, unnecessary suffering, and proportionality; see also the fundamental sources of IHL: Geneva Conventions 1949, Additional Protocol I and II 1977 and the Statute of the International Criminal Court 2001.

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Article 8(2)(e)(i) of the Rome Statute states that the ICC has jurisdiction over acts that intentionally target the civilian population as such or act against individual civilians not directly participating in hostilities. This ultimate prohibition cannot be counterbalanced by military necessity.<sup>48</sup> Specifically, the article contains two elements: (1) the perpetrator directed an attack; (2) the object of the attack is a civilian population, and civilians did not directly participate in the hostilities. The phrasing related to the first element in the article, “intentionally directing attacks,” repeats the essence of Article 30(2)(a) of the Rome Statute: in relation to conduct, a person means to engage in the conduct.<sup>49</sup> In that regard, the Tatmadaw clearly launched a direct airstrike against A Nang Pa village, and the airstrike targeted the civilian population.

Article 50 of Geneva Convention I, 1949, does not specifically address the perpetrator’s state of mind.<sup>50</sup> However, the term “willful” in the article applies to both intentional and reckless conduct, killing and causing great suffering or serious injury to body or health, toward the persons protected by the convention. Notably, identifying various forms of the mental element can be difficult, but the intention of a perpetrator to commit the material element of a particular crime can be demonstrated by observing his/her behavior and/or the nature of the act.

Based on the assessed geographical location of the attack site, the Tatmadaw surely knew of the presence of civilians—especially given that the Tatmadaw’s Ginsi (Kansee) Checkpoint is just a few miles from the concert site. All travelers had to report their identity to the officers at the checkpoint.<sup>51</sup> In addition, the preparation for the celebration took about a week, and all the supplies, goods, and stocks brought into the area also had to pass through the checkpoint. The records of travelers’ whereabouts maintained at the checkpoint indicate that residents from nearby villages were present at the time of the celebration as well.

Under the Geneva Conventions, the Tatmadaw is obliged to take precautionary measures to avoid collateral civilian losses. The Tatmadaw was surely aware of the factual circumstances that established the presence of the civilian population before carrying out the concert attack but argued that only KIA

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<sup>48</sup> *The Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 800.

<sup>49</sup> Noëlle Quénivet, “Article 8(2)(e)(i)”, Mark Klamberg and Jonas Nilsson (Eds.) *Commentary on the Law of the International Criminal Court – The Rome Statute* available at <<https://cilrap-lexsisitus.org/clicc/8-2-e-i/8-2-e-i>> accessed 2 December 2022.

<sup>50</sup> Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field (GC I, 12 August 1949), Art 50 Grave Breaches.

<sup>51</sup> Interview with #3 (16 November 2022)

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troops could enter the site.<sup>52</sup> Therefore, the Tatmadaw's statement amounts to an attempt to deny the clear evidence that most people in the area of the concert were civilians. In addition, in different ICC cases, the court expressed that the "presence amongst the civilian population of individuals who do not fit within the definition of a civilian, however, does not deprive the entire population of its civilian character."<sup>53</sup> In the application of Article 8(2)(e)(i), the court also linked indiscriminate attacks with the use of heavy armament or "weaponry that has indiscriminate effects"<sup>54</sup> and "the intention of attacking directly the civilian population even if fighters are equally the object of the attack."<sup>55</sup>

In its statement, the Tatmadaw mentioned that "some mining owners who operate illegal businesses and KIA troops were the only persons allowed to enter the site but public travel to the site is restricted." These words also somewhat indicate that the Tatmadaw were aware that civilians not directly participating in the hostilities were present at the concert site.

Another factor worth considering is the behavior of the Tatmadaw. Ethnic minorities in conflict-affected states/provinces, especially those who support or sympathize with EROs, have been the target of atrocious crimes.<sup>56</sup> Such a pattern of crime is repeated in all states/provinces. The civilians sympathizing with one belligerent party supplying food and shelter do not lose their civilian status and do not qualify as direct participants in the hostilities.<sup>57</sup> As such, the intention to inflict casualties upon the civilian population can be deduced from certain aspects of the behavior of the attacking party.

For example, in *Mbarushimana* intention could be inferred from the fact that the armed group wanted to exact revenge on both civilians and soldiers (dubbed operation "eye for eye", *Mbarushimana*, 16 December 2011, para. 144), the orders were to kill all individuals (for example, "everything that moves should be killed", "everything which has breath shouldn't be there at all", para. 144) and the troops were congratulated for achieving the objective, for instance killing civilians (para. 150).<sup>58</sup>

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<sup>52</sup> Information Team of the State Administrative Council, "Security forces follow Rules of Engagement-ROE in taking necessary security measures in Phakant area" (24 October 2022) <<https://cincds.gov.mm/node/19908>> accessed 25 November 2022.

<sup>53</sup> Noëlle Quénivet, "Article 8(2)(e)(i)", Mark Klamberg and Jonas Nilsson (Eds.) Commentary on the Law of the International Criminal Court – The Rome Statute available at <<https://cilrap-lexsis.org/clicc/8-2-e-i/8-2-e-i>> accessed 2 December 2022.

<sup>54</sup> *The Prosecutor v. Germain Katanga* (n 30) para 802.

<sup>55</sup> *Quénivet* (n 52).

<sup>56</sup> UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' (39th Session, 17 September 2018) A/HRC/39/CRP.2 para.156; Available at <[undocs.org/en/A/HRC/39/CRP.2](https://undocs.org/en/A/HRC/39/CRP.2)> accessed 26 November 2022.

<sup>57</sup> *The Prosecutor v. Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10 (16 December 2011) para 148.

<sup>58</sup> *Quénivet* (n 53).

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As demonstrated above, the Tatmadaw had knowledge of the presence of civilians at the concert yet deliberately bombed the same target six times using three fighter jets.<sup>59</sup> The Tatmadaw was aware that such conduct might result in foreseeable consequences. When ascertaining the intention of the attacking party, the means and methods used during the attack, the discriminatory character of the attack, and the nature of the act must also be considered.<sup>60</sup>

### **5.3 Why do all aerial bombardments by the Tatmadaw constitute a "widespread or systematic attack" under Art. 7 "Crimes against humanity" of the Rome Statute of the ICC?**

During multiple military operations against its opponents, the Tatmadaw has caused countless civilian casualties in the states/provinces and regions of the country. Before the February 2021 coup, for example, many ethnic states/provinces—such as Kachin, Shan, Rahkine, Karen, Chin, Kayah (Karenni), and Mon States—have been the target of atrocious crimes under the notorious “clearance operations.” The most serious human rights violations occurred in Kachin, Shan, Rahking, and Karen States. Since the military takeover, the country has seen an unprecedented level of violence during the nationwide civil war with an increasing use of air power. The Tatmadaw have shown no mercy, not even to civilians, in carrying out its disastrous military campaign.

All the operations launched by the successive military leaders have one thing in common: civilian casualties and the destruction of civilian infrastructure. Houses were torched and looted, and religious buildings, schools, and hospitals were destroyed. These crimes by the Tatmadaw were repeated in Sagaing, Magwe, and Pegu Regions—all places where armed conflict did not occur before the coup. The air assaults of the regime have been similar in character to the ground operations; millions of people are forcibly displaced, civilians (including children) are killed, and civilian objects are destroyed. All these attacks against civilians can amount to crimes against humanity under international law.

Article 7 of the Rome Statute requires that the attack shall be “part of a widespread or systematic attack directed against any civilian population” when defining murder and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” as crimes against humanity. The term “widespread” means large-scale nature of the attack and

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<sup>59</sup> Interview with #2 (17 November 2022)

<sup>60</sup> *Quénivet* (n 53).



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the number of victims affected, while “systematic” refers to the organized nature of the acts of violence not of inconsistent random occurrence.<sup>61</sup>

The airstrikes launched by the Tatmadaw, especially those after the coup, may constitute crimes against humanity. For example, among others, the aerial bombardment on the concert in Kachin State outlined in this report, the aerial attack on a school using two combat helicopters in Sagaing Region, and the aerial bombardment on residential areas in the capital of Kayah State were all directed against the civilian population. The use of excessive force, the number of civilians affected, the indiscriminate character of the attack having no specific military target, and the failure to comply with the precautionary measures required by Article 57 of AP I to the Geneva Conventions may be enough to prove that the Tatmadaw has deliberately directed its attacks against the civilian population.<sup>62</sup>

In order to satisfy the elements of “widespread or systematic,” the Tatmadaw’s pattern of crimes must be a non-accidental repetition of similar criminal conduct on a regular basis.<sup>63</sup> The existence of both “widespread and systematic” character does not need to be proven:

(...) the attack must be either “widespread” or “systematic”, that is, that the requirement is disjunctive rather than cumulative. (...) <sup>64</sup>

Pursuant to Article (7) of the Rome Statute, the two legal elements—that the attack was directed against any civilian and was widespread or systematic—are required in defining crimes against humanity. However, while the existence of a policy or plan may be relevant, it is not necessarily required to affirm that the attack or the acts of individual perpetrators met the threshold of crimes against humanity.<sup>65</sup>

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<sup>61</sup> *Prosecutor v. Kordic and Cerkez* (Judgment) ICTY IT-95-14-A, Appeal Chamber (17 December 2004) para.94 Available at <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00206980-00207003.pdf>

<sup>62</sup> *Prosecutor v. Kunarac et al.* (Judgement) ICTY IT-96-23/1-A, Appeal Chamber (12 June 2002) para.91 Available at <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>

<sup>63</sup> *Prosecutor v. Kunarac et al.* Judgement, para.94

<sup>64</sup> *Ibid*, para.97

<sup>65</sup> *Ibid*, para.98

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## Chapter (6)

### A Common Plan to Keep Min Aung Hlaing in Power

#### 6.1 Contrasting Laurent Gbagbo with Min Aung Hlaing

Laurent Gbagbo, who became the president of Ivory Coast in 2000, was arrested in 2011 for the alleged commission of crimes against humanity. He had refused to concede defeat in the election, and later conflict between his forces and rival presidential candidate Ouattara led to the deaths of around 3,000 people.<sup>66</sup> The ICC trial started on 28 January 2016, but Gbagbo was acquitted of all charges on 15 January 2019.

The Chamber concluded by majority that the Prosecutor has failed to demonstrate several core constitutive elements of the crimes as charged, including the existence of a "common plan" to keep Mr Gbagbo in power.<sup>67</sup>

..... that the Prosecutor failed to demonstrate that public speeches by Mr Gbagbo or Mr Blé Goudé constituted ordering, soliciting or inducing the alleged crimes. The Chamber decided that, accordingly, there is no need for the defence to submit further evidence.<sup>68</sup>

Even though the ICC Prosecutor filed a notice of appeal on 16 September 2019, the Appeals Chamber confirmed the acquittal with a majority on 31 March 2021.<sup>69</sup> The Appeals Chamber found that the evidence against Laurent Gbagbo, apart from the other co-accused, had been “exceptionally weak.”<sup>70</sup>

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<sup>66</sup> Philip Andrew Churm, ‘Former Ivory Coast president, Laurent Gbagbo, pardoned by Ouattara’ Africanews (7 August 2022) <https://www.africanews.com/2022/08/07/former-ivory-coast-president-laurent-gbagbo-is-pardoned-by-ouattara/> accessed 24 December 2022.

<sup>67</sup> ICC Trial Chamber I acquits Laurent Gbagbo and Charles Blé Goudé from all charges(15 January 2019) <<https://www.icc-cpi.int/news/icc-trial-chamber-i-acquits-laurent-gbagbo-and-charles-ble-goude-all-charges>>

<sup>68</sup> Ibid.

<sup>69</sup> ICC Case Information Sheet, ‘Situation in Cote d’Ivoire: The Prosecutor v. Laurent Gbagbo and Charles Ble Goude’ (updated July 2021).

<<https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/gbagbo-goudeEng.pdf>>

<sup>70</sup> ICC, ‘Appeals Judgment in the Gbagbo and Blé Goudé case at the ICC’, (31 March 2021).

<https://www.icc-cpi.int/sites/default/files/itemsDocuments/2021-03-31-gbagbo-ble-goude-judgment-faq-eng.pdf>

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The Majority of judges considered that the Prosecutor failed to submit sufficient evidence to prove the responsibility of Mr Gbagbo and Mr Blé Goudé for the specific incidents under the Chamber’s scrutiny.<sup>71</sup>

The majority of judges felt the prosecutor failed to submit sufficient evidence to prove that the specific incidents under the chamber’s scrutiny were the responsibility of Mr. Gbagbo and Mr. Blé Goudé.



*Military Council leader Min Aung Hlaing (Photo: Internet)*

## **6.2 The Possible Nexus between the case of Ivory Coast and that of Burma**

About nine months before the ICC adjudicated the Laurent Gbagbo case, ICC Prosecutor Fatou Bensouda, for the case of Rohingya, initiated investigation proprio motu claiming that the ICC had jurisdiction since the acts of forced deportation—although having their origins in the territory of a non-party (Burma)—have ongoing effects on the territory of a state party (Bangladesh).<sup>72</sup>

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<sup>71</sup> ICC, ‘Questions and answers on Trial Chamber I’s Acquittal’, (16 July 2019).  
<<https://www.icc-cpi.int/sites/default/files/itemsDocuments/GBG-QA-EN.pdf>>

<sup>72</sup> ICC, Application Under Regulation 46(3), Source: Office of the Prosecutor, 9 April 2018.  
<[https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018\\_02057.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02057.PDF)>

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From a reading of Art. 12.2.a, it appears to be sufficient that the alleged conduct has occurred on the territory of a state party in order for the ICC to exercise jurisdiction. That provision does not require that the nationals of the state party in question (here Burma) have committed the alleged conduct. It should thus be possible for the ICC to exercise jurisdiction over the nationals of any state as long as the alleged conduct has occurred on the territory of a state party.<sup>73</sup>

Afterward, in line with the initiative of the ICC Prosecutor, on 4 November 2019, the ICC Pre-Trial Chamber III authorized the prosecutor to proceed with an investigation for the alleged crimes within the ICC's jurisdiction over the situation in Bangladesh/Burma.<sup>74</sup>

**Next steps:** The Office of the Prosecutor will start collecting the necessary evidence from a variety of reliable sources, independently, impartially, and objectively. The investigation can take as long as needed to gather the required evidence. If sufficient evidence would be collected to establish that specific individuals bear criminal responsibility, the Prosecutor would then request Judges of Pre-Trial Chamber III to issue either summonses to appear or warrants of arrest. The responsibility to enforce warrants of arrest issued by an ICC Chamber remains with States. States Parties to the Rome Statute have a legal obligation to cooperate fully with the ICC. Other States may be invited to cooperate with the ICC and may decide to do so on a voluntary basis.

Although the ICC Prosecutor's effort with respect to Burma was remarkable, she might have hesitated to proceed with an investigation strenuously. That hesitation may have occurred because the ICC rendered its decision on Bangladesh/Burma about three months after the same court acquitted Laurent Gbagbo from Ivory Coast given the lack of a common plan to attack a civilian population.

Having thoroughly analysed the evidence, the Chamber concluded by majority that the Prosecutor failed to demonstrate several core constitutive elements of crimes against humanity as charged: in particular, the existence of the alleged common plan to keep Mr Gbagbo in power, which included the commission of crimes against civilians; the existence of the alleged policy to attack a civilian population" and the existence of patterns of violence from which it could be inferred that there was a "policy to attack a civilian population"; that Mr Gbagbo or Mr Blé Goudé knowingly or intentionally contributed to the commission of the alleged crimes or that their speeches constituted ordering, soliciting or inducing such crimes.<sup>75</sup>

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<sup>73</sup> Commented by David Fisher, Professor of International Law, Faculty of Law, Stockholm University, 17 April 2018.

<sup>74</sup> ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar, 4 November 2019. <<https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-situation-bangladesh/myanmar>>

<sup>75</sup> *ibid* (n 72).

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### 6.3 “Common Plan” and “Policy to Attack a Civilian Population”

Given the lack of a common plan, the ICC acquitted Laurent Gbagbo. A reasonable concern then arose insofar as Min Aung Hlaing, even if tried at the ICC, might enjoy a destiny like that of Laurent Gbagbo. If that should occur, the Tatmadaw would continue enjoying unbridled impunity in Burma; the gravest crimes of international concern would remain unabated. Moreover, the vicious circle would never be deterred; the brutal rule of the military dictatorship would persist; and Burma might never become a stable, peaceful, just, and developed society. Seeking accountability of primarily the Tatmadaw’s senior leaders has thus become a *sine qua non*.

In accordance with the doctrine of superior/command responsibility practiced in international law, superior/command responsibility is realized as a form of responsibility for the failure to act: superiors may be held criminally responsible under the doctrine when, despite awareness of subordinates’ crimes, superiors culpably fail to fulfill their duties to prevent and punish the crimes. The superior commanders of the Tatmadaw have abused this doctrine. Specifically, they attempted to cover up their own responsibility by acting against subordinate soldiers who committed a heinous crime against Rohingya on the ground in Rakhine State. The case of Inndin can be observed as an example.

Tatmadaw’s senior leaders normally sit in their luxurious high-command offices in Nay-pyi-daw, the capital of the country. For the gravest crimes committed against Rohingya, the senior leaders portrayed themselves as innocent persons who fulfilled their duty to prevent and punish such crimes. The leaders prepared to defend themselves if indicted in the International Criminal Court or an International Criminal Tribunal for Burma—like that of Yugoslavia. Even if the mission was possible, the situation made it quite difficult to establish linked evidence between the crimes against Rohingya that occurred on the ground on the one hand and the accountability of the superior commanders, led by Min Aung Hlaing, sitting in Nay-pyi-daw on the other. However, exploring the case of A Nang Pa may contribute to all efforts in seeking accountability of the Tatmadaw in their alleged commission of the gravest crimes in the country.





*Tatmadaw Officers (Photo: Internet)*

The doctrine of superior/command responsibility may be relevant only when the superior did not personally commit any of the gravest international crimes. But what if the superior personally provided orders to commit the stated crime as a common plan? In the case of Ivory Coast, the ICC prosecutor might have failed to prove that President Laurent Gbagbo committed such crimes. In the case of Burma, however, established facts show that aerial bombings or airstrikes on civilians can never occur without orders from a group of superiors headed by Min Aung Hlaing. Such orders occur under a system of chain of command being practiced by the Tatmadaw. This command structure connotes that—whenever aerial bombings or airstrikes, like those stated above, take place—the accountability vividly lies with Commander-in-Chief Min Aung Hlaing and his central command. It can be observed below.

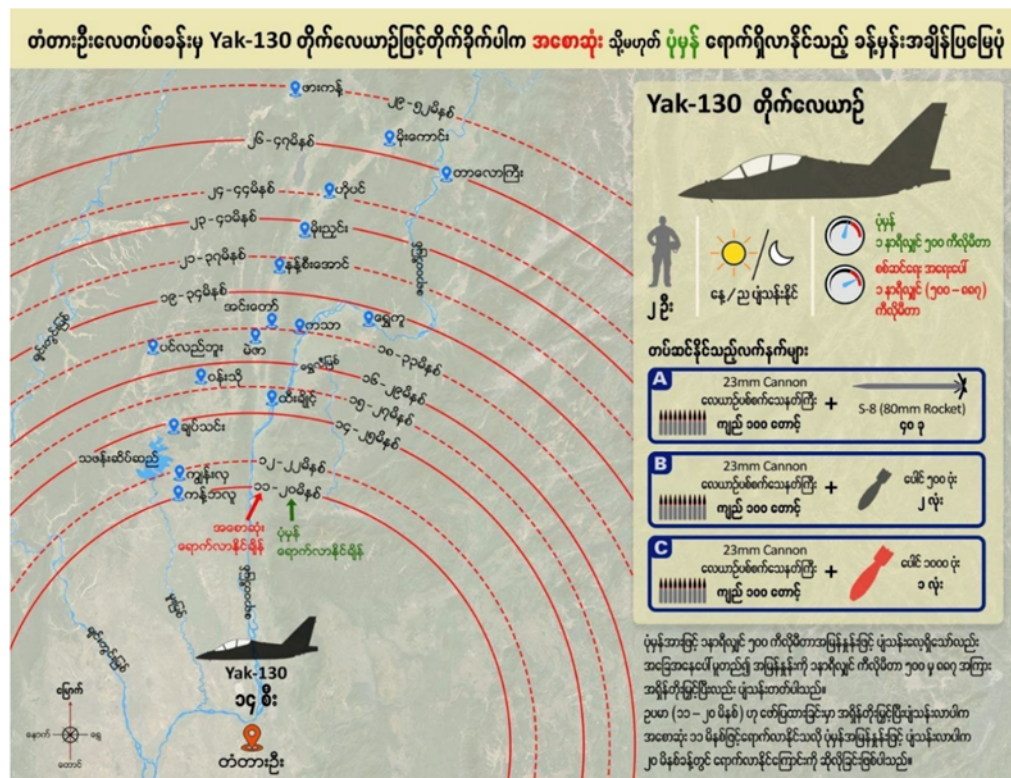
#### **6.4 Chain of Command**

According to the data collected by Enemy Air Route (EAR), three Tatmadaw fighter jets departed from the Tada-U Air Base on 23 October 2022, two at 7:45 pm and another at 7:48 pm. Those aircraft crossed Hti-gyaing Town at 8:05 pm and headed straight north. Reportedly, the jets attacked A Nang Pa at around 8:30 pm and landed at Tada-U air base at 9:12 pm, 9:17 pm, and 9:19 pm, respectively.<sup>76</sup>

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<sup>76</sup> Data collected by Enemy Air Route available at <https://t.me/enemyairroute>





Military experts suggested that the aircrafts were Russian-made Yakolev (Yak-130) (mitten), which are training and light combat jets. Eighteen active Yak-130 aircrafts are in the Tatmadaw's inventory.<sup>77</sup> While the jets can be equipped with S-13B 122mm (Penetrator), S-24B 240mm (Blast Fragmentation), and S-8KO 80mm rockets (HEAT), as well as a 23mm cannon, the Tatmadaw's Yak-130 are mostly equipped with S-8KO rockets.<sup>78</sup> Each fighter jet can release two rockets at a time, which corresponds to the 6 rockets used in the A Nang Pa attack. Reportedly, three combat aircrafts in A Nang Pa fired with the 23mm cannons and dropped at least four 500-pound aircraft bombs.

At the time of the aerial attack, no fighting was occurring between the belligerent parties—in this case, the Tatmadaw and Kachin Independence Army (KIA)—in A Nang Pa and its vicinity. In fact, there had not been any clashes in the Hpakant township area for nearly two months before the airstrike.<sup>79</sup>

The Directorate of Military Training, commissioned by the Commander-in-Chief of the Tatmadaw, revised and published its sixth edition of the “Responsibility of General Staff,” which is a

<sup>77</sup> FlightGlobal, World Air Forces Directory 2022 available at <https://www.flightglobal.com/download?ac=83735>

<sup>78</sup> Myanmar Witness, ARMS INVESTIGATION: Russian YAK-130 aircraft in Myanmar (29 July 2022) <https://www.myanmarwitness.org/reports/arms-investigation-russian-yak-130-aircraft-in-myanmar> accessed 6 December 2022.

<sup>79</sup> Interview with #2 (17 November 2022)

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manual or handbook. On pages 18–20 and 29–31 in Chapter 25, Military (Air Force), the manual fixes the rules and procedures for military activities carried out by other Tatmadaw corps when they request the support of the air force corp. The request for air assistance must be made in accordance with the following rules or procedures.

## **6.5 Requesting Air Assistance**

In order to make the request for air assistance simple and straightforward in the operations of the different Tatmadaw corps, every staff officer must fully understand the procedure in use for the request itself. When requesting air assistance, two procedures are used: planned and immediate air assistance.

**Planned Air Assistance:** Such assistance is requested through the hierarchical command line.

**Immediate Air Assistance:** Infantry troops shall make a direct request to their Tactical Operation Command for immediate assistance via the hierarchical command line. The local superior command of the troops must also be informed about this request. The Regional Military Command (RMC), Regional Operation Command, Infantry Divisions, and Military Operation Commands can coordinate with the central commands of the air force or their regional air commands at both military and civilian airport air bases, only if authorized by the central headquarters.

Despite having the capacity for the operation and the ability to coordinate with the local commands, the above-mentioned commands must request authorization for the use of the aircraft from the Office of the Chief of Army Staff. If the office decides to authorize immediate air assistance, the air assistance operation can be conducted in coordination with the Office of the Chief of Air Force Staff.

**Writing a Cablegram for Air Assistance:** To make the requesting process easy, clear, and quick, the cablegram shall be written in a manner that uses the following sub-sections:

(a) Status of Air Assistance

- (1) Planned Assistance
- (2) Immediate Assistance



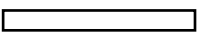




(b) Types of Air Assistance

- (1) Attack with aircrafts
- (2) Air reconnaissance
- (3) Airlift for wounded troops

- (4) Logistical transportation
- (5) Airborne attack
- (c) Mapping (stated with six digits)
- (d) Latest time and day
- (e) Best time and day
- (f) Tasks to be undertaken
- (g) Targeted area or place
- (h) Location of the troops
- (i) Other significances

## Communication System for the Air Assistance Request

### Reference

	Planned Assist
	Sudden Assist
	Coordination
	Directing Air force
	To command on allocation of authority
	To command on allocation of authority
	To communicate with air and ground forces

### Cablegram Registration Form

				Registration No
Name	No	Prioritization	Order	

(Only the communication office to use out of these boxes)

(U) Address of Writer	Date & Time	Received Date&Time
Address to take action		Office, Date
Seal		

Copy to Address

Writer No.            (a) Sudden;   (b) Attack with aircraft  
                              (c) L 604321   (d) 241654   (e) Not necessary  
                              (f) Combat     (g) Hilltop bunker at the front of the village  
                              (h) Target 1000 yards to North (i) Machine gun of the enemy also called as seagull

Explanation;        (1) For the best date and time, to describe “Not necessary” as it is an urgent assistance  
                              (2) To describe the necessary type of the attack in the aerial attack to enemy

..... **Reference End** .....

According to the ‘Responsibility of General Staff’ (f1-4-1002) of the Tatmadaw mentioned above, the aerial attack on A Nang Pa was clearly not ordered through the formal request of air assistance during a fight on the ground. Rather, the attack targeted civilians with systematic preparation at a time with no ongoing armed conflict. The following chart shows the high-ranking officers most responsible for the civilian-targeted aerial attack, based on the hierarchical command system of the Tatmadaw.

No.	Position/Name	Batch No.	Appointment	Remark
1	Senior General Min Aung Hlaing	Army - 14232 DSA Batch - 19	Commander-in-Chief of Defense Services	
2	Vice Senior General Soe Win	Army - 16489 DSA Batch - 22	Deputy Commander-in-Chief of Defense Services, Chief of Staff (Army)	
3	General Maung Maung Aye	Army - 18131 DSA Batch - 25	Joint Chief of Staff (Army, Navy, Air force)	
4	General Tun Aung	Air force - 1982 DSA Batch - 27	Chief of Staff (Air force)	
5	Lieutenant General Tayza Kyaw	Army - 20278 All Burma Federation of Student Unions - 73	Bureau of Special Operation 1, Commander Office the Chief of Staff (Army)	
6	Lieutenant General Moe Myint Tun	Army - 21395 DSA Batch - 30	General Staff (Army), Office of General Staff (Army)	
7	Lieutenant General Zaw Win Myint	Airforce - 2080 DSA Batch - 28	General Staff (Air force), Office of General Staff (Air force)	
8	Brigadier General Way Lin	Army – 29... DSA Batch - 39	Brigadier General of Staff (Operation), Office of General Staff (Army)	
9	Brigadier General (....)	(.....)	Brigadier General of Staff (Operation), Office of General Staff (Army)	
10	Brigadier General Zaw Min Oo	Air force (....) DSA Batch - 34	Brigadier General of Staff (Air force), Office of General Staff (Air force)	



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## **Chapter (7)**

### **A Conclusive Analysis**

# **For the Emergence of A Common Plan for Eradication of the Military Dictatorship in Burma**

### **7.1 Impunity and immunity issue: from the international law aspect**

The successive military regime had been committing war crimes, genocide and crimes against humanity, including multiple violations of international humanitarian laws, international criminal laws and international legal doctrines. Yet the perpetrators of these crimes continuously enjoy absolute impunity. Hence, the Min Aung Hlaing regime has unsurprisingly continued to commit unspeakable crimes, without any regard for humanity, in a frenzy after the military coup. The Tatmadaw's indiscriminate attacks detailed in this report, including the airstrikes on both Let Yet Kone and A Nang Pa, provide just a small example of such attacks.

While the armed conflict is not of an international character, the crimes committed by the Tatmadaw are so heinous that the crimes may even amount to crimes against humanity. The international community thus has an obligation to protect and prevent these crimes in order to end the unbridled impunity, being enjoyed by the successive military regimes, in Burma. Notably, the electoral disputes alleged by the regime were not the only motives behind the military coup that has led the country into the current catastrophic situation; the goal was also to keep the Min Aung Hlaing regime in power.

Regarding why the military staged a coup on February 1, 2021, a comment provided by the UN Special Envoy is worth observing: Min Aung Hlaing was due to retire in June, so may be he was worried about his immunity given the ICC and ICJ legal proceedings.<sup>80</sup> Accordingly, rather than recognizing the November 2020 election result that would allow the NLD to retain power, Min Aung Hlaing led the coup. This situation has served as a siren call for the generals to grip power tightly to circumvent the efforts of the international justice mechanisms.

However, even if impunity and immunity issues can be dealt with properly by the international community, Burma still needs to effectively address people's rights to self-determination leading to the

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<sup>80</sup> Press Conference on the Situation in Myanmar by Christine Schraner Burgener, the UN Special Envoy, (3 March 2021). <<https://www.unmultimedia.org/avlibrary/asset/2605/2605832/>> accessed 18 Nov 2021.

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emergence of a federalism suited to Burma with the underpinning of the rule of law. Only then, will the country become a stable, just, peaceful and developed society.

## 7.2 A Federalism Approach

Following the coup and commencing from February 6, 2021, the youths who led the Civil Disobedience Movement (CDM) asked for democracy in general terms. But after the ethnic groups joined the movement, countless numbers of people expressly called for federal democracy. The CRPH, mostly influenced by NLD leaders, thus faced the federalism issue, and was required to deal with it, given the public pressure. Unfortunately, after a series of discussions with many ethnic organizations, the CRPH ended up with a Federal Democracy Charter filled with uncertainties although also including some valuable provisions. Given this continued topicality of the federalism approach, it will be duly observed in this conclusive analysis.

To facilitate the emergence of a federal union suited to Burma, the production of, and compliance with, the provisional/interim constitutions in both federal and provincial levels is a *sine qua non* even during the struggle against the military dictatorship. It will undoubtedly be a daunting task given the lack of constitutional culture in Burma, but not impossible. The stated provisional/interim constitutions are required to reflect core values contained in the Federal Constitution (First Draft), the FCDCC Constitution (Second Draft), some valuable parts of the Federal Democracy Charter, and the provisions legitimizing the combinations of *de jure* and *de facto* standards and the others dealing with, or resolving, the current underlying issues taking place on the ground.

In support of this, the following characteristics of a federalism suited to Burma may be worth observing to facilitate the emergence of a successful federal union:

1. Promotion and protection of human rights must be a top priority; human rights must be protected by the rule of law; and, upholding the rule of law should be a prime focus;
2. The power of judicial review must be practiced by the independent, impartial, efficient and resource-rich judiciaries on federal and states/provinces levels of governments, as an implementation of constitutionalism that accentuates limited government;
3. The independent formation and operation of political parties, which exercise diverse political ideologies, and of Civil Society Organizations (CSOs)<sup>81</sup> need to be guaranteed;

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<sup>81</sup> Note: In a federal union existence and operation of such CSOs are vital, *inter alia*, for two reasons: they can check the power abuses of the three levels of government and their operations, transcending boundaries of one or more constituent

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4. The formation of transparent and accountable democratic governments, primarily representing the diverse ethnic minorities and citizens of the respective ethnic states, is required in all three levels of the Federal Union; and,
  5. Having met the four situations stated above, with the participation and cooperation of the ethnic states/provinces – including Myanmar state/province, which exercises provincial sovereignty – a new federal democratic union may be formed.

### **7.3 Seeking trust with the emergence of a legislative assembly at the federal union level in support of a genuine peace-seeking process**

The formation of the NUG, with the combination of the *de jure* and *de facto* standards, is significant. Nevertheless, it does not suffice to deal with the flaws of the electoral system.

The previous elections, including the 2020 elections, resulted in a distorted seat allocation for the ethnic minorities in the legislative assemblies. Conversely, the ethnic nationalities and their states/provinces express their wishes to make their laws and create their own destiny. More importantly, in attempting to seek trust from major EROs and ethnic political parties and to resolve the underlying issues taking place on the ground, a formal and legitimate venue with an accountable mechanism is required for political negotiation and mediation. There is currently nothing but a legislative assembly at the federal union level.

In the 2020 elections, the NLD party alone won a landslide victory.<sup>82</sup> Hence, the concern of the EROs is somewhat reasonable that the ethnic political parties would never get an opportunity to influence the law and law-making process; and it recommends that the ethnic minorities should replace the military who occupy 25% seats.<sup>83</sup>

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units, tackling common issues confronting people inhabiting many constituent units, and facilitate the unification of the entire federal union. Although state agencies are highly valuable, they are not the only actors; the CSOs have proliferated in recent decades and their participation in global governance activities have increased dramatically.

<sup>82</sup> (US-ASEAN Business Council) Myanmar Analytical Update: Ruling NLD Party Wins 2020 General Elections in a Landslide; Will Form New Government (12 November 2020) <<https://www.usasean.org/article/2020/11/12/myanmar-analytical-update-ruling-nld-party-wins-2020-general-elections-landslide>> accessed 16 July 2022.

<sup>83</sup> United Wa State Party, 'The general policy of the Wa state on political dialogue: Detailed Requests' (UWSP, document submitted to the First Union Peace Conference 31 August 2016) pt 3 Seat Allocations for Members of the Legislative Assembly. Available at <https://drive.google.com/file/d/1bMDbw2m0kP06fFBcv2mgnjyDcEvDyniv/view> accessed 5 August 2020.

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To resolve this, there are the four ways: (1) 25% seat occupied by the military must be permanently removed; (2) In a new Federal Democratic Constitution, except for the matters delegated to the federal level governmental institutions for the common interests of the Ethnic States/Provinces, law making powers should remain in the state/province legislative assemblies; (3) As has been the case in Belgium, a federal country,<sup>84</sup> in the legislative assemblies, seats for ethnic minorities, whose population is quite low, should be reserved; (4) Having been promoted the FTPT to the Two Round System (TRS), a Proportional Representation electoral system should be added. Even if it is rather complicated, it would be beneficial for the long-term interests of the entire Federal Union, particularly those of the Ethnic States/Provinces.

Under the 2008 Constitution, a FPTP system alone is guaranteed. The practice of a PR system is potentially prohibited as merely “township constituency” is fixed.<sup>85</sup> The Federal Democracy Charter displays a similar mistake by repeatedly using the term “township constituency” in connection with the population provided for in the 2008 Constitution,<sup>86</sup> thereby blocking the PR electoral system that would enhance ethnic minority representation in Parliament. Nor does the Charter guarantee reserved seats in Parliament for ethnic nationalities without passing through elections. As such, the Charter will be a mere continuation of majoritarian democracy, which has been one cause of the civil war in the country.

In the November 2020 elections, a substantial dispute arose involving the independent status of the UEC, operated under the 2008 Constitution.<sup>87</sup> Generally, all UEC members are selected and appointed by the President alone<sup>88</sup> without input based on the will of the constituent units of the Federal Union, in terms of Ethnic States/Provinces.<sup>89</sup> Regarding how to form an independent election commission, the Charter is silent.<sup>90</sup> In addition, the Charter makes a similar mistake by establishing the

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<sup>84</sup> The Parliament of the Brussels-Capital Region in Belgium includes 17 reserved seats for the Flemish minority on a total of 89, but there are no separate electorates. <[https://en.wikipedia.org/wiki/Reserved\\_political\\_positions](https://en.wikipedia.org/wiki/Reserved_political_positions)>

<sup>85</sup> *Constitution 2008* Art. 109 (a).

<sup>86</sup> Federal Democracy Charter, Part 1, ch 4, pt 3, para 7.

<sup>87</sup> Nehginpao Kipgen, ‘The 2020 Myanmar Election and the 2021 Coup: Deepening Democracy or Widening Division?’ (2021) 52 *Asian Affairs* 1, 5-11; Su Mon Thant and Nicholas Ross, ‘Myanmar’s electoral management institutions: the challenges of monitoring’ (New Mandala 30 September 2020) <<https://www.newmandala.org/myanmars-electoral-management-institutions-the-challenges-of-monitoring-the-2020-elections/>> accessed 18 March 2022; Soe Thu Aung, ‘2020 Myanmar elections see more electoral disputes than previous elections’ (Mizzima 21 November 2020) <<https://www.mizzima.com/article/2020-myanmar-elections-see-more-electoral-disputes-previous-elections>> accessed 18 March 2022.

<sup>88</sup> *Constitution 2008* Art. 398.

<sup>89</sup> The Constitution of the Federal Republic of the Union of Burma (Second Draft) Art. 187.

<sup>90</sup> Federal Democracy Charter, Part 1, ch 4, pt 3 para 15(b).

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position of State Counsellor.<sup>91</sup> Under the Charter, the State Counsellor ranks above the Prime Minister, who is the Chief Executive.<sup>92</sup> This hierarchy contradicts the practice of any democratic country that practices a parliamentary system. Further, the Charter does not prescribe how the President and Deputy President are elected by setting out a presidential election system. Their positions appear to be carried over from the 2008 Constitution.<sup>93</sup> Given the above, the Charter incorporates the mistaken legacies of the past.

With reference to the above situations, even if the legality of the 2020 elections is recognized, a federal union legislative assembly should not be convened merely with the members elected in the 2020 elections. From the perspective of the Ethnic States/Provinces, no taxation without representation principle should be heeded. To facilitate resolving this, the **Federal Assembly** should be formed within the first phase of the interim period, with the inclusion of the following portions.

- (1) 65% of all elected persons at Union level in the 2020 general election.
- (2) 35% of the representatives selected by the major Ethnic Resistance Organization (ERO)<sup>94</sup> from each Member State/Province or selected through negotiation among them if there is more than one Ethnic Resistance Organization within a Member State/Province.

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<sup>91</sup> *ibid*, Part 2 ch 3 para 7(b).

<sup>92</sup> *ibid*.

<sup>93</sup> Note: There is no country – in which a military official chosen and sent by the Commander-in-Chief of the Armed Forces can become the President or even the Deputy President – in accordance with the Constitution. Nor is the practice of the presidential electoral system under the 2008 Constitution in line with other countries applying a presidential system.

<sup>94</sup> Definition of the Ethnic Resistance Organizations

Any armed organizations that meet the following criteria shall be considered as Ethnic Resistance Organization:

- (A) Having at least 10 years of experience fighting consistently against the military dictatorship and the Myanmar Army in pursuit of self-determination or by upholding any political ideologies;
- (B) Being independent organizations, which have effective political leadership and objectives and are by no means under the command of the Tatmadaw; and not being an organization separated from the mother Organization;
- (C) Having systematically organized armed Forces with more than (1000) troops at the very least, under their political leadership and command;
- (D) Having a designated or controlled territory; and,
- (E) Organizations that stand against the military coup and are willing to protect the people participating in the CDM movement and the peaceful protesters.



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## 7.4 Responsibility of States to Comply with International Law

Under the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), States bear responsibility for internationally wrongful acts and omissions, including acts and omissions which violate the peremptory norms of general international law.<sup>95</sup> Breaches of such norms include genocide, war crimes, crimes against humanity, torture, etc. Cases encompassing accusations for such crimes by the Tatmadaw are presently underway against Burma in the ICJ<sup>96</sup> and relate to the period before the 2021 coup. A proceeding involving individual responsibility for international crimes is underway in the ICC.<sup>97</sup>

In attempting to deal with the situations primarily involving international crimes in Burma, the entire international community, particularly ‘States’, are obligatory to comply with the rule of international law aiming to uphold the rule of law.

The International Law Commission highlighted the hierarchical superiority of peremptory norms of general international law (*jus cogens*) norms and they are hierarchically superior to other norms of international law in terms of both characteristic and its effect.<sup>98</sup> Accordingly, the military perpetrators led by Min Aung Hlaing, who allegedly committed the gravest crimes of international concern, must be held accountable. The applicability of *jus cogens* norms does not depend on the consent of States, nor ANSAs, to be bound. They are universally applicable. States cannot derogate from them by creating their own special rules<sup>99</sup> such as ‘Humanitarian Ceasefire’<sup>100</sup> which might prolong the rule of the military dictatorship. The Commission’s criteria for *jus cogens* norms are drawn from the definition contained in Article 53 of the 1969 Vienna Convention. Accordingly, any treaty provisions are void if they conflict with *jus cogens* norms, accepted and recognized by the international community of States as a whole.<sup>101</sup>

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<sup>95</sup> Art. 1 and cf. Art. 26. <[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)> accessed 6 January 2022.

<sup>96</sup> International Court of Justice (ICJ); 2021 28 January General List No. 178. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (THE GAMBIA v. MYANMAR), ORDER. <<https://www.icj-cij.org/public/files/case-related/178/178-20210128-ORD-01-00-EN.pdf>>

<sup>97</sup> ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar, ICC Press Release (14 November 2019). <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>>.

<sup>98</sup> United Nations General Assembly, ‘Draft report of the International Law Commission on the work of its seventy first session’, conclusion (8), (12 June 2019). <<https://legal.un.org/ilc/reports/2019/english/chp5.pdf>>

<sup>99</sup> ILC, ‘Report of the International Law Commission on the Work of its 71<sup>st</sup> Session’ (29 April-7 June and 8 July-9 August 2019) UN Doc A/74/10, p. 155, Conclusion (3), para 12.

<sup>100</sup> Legal Aid Network (LAN), ‘A Legal Analysis Statement of the Ceasefire Agreement Concluded Between the ULA/AA and the Military Council in Burma (The First Part)’ <<https://bit.ly/3WSp2lc>>

<sup>101</sup> 1969 Vienna Convention, Article 53 and 64.

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## 7.5 A New Approach to Transitional Justice

In Burma, unless the accountability issue can be resolved effectively with the underpinning of the rule of law, genuine peace might never be achieved. In many countries with armed conflicts, all the perpetrators could not be held accountable even if dialogue processes brought a noticeable achievement, so the rule of law could not be upheld completely. However, the accountability issue was somewhat addressed in these countries, by applying the transitional justice concept.<sup>102</sup> Regarding Burma, even if the term “national reconciliation” was rhetorically and repeatedly claimed, transitional justice measures were never undertaken. Importantly, Burma is different from those countries as the perpetrators who committed human rights violations, amounting to the gravest international crimes, cannot be addressed through the simple notion of transitional justice. Accountability must be sought, at a minimum, until the new state security institutions and independent judiciary emerge primarily to protect and promote human rights. In support of this notion, the EU’s position may be noteworthy and worth observing.

In addition to conducting normal transitional justice measures, the EU has become focused on ending impunity and seeking accountability, thereby contributing more to re-establishing and strengthening the rule of law<sup>103</sup> rather than justice. The EU program is notable in three ways: First, the importance of criminal justice is highlighted, and states are reminded that it is their obligation to investigate and prosecute “serious crimes under international law.”<sup>104</sup> Second, the role of the ICC is underlined, and effort is exerted to fill the gap between international and national legal mechanisms while invoking the complementarity principle provided for under Article 1 of the Rome Statute.<sup>105</sup>

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<[https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)> accessed 6 January 2022.

<sup>102</sup> United Nations, Building Just societies: Reconciliation in transitional settings, Workshop report, AccrA, GhAnA, (5-6 June 2012) 6.

<[https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/12-58492\\_feb13.pdf](https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/12-58492_feb13.pdf)>

Note: The stated reconciliation concept and process unequivocally lacked in Burma at least over the previous three decades despite having a rhetoric term ‘national reconciliation’.

<sup>103</sup> The EU’s Policy Framework on support to transitional justice (2020)

<[https://eeas.europa.eu/archives/docs/top\\_stories/pdf/the\\_eus\\_policy\\_framework\\_on\\_support\\_to\\_transitional\\_justice.pdf](https://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf)>

<sup>104</sup> *ibid* EU 5.

<sup>105</sup> *ibid* EU 3:

‘The EU and its Member States provide support to third countries in order to assist them in developing and strengthening their capacities to meet the obligations arising out of the Rome Statute by, e.g. promoting national legislation implementing the Rome Statute and supporting justice and rule of law programmes with a focus on criminal justice, as underlined in the Toolkit for bridging the gap between International and National Justice.’

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Finally, to guarantee non-recurrence, the significant role of institutional reform—an instrumental foundation for the rule of law—is accentuated.<sup>106</sup>

## **7.6 A Brief Analysis of National Defense Authorization Act – NDAA, 2023, (USA) from the aspect of the ethnic nationalities’ right to self-determination**

In connection with human rights situations in Burma, the emergence of the above act<sup>107</sup> in the US must be welcome and also highly appreciated. It attempts to address several underlying issues focusing on protection of the rights of minority groups leading to a federalist form of government.<sup>108</sup> In connection with this, the law particularly seeks accountability of perpetrators who committed human rights violations against ethnic groups and the people of Burma.<sup>109</sup> It is notable that the rights of ethnic groups are accentuated more than the general public, in terms of the people.

In addition, the said law continues to authorize the US government to facilitate programs to strengthen federalism in and among ethnic states in Burma.<sup>110</sup> In regard to the NDAA, apart from the international community, all various ethnic nationalities in Burma should be noteworthy that only after stating ‘a federalist form of government’ and ‘federalism’, the law stipulates the term ‘ethnic states.’ As such, it is crystal clear that the stated term just refers to the ‘ethnic states/provinces’ which form a federal union and exist within its federal framework, rather than independent ethnic states. Afterward, the law authorizes the US government to provide technical support and non-lethal assistance for Burma’s Ethnic Armed Organizations.

Such a legal and formal recognition of the ethnic nationalities and their representative organizations never transpired in the history of the US. The other states may follow suit. The NDAA stands as a symbol for the victory of all ethnic nationalities who have been tremendously and desperately suffering since independence of the country until today.

According to the NDAA, under a statement of policy, the NUG, NUCC, and CRPH are indicated as well,<sup>111</sup> and they also deserve to receive support. However, they may be mindful that the law has not

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<sup>106</sup> *ibid* EU 7.

<sup>107</sup> National Defense Authorization Act – NDAA, 2023, United States of America. Available at: <https://www.congress.gov/bill/117th-congress/house-bill/5497/text>

<sup>108</sup> The NDAA, Part I – Matters Relating to the Conflict in Burma, Sec 5569 Statement of Policy, para 3.

<sup>109</sup> *ibid*, para 4.

<sup>110</sup> NDAA Part 3, Authorization of Appropriations for Assistance for Burma, Sec 5575, General Authorization of Appropriation, para 1.

<sup>111</sup> *ibid* (n 110) para 3.

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yet formally recognized the NUG per se as an official government of Burma and that the law encourages the NUG to recognize, and attempt to fully cooperate with, the EROs. To facilitate this, many EROs which have been joining hands with the State Administrative Council or the Military Council led by Min Aung Hlaing must evaluate their mistaken policy and leave the latter behind once and for all. To implement the effective and legal cooperation between the two entities stated above, they should negotiate each other, establish formal or informal dialogues surrounding a federalism suited to Burma and based on it, produce a provisional/interim federal democratic constitution together.

## **Chapter (8)**

### **Recommendation**

While struggling against the military dictatorship, to lay down a rule of law foundation encompassing the entire country and all stakeholders including ANSAs and PDFs is a sine qua non. In spite of maintaining ethnic nationalism leading to the emergence of a federalism suited to Burma, protection of human rights with the underpinning of the rule of law must be a prime priority. It is to be undertaken, at a minimum, in line with the Geneva Convention, also known as law of war, even in a non-international armed conflict. To this end, in connection with the 2020 election results, constitutionalism which focuses on limited government concepts needs to be activated. Finally, a strong national legal order – which is essential for a just, peaceful and prosperous society – is recommended highlighting the core and distinguishing feature of law.

Legal Aid Network has called on the anti-coup resistance groups, EROs, and NUG to do the following:

- (a) Adopt the provisional federal democratic constitutions in ethnic states/provinces and federal central level incorporating measures for a transitional justice process, as well as measures to support the future prosecution of Min Aung Hlaing and his accomplices;
- (b) Form the ethnic states/provinces and federal union legislative assemblies with the combination of de jure and de facto standards as an implementation of the 2020 election result in line with a federalism suited to Burma, alongside the emergence of the Federal Supreme Court and States/Provinces Chief Courts in accordance with the constitutions stated above;
- (c) Produce a Military Law invoking the Geneva Convention so that civilians can be effectively protected during the armed conflicts that might not be terminated shortly;
- (d) Facilitate the emergence of a new Federal Union Army and enact a Federal Union Army Act so that, apart from others, a joint command structure for the FUA can be created, ensuring that the

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violations of the Military Law and Federal Union Army Act allegedly committed by the resistance groups can also be deterred and punished;

- (e) Repeal the 2010 Judicial Law that denies an independent judiciary which exercise limited government norms, and produce new judicial laws that exercise civilian judicial oversight of the military tribunals by both states/provinces and federal-level central legislatures;
- (f) Raise the criminal accountability of the State Administrative Council or the Military Council led by Min Aung Hlaing nationally and internationally whenever they conduct aerial bombings and airstrikes anywhere in the future to impose tremendous pressure on those in power, thereby restraining them from conducting the stated brutal actions;
- (g) Exert extensive efforts to hold Min Aung Hlaing and his senior accomplices accountable in the International Criminal Court (ICC), International Criminal Tribunals, or the hybrid courts; and
- (h) Continue providing technical, financial, and humanitarian support to the victims of heinous crimes, IDPs, anti-coup resistance groups, and investigative commissions.