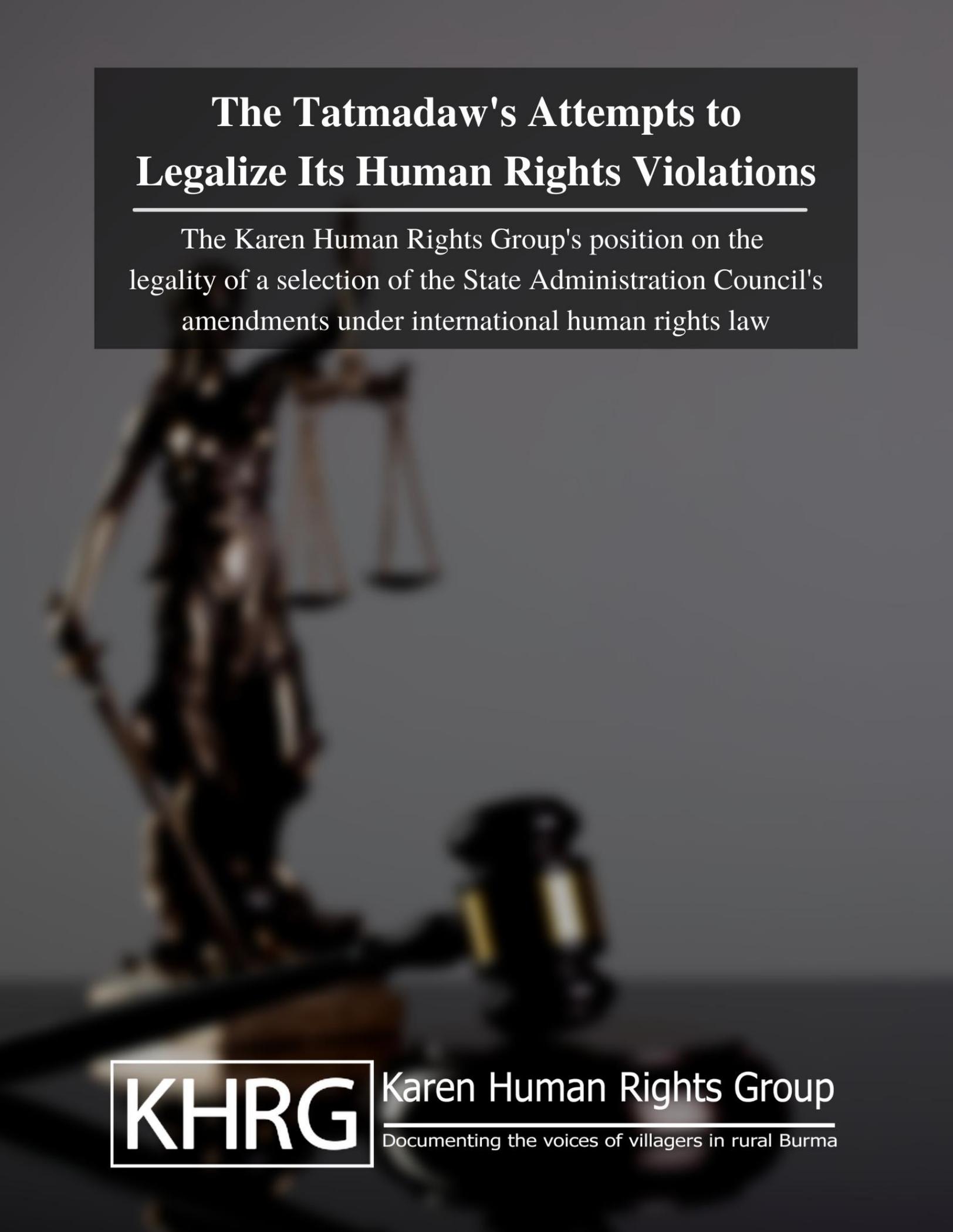


The Tatmadaw's Attempts to Legalize Its Human Rights Violations

The Karen Human Rights Group's position on the
legality of a selection of the State Administration Council's
amendments under international human rights law



KHRG

Karen Human Rights Group

Documenting the voices of villagers in rural Burma

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1. PREFACE

The Tatmadaw, led by Senior General Min Aung Hlaing, initiated the military coup on February 1, 2021 which forcibly seized power from the democratically elected National League for Democracy and pushed Myanmar into the current state of nationwide political instability marked by ongoing impunity for human rights violations and an exacerbating humanitarian crisis. Since then, security forces have been employing extremely violent tactics against the general populace in major cities — tactics which have been regularly used to persecute ethnic minorities even before the coup, especially in the peripheries of the country.

From the outset, the UN Special Rapporteur on the Situation of Human Rights in Myanmar warned that the atrocities committed by the junta since the coup could amount to crimes against humanity.¹ Some of these atrocities entail the disproportionate use of force against demonstrators and strikers;² killings of at least 884 people;³ arbitrary arrests and enforced disappearances of thousands of people including journalists, activists and others opposed to the coup;⁴ raids of homes without warrants to arrest and detain those suspected of being in opposition to the coup;⁵ and torture of detainees.⁶

In conjunction with these acts of violence against civilians is the Tatmadaw's unlawful use of article 419 of the 2008 Constitution to form the State Administration Council ("SAC")⁷ through which it then enacted several amendments to Myanmar's domestic laws which have encroached upon the fundamental freedoms of the people of Myanmar. Specifically, article 419 permits the Commander-in-Chief of the Defence Services ("Chief of Defence Services") to form a body to exercise powers of the executive, legislature, and judiciary after the President declares a "state of emergency" (article 417) and transfers all branches of the government to the Chief of Defence Services (article 418).⁸ Experts on Myanmar's Constitution have pointed out, however, that the Tatmadaw's February 1 declaration of a "state of emergency" under article 417⁹ is absent of any legal basis, as it is impossible for allegations of voter fraud during the

¹ "Statement by Thomas H. Andrews UN Special Rapporteur on the Situation of Human Rights in Myanmar United Nations Human Rights Council" (*UN Office of the High Commissioner for Human Rights*, March 11, 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26884&LangID=E>> accessed July 1, 2021.

² UN Human Rights Council "Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Thomas H. Andrews" (March 4, 2021) A/HRC/46/56 ("Report of the Special Rapporteur on the Situation of Human Rights in Myanmar") [49]–[52].

³ As of June 30, 2021, the Assistance Association for Political Prisoners ("AAPP") estimates that 884 people were killed by the junta, see at "Daily Briefing in Relation to the Military Coup" (*AAPP*, June 30, 2021) <<https://aappb.org/?p=16231>> accessed 1 July 2021. See also, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (n 2) [29]–[48].

⁴ "Myanmar: Hundreds Forcibly Disappeared" (*Human Rights Watch*, April 2, 2021) <<https://www.hrw.org/news/2021/04/02/myanmar-hundreds-forcibly-disappeared>> accessed July 1, 2021; Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Thomas H. Andrews (n 2) [53]–[60].

⁵ "Don't Open the Door': Junta's Midnight Raids Arouse Fear and Resistance" *Frontier Myanmar* (February 16, 2021) <<https://www.frontiermyanmar.net/en/dont-open-the-door-juntas-midnight-raids-arouse-fear-and-resistance/>> accessed June 16, 2021 ("Frontier Myanmar, 'Don't Open the Door': Junta's Midnight Raids Arouse Fear and Resistance"); Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (n 2) [55].

⁶ "Myanmar: Teenager Describes Torture, Mock Burial" (*Human Rights Watch*, June 22, 2021) <<https://www.hrw.org/news/2021/06/22/myanmar-teenager-describes-torture-mock-burial>> accessed July 1, 2021 ("HRW, Myanmar: Teenager Describes Torture, Mock Burial"); "US Editor Nathan Maung Says He Was Tortured by Myanmar Junta" *South China Morning Post* (June 27, 2021) <<https://www.scmp.com/news/asia/southeast-asia/article/3138951/us-editor-nathan-maung-says-he-was-tortured-myanmar-junta>> accessed July 1, 2021 ("SCMP, US Editor Nathan Maung Says He Was Tortured by Myanmar Junta"); "Tortured to Death in Myanmar Regime Custody" *The Irrawaddy* (June 10, 2021) <<https://www.irrawaddy.com/news/burma/tortured-to-death-in-myanmar-regime-custody.html>> accessed July 1, 2021 ("The Irrawaddy, Tortured to Death in Myanmar Regime Custody").

⁷ The Myanmar Times, "Myanmar Military Announces New State Administrative Council" (*The Myanmar Times*, February 2, 2021) <<https://www.mmtimes.com/news/myanmar-military-announces-new-state-administrative-council.html>> accessed 26 May 2021.

⁸ Constitution of the Republic of the Union of Myanmar ("Constitution") 2008 arts 417-419.

⁹ Frontier Myanmar, "Tatmadaw Seizes Power under State of Emergency, to Rule for a Year" *Frontier Myanmar* (February 1, 2021) <<https://www.frontiermyanmar.net/en/tatmadaw-seizes-power-under-state-of-emergency-to-rule-for-a-year/>> accessed 26 May 2021.

November 2020 elections to amount to a “state of emergency”. According to experts, article 417 relates to a situation in which the sovereignty of the country is threatened through “violent and wrongful forcible means” which involves the use of force.¹⁰ Further, the Tatmadaw’s declaration of a “state of emergency” is unconstitutional as the Constitution only gives the President, who was arrested and detained by the Tatmadaw since February 1, the power to declare a state of emergency.¹¹ It is manifest that the SAC is an illegal entity and that any powers it exercises (executive, legislative, and judiciary) including the amendments it enacts are invalid under the Constitution.

2. PURPOSE AND SCOPE

The amendments the SAC enacted in the weeks following February 1 also bear adverse consequences for the protection of the fundamental rights of the people of Myanmar under international human rights law. Therefore, this brief examines the legality of some of the amendments in accordance with some of Myanmar’s legal obligations under international human rights law. Taking note that Myanmar is not a state party to some international human rights treaties such as the International Covenant on Civil and Political Rights (“ICCPR”),¹² this brief also identifies relevant non-binding principles in the Universal Declaration of Human Rights (“UDHR”) and ASEAN Human Rights Declaration (“AHRD”). At the same time, this brief demonstrates the SAC’s attempts to legitimize its human rights violations by using its illegitimate authority to enact invalid amendments to Myanmar’s domestic law to institute a climate of impunity for its human rights violations. Finally, it includes some recommendations on actions that ASEAN, the National Unity Government, and states can take to protect and promote the fundamental rights of the people of Myanmar.

The analysis of this brief is limited in scope. The four amendments examined in this brief, outlined in Section 3 (Overview of Selected Amendments), were selected based on their prominence in the news at the time that the concept of this brief was conceived in early March 2021. Similarly, the scope of analysis in Section 4 (Applicable International Law) and Section 5 (Analysis) is a non-exhaustive account of the relevant international human rights standards applicable to Myanmar. The examined human rights laws and principles focus on night raids, arbitrary arrests and detentions, and restrictions of social media platforms and internet shutdowns as these featured most prominently in the news within the period of February to April 2021 during which the concept of this brief was under discussion. In recent months, more of the SAC’s atrocities have come to light particularly its perpetration of sexual and gender-based violence against girls, women, and members of the LGBTIQ community.¹³ In this regard, further research could focus on a gender-analysis of the coup which could, for instance, include some of Myanmar’s relevant human rights treaty obligations such as the Convention on the Elimination of Discrimination against Women.

¹⁰ Melissa Crouch, “Myanmar Coup Has No Constitutional Basis” (*East Asia Forum*, February 3, 2021) <<https://www.eastasiaforum.org/2021/02/03/myanmar-coup-on-the-pretext-of-a-constitutional-fig-leaf/>> accessed June 22, 2021 (“Crouch, ‘Myanmar Coup Has No Constitutional Basis’”); Sujit Choudry and Asanga Weikala, “Myanmar’s Military Coup d’État Is Unconstitutional” (*Verfassungsblog*, February 15, 2021) <<https://verfassungsblog.de/myanmars-military-coup-detat-is-unconstitutional/>> accessed June 22, 2021 (“Choudry and Weikala, ‘Myanmar’s Military Coup d’État Is Unconstitutional’”); Sebastian Strangio, “Was Myanmar’s Coup Legal? And Does It Matter?” *The Diplomat* (February 17, 2021) <<https://thediplomat.com/2021/02/was-myanmars-coup-legal-and-does-it-matter/>> accessed June 22, 2021 (“Choudry and Weikala, ‘Was Myanmar’s Coup Legal?’”).

¹¹ Crouch, “Myanmar Coup Has No Constitutional Basis” (n 10); Choudry and Weikala, “Myanmar’s Military Coup d’État Is Unconstitutional” (n 10); Strangio, “Was Myanmar’s Coup Legal?” (n 10).

¹² For list of international human rights treaties ratified by Myanmar, see “Status of Ratification Interactive Dashboard” (*UN Office of the High Commissioner for Human Rights*) <<https://indicators.ohchr.org/>> accessed July 2, 2021.

¹³ See most recently, “Myanmar’s LGBTIQ Community Faces Death and Torture From Junta” *The Irrawaddy* (July 1, 2021) <<https://www.irrawaddy.com/news/burma/myanmars-lgbtqi-community-faces-death-and-torture-from-junta.html>> accessed July 5, 2021 (“The Irrawaddy, Myanmar’s LGBTIQ Community Faces Death and Torture From Junta”).

Ultimately, we hope that this brief would serve as a resource for civil society and community-based organizations to conduct further advocacy and research aimed to raise awareness on the SAC's use of its illegitimate authority to enact "laws"¹⁴ to encroach on the human rights of the people of Myanmar.

3. OVERVIEW OF SELECTED AMENDMENTS

SAC Law No. 3/2021 enacted the Fourth Amendment of the Ward or Village-Tract Administration Law. In particular, the amendment to section 17 requires any person living in a ward or village-tract to inform the ward or village-tract administrator of the arrival and departure of any overnight guests not listed in the family unit and not residing in the same ward or village-tract.¹⁵ Violation of section 17 leads to a "fine not exceeding ten thousand kyat", or a prison term not exceeding seven days if the person defaults on the fine.¹⁶

SAC Law No. 4/2021 enacted the Amendment of Law Protecting the Privacy and Security of the Citizens. The SAC suspended rights protected in sections 5, 7, and 8 of the Law Protecting the Privacy and Security of the Citizens.¹⁷ By suspending these provisions, authorities are permitted to enter into homes and private properties without a warrant for purposes of search, seizures, and arrests (section 5); to detain a person without a warrant for more than 24 hours (section 7); to intercept all forms of communications without a warrant (section 8); and to collect and seize all information and data gathered from intercepts (section 8).

SAC Law No. 5/2021 enacted the Law Amending the Penal Code. Amongst other changes to the Penal Code is the amendment of section 505 (a). Section 505 (a) has been broadened to allow authorities to prosecute individuals, *inter alia*, for causing or intending to cause "fear to a group of citizens or to the public"; for spreading "false news"; or for "affect[ing], hinder[ing], damag[ing] the motivation, discipline [or] health" of a civil servant.¹⁸

SAC Law No. 7/2021 enacted the Law Amending the Electronic Transactions Law. Relevant to this brief is the inclusion of section 38 in the amendment to the 2004 Electronic Transactions Law ("ETL").¹⁹

- Section 38 (b) imposes criminal sanctions on a broad range of conduct regarding the handling of digital information. Specifically, a person (A) could be sanctioned for obtaining, disclosing, using, destroying, modifying, or disseminating any personal data of another person (B) without B's approval.

¹⁴ Throughout this brief, we use scare quotes with regards to the word "law" only when referring to the SAC's amendments as the SAC does not have the authority to amend or enact laws.

¹⁵ "Fourth Amendment Of The Ward Or Village-Tract Administration Law" (*Global New Light Of Myanmar*, February 14, 2021) <<https://www.gnlm.com.mm/fourth-amendment-of-the-ward-or-village-tract-administration-law/>> accessed May 25, 2021 ("GNLM, Fourth Amendment Of The Ward Or Village-Tract Administration Law").

¹⁶ *ibid.*

¹⁷ "Amendment Of Law Protecting The Privacy And Security Of The Citizens" (*Global New Light Of Myanmar*, February 14, 2021) <<https://www.gnlm.com.mm/amendment-of-law-protecting-the-privacy-and-security-of-the-citizens/>> accessed May 27, 2021("GNLM, Amendment Of Law Protecting The Privacy And Security Of The Citizens"); "Law Protecting the Privacy and Security of Citizens" (*Myanmar Centre for Responsible Business*, March 8, 2017) ("MCRB, Amendment Of Law Protecting The Privacy And Security Of The Citizens") ss 5, 7, 8 <https://www.myanmar-responsiblebusiness.org/pdf/Law-Protecting-Privacy-and-Security-of-Citizens_en_unofficial.pdf>.

¹⁸ For the full list of criminalized conduct, see "State Administration Council Law No (5/2021) Law Amending the Penal Code and State Administration Council Law No (6/2021) Law Amending the Code of Criminal Procedure" (*International Center for Not For Profit Law*, 2021) ("ICNL, 'State Administration Council Law No (5/2021) Law Amending the Penal Code and State Administration Council Law No (6/2021) Law Amending the Code of Criminal Procedure'") <<https://www.icnl.org/resources/library/state-administration-council-law-no-5-2021-law-amending-the-penal-code-and-state-administration-council-law-no-6-2021-law-amending-the-code-of-criminal-procedure>> accessed June 21, 2021.

¹⁹ The full Electronic Transactions Law Amendment is downloadable at, "Legislation Amending the Electronic Transactions Law" (*Free Expression Myanmar*) ("FEM, 'Legislation Amending the Electronic Transactions Law [unofficial translation]'" <<https://freeexpressionmyanmar.org/wp-content/uploads/2021/02/Electronic-Transaction-Law-Amendment-2021-EN-MM.docx.pdf>> accessed May 30, 2021.

- Section 38 (c) imposes criminal sanctions on anyone who creates “misinformation and disinformation” in the digital space with the intent of “causing public panic, loss of trust, or social division.”
- Section 38 (d) imposes criminal sanctions on a broad range of cybercrimes perpetrated with the intent to threaten national sovereignty, national security, and the rule of law, notions which are undefined in the provision. Some of these cybercrimes include preventing unauthorized access into one’s own digital platforms such as networks, computers or digital data (supposedly if a person takes measures to prevent authorities from conducting unlawful surveillance); and attempts to hack into digital platforms.
- Section 38 (e) imposes criminal sanctions on a range of cybercrimes committed with the intent to “deteriorate” Myanmar’s foreign relations with other states. These cybercrimes include vague and unclear language such as “attempts of unauthorized access and hacking cyber sources”.

4. APPLICABLE INTERNATIONAL LAW

A. Prohibition Against Arbitrary or Unlawful Interference with Privacy, Family, Home or Correspondence

Myanmar ratified the Convention on the Rights of the Child (“CRC”) in 1991. Article 16 (1) of the CRC imposes a legal obligation on Myanmar to ensure that “no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.”²⁰ Further, article 16 (2) also requires Myanmar to enact laws to protect the child from the prohibitions set out in article 16 (1).²¹ Finally, Myanmar has a non-derogable obligation to “respect and ensure”²² these rights under article 16 by making the best interest of the child a primary consideration,²³ through undertaking all appropriate measures including legislative and administrative.²⁴

Myanmar is also a signatory to the UDHR. Specifically, article 12 provides that “no one shall be subjected to arbitrary interference with [their] privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”²⁵ In a similar vein, article 21 of the AHRD holds a similar provision to article 12 of the UDHR, even going a step further to explicitly protect personal data from arbitrary interference.²⁶

B. Prohibition Against Arbitrary Deprivation of Liberty

Legally binding on Myanmar is customary international law’s absolute prohibition of arbitrary deprivation of liberty, wherein no derogation is permitted under any circumstances.²⁷ According to the Working Group on Arbitrary Detention, the content of the prohibition under customary international law includes arbitrary arrest and detention of a person which include measures

²⁰ Convention on the Rights of the Child (adopted November 20, 1989, entered into force September 2, 1990) 1577 UNTS 3 (“CRC”) art 16 (1).

²¹ *ibid* art 16 (2) (“The child has the right to the protection of the law against such interference or attacks”).

²² *ibid* art 2.

²³ *ibid* art 3.

²⁴ *ibid* art 4; UN Committee on the Rights of the Child, “Report on the Second Session” (October 19, 1992) UN DOC CRC/C/10 (“Committee on the Rights of the Child, ‘Report on the Second Session’”) [67].

²⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (“UDHR”) art 12.

²⁶ ASEAN Human Rights Declaration (adopted 18 November 2012) (“AHRD”) art 21 (“Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person’s honour and reputation. Every person has the right to the protection of the law against such interference or attacks”).

²⁷ UN Working Group on Arbitrary Detention, “Report of the Working Group on Arbitrary Detention” (December 24, 2012) UN Doc A/HRC/22/44 (“Working Group on Arbitrary Detention, ‘Report of the Working Group on Arbitrary Detention’”) [42]–[51].

such as house arrest and secret and/or incommunicado detention.²⁸ Further, an arrest and detention can be considered “arbitrary” even if authorized and enforced by law if “premised upon an arbitrary piece of legislation or is inherently unjust.”²⁹

C. The Right to the Freedom of Expression

Under article 19 of the UDHR, the right to the freedom of expression constitutes the freedom to “seek, receive, and impart information and ideas through any media and regardless of frontiers.”³⁰ A similar provision can be found in article 23 of the AHRD.³¹

While Myanmar is not a party to the ICCPR, the scope of the freedom of expression under the UDHR may be understood through the Human Rights Committee’s³² (“HRC”) interpretation of article 19 of the ICCPR, as the ICCPR is a codification of the same protections provided for in the UDHR. The HRC noted that the freedom of expression includes the right to express and receive communications of every form that is capable of transmission.³³ As regards to legitimate restrictions to the right, it may only be restricted for the protection of the rights or reputations of others, of national security or public order, or of public health or morals.³⁴ Further, restrictions must fulfill three cumulative requirements to be legitimate (also referred to as the three-part test): 1) They must be “provided by law” meaning they have to be formulated with sufficient precision so as to allow individuals to regulate their conduct;³⁵ 2) be “necessary” for a legitimate purpose;³⁶ and 3) be “proportionate” to the interest they serve to protect.³⁷

5. ANALYSIS

A. The Facilitation of Impunity for Arbitrary Raids, Arrests and Detentions

Part of the SAC’s tactic to stifle dissent in efforts to assert total control over the country has been to arbitrarily arrest and detain people suspected of being in opposition to its rule by encroaching on privacy. Security forces have been arbitrarily arresting and detaining people after finding any shred of evidence considered to be offensive to the junta through arbitrary inspections of mobile phones. Further, security forces without warrants have been entering into homes and offices to arrest and detain people aligned with the anti-coup movement such as protestors, members of the opposition party, healthcare workers, and lawyers.³⁸ The SAC has even gone so far as to arbitrarily arrest and detain children. As of March 22, Save The Children alone reported that it had responded to a total of 146 cases of child arrests and detentions, of

²⁸ *ibid* [52]–[60].

²⁹ *ibid* [63].

³⁰ UDHR art 19.

³¹ AHRD art 23 (“Every person has the right to freedom of opinion and expression, including [...] to receive, seek, impart information, whether orally, in writing or through any other medium of that person’s choice”).

³² The HRC is a body of independent experts that monitors the implementation of the ICCPR by its states parties, see “Human Rights Committee” <<https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>> accessed July 6, 2021.

³³ UNHRC “General Comment No. 34: Article 19: Freedoms of Opinion and Expression” UN Doc CCPR/C/GC/34 (September 12, 2011) (“UNHRC, ‘General Comment No. 34: Article 19: Freedoms of Opinion and Expression’”) [11].

³⁴ *ibid* [21].

³⁵ *ibid* [22], [25].

³⁶ *ibid* [33].

³⁷ *ibid* [34].

³⁸ Frontier Myanmar, “Don’t Open the Door’: Junta’s Midnight Raids Arouse Fear and Resistance” (n 5); “Myanmar: Arrests Mount as Protests Expand” (*Human Rights Watch*, February 13, 2021) <<https://www.hrw.org/news/2021/02/13/myanmar-arrests-mount-protests-expand>> accessed 16 June 2021; “Myanmar Protesters Leave Yangon District after Being Trapped by Security Forces” *Channel News Asia* (March 9, 2021) <<https://www.channelnewsasia.com/news/asia/myanmar-forces-trap-protesters-as-un-and-us-urge-restraint-14364616>> accessed June 16, 2021; “Myanmar Regime Launches Late Night Raids, Arrests Civilians and Opposition Members” *The Irrawaddy* (March 7, 2021) <<https://www.irrawaddy.com/news/burma/myanmar-regime-steps-crackdown-ahead-mondays-general-strike.html>> accessed June 16, 2021; “Security Forces Search Myanmar Protest District Room by Room” *Channel News Asia* (March 10, 2021) <<https://www.channelnewsasia.com/news/asia/security-forces-search-myanmar-protest-district-room-by-room-14372298>> accessed June 16, 2021.

which 17 are still in detention.³⁹ Meanwhile, UNICEF reported on March 4 that its partners estimated that since the coup more than “500 children have been arbitrarily detained. Many of those arrested or detained are being held incommunicado.”⁴⁰

To evade arrest and detention by security forces, those aligned with the anti-coup movement including protestors, activists, and members of the Civil Disobedience Movement, have sought refuge in the homes of relatives, friends, and other local residents.⁴¹ Security forces, however, have issued threats against residents warning that they too would be arrested if found harboring those they deem as fugitives.⁴² Recent reports indicate that security forces have resorted to arresting and detaining family members and friends of those they sought to arrest but were unable to locate during raids, effectively taking hostages.⁴³

Former detainees have reported being tortured by security forces. Accounts of torture include beatings, being placed in stress positions, and even mock burials.⁴⁴ Some detainees were even tortured to death.⁴⁵ Further, reports indicate that security forces use sexual and gender-based violence as a form of torture.⁴⁶ In one account, security forces stripped naked a transgender woman and raped her by penetrating her with a bottle.⁴⁷

These acts of torture, raids, and arbitrary arrests and detentions are accompanied by the SAC’s enactments of the *Fourth Amendment of the Ward or Village Tract Administration Law* and the *Amendment of Law Protecting the Privacy and Security of Citizens*. The contents in the provisions suggest that the SAC issued the amendments to enable its security forces to conduct raids as well as to arbitrarily arrest and detain anyone with impunity, as illegitimate as these “laws” may be. At the same time, these amendments contravene Myanmar’s international legal obligations under treaty law protecting children against the arbitrary interference with privacy, family, home or correspondence; and under customary international law protecting against arbitrary arrest and detention. These amendments are also incompatible with the same principles in the AHRD and UDHR.

³⁹ “Myanmar’s Military Coup Claims Its Youngest Victim to Date as a 6-Year-Old Girl Is Reportedly Killed by Security Forces” (*Save the Children*, March 23, 2021) <<https://www.savethechildren.net/news/myanmar%E2%80%99s-military-coup-claims-its-youngest-victim-date-6-year-old-girl-reportedly-killed>> accessed June 16, 2021.

⁴⁰ “UNICEF Condemns Killings and Arbitrary Detentions of Children by Security Forces during Ongoing Crisis in Myanmar” (*UNICEF*, March 4, 2021) <<https://www.unicef.org/press-releases/unicef-condemns-killings-and-arbitrary-detentions-children-security-forces-during>> accessed June 16, 2021.

⁴¹ For example, see “More Than 20 People Arrested as Security Forces Break Up ‘22222’ Protest in Myanmar’s Capital” *The Irrawaddy* (February 22, 2021) <<https://www.irrawaddy.com/news/burma/20-people-arrested-security-forces-break-22222-protest-myanmars-capital.html>> accessed June 18, 2021; “Myanmar Junta Warns Public Not to Hide Fugitive Protesters” *Channel News Asia* (February 14, 2021) <<https://www.channelnewsasia.com/news/asia/myanmar-coup-junta-fugitive-protesters-overnight-guests-14193522>> accessed June 18, 2021 (“CNA, ‘Myanmar Junta Warns Public Not to Hide Fugitive Protesters’”).

⁴² For example, see CNA, “Myanmar Junta Warns Public Not to Hide Fugitive Protesters”; Eustace Jones, “A Township under Siege: Residents Recall Assault on Sanchuang” *Southeast Asia Globe* (April 6, 2021) <<https://southeastasiaglobe.com/sanchuang-siege-myanmar/>> accessed June 18, 2021; “Most Protesters Manage to Escape Sanchuang under Siege” *Myanmar NOW* (March 9, 2021) <<https://www.myanmar-now.org/en/news/most-protesters-manage-to-escape-sanchuang-under-siege>> accessed June 18, 2021.

⁴³ For example, see Khin Maung Nyane and Joshua Lipes, “Myanmar Security Forces Arresting Relatives of Anti-Coup Activists They Can’t Nab in Raids” *Radio Free Asia* <<https://www.rfa.org/english/news/myanmar/arrests-06072021192645.html>> accessed July 5, 2021; “Myanmar: Stop Holding Family, Friends Hostage” (*Human Rights Watch*, June 14, 2021) <<https://www.hrw.org/news/2021/06/14/myanmar-stop-holding-family-friends-hostage>> accessed July 5, 2021.

⁴⁴ For example, see HRW, “Myanmar: Teenager Describes Torture, Mock Burial” (n 6); SCMP, “US Editor Nathan Maung Says He Was Tortured by Myanmar Junta” (n 6).

⁴⁵ *The Irrawaddy*, “Tortured to Death in Myanmar Regime Custody” (n 6).

⁴⁶ “Female Detainee Sexually Assaulted, Tortured During Interrogation: Former Cellmate” (*The Irrawaddy*, April 24, 2021) <<https://www.irrawaddy.com/news/burma/female-detainee-sexually-assaulted-tortured-interrogation-former-cellmate.html>> accessed July 1, 2021 (“The Irrawaddy, Female Detainee Sexually Assaulted”); “Rights of Women Violated in Myanmar Prisons” (*Human Rights Watch*, June 8, 2021) <<https://www.hrw.org/news/2021/06/08/rights-women-violated-myanmar-prisons>> accessed July 1, 2021 (“HRW, Rights of Women Violated in Myanmar Prisons”).

⁴⁷ *The Irrawaddy*, “Myanmar’s LGBTIQ Community Faces Death and Torture From Junta” (n 13).

i. Section 17 of the Fourth Amendment of the Ward or Village-Tract Administration Law violates Myanmar’s obligations under the CRC and are incompatible with the UDHR and AHRD

The SAC’s amendment of section 17 of the Fourth Amendment of the Ward or Village-Tract Administration Law requiring the registration of overnight guests, violates Myanmar’s obligations under article 16 of the CRC. The enforcement of the amended section 17 against children constitutes an “arbitrary interference” of their privacy, family or home under article 16 (1) of the CRC.⁴⁸ The Human Rights Committee’s interpretation of the meaning of “arbitrary interference” in article 17 (1) of the ICCPR is relevant to Myanmar’s violation of article 16 since article 16 (1) of the CRC protects the same rights as that of article 17 (1) of the ICCPR,⁴⁹ the difference being that article 16 (1) focuses specifically on children. In particular, it states that the meaning of “arbitrary interference” includes laws that counter “the provisions, aims and objectives” of the protections afforded to a person’s privacy, family or home.⁵⁰ It follows then that the amended section 17 amounts to an “arbitrary interference” within the meaning of article 16 (1). Further, amended section 17 — permitting such sweeping and arbitrary encroachment on the prohibition against arbitrary interference with privacy, family, home or correspondence — contradicts article 16 (2) which guarantees that children have “the right to the protection of the law against such interference.”⁵¹

Moreover, the amendments are incompatible with the principles enshrined in article 12 of the UDHR, as well as article 21 of the AHRD. Containing a similar provision to article 12 of the UDHR,⁵² article 21 of the AHRD states “every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence.”⁵³

ii. Suspension of sections 5 and 8 of the Law Protecting the Privacy and Security of the Citizens contravenes prohibition against arbitrary interference with the right to privacy, family, home or correspondence

The SAC’s suspension of sections 5 and 8 of the Law Protecting the Privacy and Security of the Citizens⁵⁴ contravenes Myanmar’s non-derogable obligations⁵⁵ under the CRC to “respect and ensure” rights,⁵⁶ including article 16, are applied to every child within its jurisdiction by adopting all appropriate measures; and by placing the best interest of the child as a primary consideration in all matters.⁵⁷

Further, the amendments violate article 16 (1)’s prohibition of arbitrary interference with the child’s “privacy, family, home or correspondence, [and] to unlawful attacks on his or her honor and reputation”,⁵⁸ as it permits authorities to interfere, without a warrant, in virtually all aspects of the private lives of any citizen. At the same time, it is incompatible with article 16 (2) as it denies children within its jurisdiction of their right to protection from arbitrary interference with, or attacks on their rights enshrined in article 16 (1).⁵⁹

⁴⁸ CRC art 16 (1).

⁴⁹ International Covenant on Civil and Political Rights (adopted December 16, 1966, entered into force March 23, 1976) 999 UNTS 171 art 17 (1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence [...]”).

⁵⁰ UNHRC “General Comment No. 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)” UN Doc HRI/GEN/1/Rev.9 (April 8, 1988) [4] <<https://www.refworld.org/docid/453883f922.html>> accessed May 31, 2021.

⁵¹ CRC art 16 (2).

⁵² See above at Section 4.A of this brief.

⁵³ AHRD art 21.

⁵⁴ GNLM, Amendment Of Law Protecting The Privacy And Security Of The Citizens (n 17); MCRB, Law Protecting the Privacy and Security of Citizens (n 17) ss 5, 8.

⁵⁵ Committee on the Rights of the Child, “Report on the Second Session” (n 24) [67] (stating that none of the general provisions under articles 2, 3, and 4 “admit a derogation in time of war of emergency”).

⁵⁶ CRC art 2.

⁵⁷ See above at Section 4.A of this brief.

⁵⁸ CRC art 16 (1).

⁵⁹ CRC art 16 (2).

In a similar vein, the suspension of sections 5 and 8 are inconsistent with the principles in article 12 of the UDHR and article 21 of the AHRD, which declared that every person within its jurisdiction has the right to be free from arbitrary interference with their privacy, home, or correspondence,⁶⁰ including personal data.⁶¹

iii. Suspension of section 7 of the Law Protecting the Privacy and Security of the Citizens contravenes the prohibition against the arbitrary deprivation of liberty under customary international law

The SAC's suspension of section 7 enables security forces to arbitrarily arrest and indefinitely detain⁶² individuals it considers as threats to its rule, including opposition political leaders, anti-coup protestors, and human rights defenders. It breaches Myanmar's obligations under customary international law prohibiting the arbitrary arrest and detention of any individual and under any circumstances,⁶³ which includes laws that authorize "automatic and indefinite detention without any standards or review."⁶⁴

B. The Infringement on the Enjoyment of the Right to the Freedom of Expression

The digital space has been a platform for the people of Myanmar to organize themselves domestically and to mobilize international support against the coup. Equally, it serves as a medium for journalists, citizen journalists, and other activists to criticize the SAC, as well as to document and expose human rights violations perpetrated by security forces. The SAC's response, particularly in the early months of the coup, was to restrict access to social media platforms such as Facebook, Twitter, and Instagram, as well as to enforce regular nationwide internet blackouts.⁶⁵

Part of its strategy to stifle dissent has also been through the amendment to section 505 (a) of the Penal Code, as well as the amendment to the ETL. The amended provisions curtail the enjoyment of the right to free expression by criminalizing an array of conduct under, *inter alia*, dubious pretexts of national security and public order which are incompatible with the standards required to constitute permissible restrictions to the freedom of expression under international human rights standards.

i. Section 505 (a) fails the "necessity" test making it an illegitimate form of restriction to the freedom of expression

Section 505 (a): Imposes a prison term of a maximum of 3 years, or a fine, or both on any person that: (i) causes or intends to cause "a member of the Defence Service or any civil servant" to disobey or to be disloyal to the government by hindering or damaging their motivation, discipline or health; or (ii) causes or intends to cause "fear to a group of citizens or to the public"; or (iii) intends to spread or spreads "fake news when knowing or believing that the news is false"; or (iv) commits or intends to commit a criminal offence against a member of the civil service."⁶⁶

⁶⁰ AHRD art 21; UDHR art 12.

⁶¹ AHRD art 21.

⁶² GNLM, Amendment Of Law Protecting The Privacy And Security Of The Citizens (n 17); MCRB, Law Protecting the Privacy and Security of Citizens (n 17) s 7 ("No one shall be detained for more than 24 hours without permission from a court unless the detention is in accordance with existing law").

⁶³ Working Group on Arbitrary Detention, "Report of the Working Group on Arbitrary Detention" (n 27) [42]–[51].

⁶⁴ *ibid* [63].

⁶⁵ "Internet Disrupted in Myanmar amid Apparent Military Uprising" (*NetBlocks*, January 31, 2021) <<https://netblocks.org/reports/internet-disrupted-in-myanmar-amid-apparent-military-uprising-JBZrmlB6>> accessed June 15, 2021; "Myanmar Experiencing 'near-Total Internet Shutdown'" *Channel News Asia* (February 15, 2021) <<https://www.channelnewsasia.com/news/asia/myanmar-experiencing-near-total-internet-shutdown-14198398>> accessed June 15, 2021; "Myanmar's Military Struggles to Control the Virtual Battlefield" (International Crisis Group 2021) 14–18 <https://d2071andvip0wj.cloudfront.net/314-myanmar-virtual-battlefield_0.pdf> accessed June 15, 2021.

⁶⁶ ICNL, "State Administration Council Law No (5/2021) Law Amending the Penal Code and State Administration Council Law No (6/2021) Law Amending the Code of Criminal Procedure" (n 18). [Quote edited for clarity].

The SAC's use of section 505 (a) to prosecute individuals and to sue news agencies who have reported on the coup and exposed human rights violations⁶⁷ is incompatible with legitimate restrictions to the freedom of expression. Under international human rights law, restrictions to free expression must be "necessary" for the protection of the "rights and reputation of others", or protection of "national security or of public order, or of public health or morals."⁶⁸ Contrary to this standard, the SAC has been regularly prosecuting journalists for reporting on the facts of the coup.⁶⁹ Additionally, it has also charged and prosecuted ordinary citizens voicing their opposition to the coup on social media, celebrities supporting anti-coup protests, as well as youths involved with the anti-coup movement.⁷⁰

ii. *The ETL amendments fail the "provided by law" and "proportionality" tests to constitute permissible restrictions*

Section 38 (b): "Any person, if convicted of obtaining, disclosing, using, destroying, modifying, disseminating or sending personal data of a person to another without approval, shall be punished by imprisonment for a term of 1 to 3 years [...]."⁷¹

Even supposing that the purpose of section 38 (b) is for the protection of privacy, the language is overbroad such that it is incompatible with the principle of proportionality which requires that restrictions be the least intrusive of measures to prevent jeopardizing the exercise of the right to the freedom of expression.⁷² Under the amendments, "personal data" is defined as any information associated with a person.⁷³ In turn, the formulation of the amendment could impose criminal sanctions on anyone who, for instance, discloses or sends information on individuals responsible for human rights violations to international criminal or human rights investigative organizations. Under human rights standards, restrictions to free expression "**may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.**"⁷⁴

Section 38 (c): "Any person who is convicted of creating misinformation and disinformation with the intent of causing public panic, loss of trust or social division on cyberspace shall be punished by imprisonment for a term of 1 to 3 years [...]."⁷⁵

⁶⁷ "Myanmar Military Regime Sues The Irrawaddy" *The Irrawaddy* (March 12, 2021) <<https://www.irrawaddy.com/news/burma/myanmar-military-regime-sues-irrawaddy.html>> accessed June 21, 2021.

⁶⁸ UNHRC, "General Comment No. 34: Article 19: Freedoms of Opinion and Expression" (n 33) [22], [28]-[32].

⁶⁹ "DVB Reporter from Pyay Sentenced to Three Years in Prison" *Myanmar NOW* (May 13, 2021) <<https://www.myanmar-now.org/en/news/dvb-reporter-from-pyay-sentenced-to-three-years-in-prison>> accessed June 21, 2021; "Myanmar Now Reporter among at Least Eight Charged for Covering Anti-Coup Protests" *Myanmar NOW* (March 2, 2021) <<https://www.myanmar-now.org/en/news/myanmar-now-reporter-among-at-least-eight-charged-for-covering-anti-coup-protests>> accessed June 21, 2021; "US Journalist Held in Myanmar Appears in Special Court, Says Employer" *The Straits Times* (June 17, 2021) <<https://www.straitstimes.com/asia/se-asia/us-journalist-held-in-myanmar-appears-in-special-court-says-employer>> accessed June 21, 2021.

⁷⁰ "Myanmar Junta Charges Celebrities with Promoting Protests" *AP NEWS* (April 6, 2021) <<https://apnews.com/article/myanmar-junta-charge-celebrities-promoting-protests-50fcb59c57f041930eac17b793e3c369>> accessed June 22, 2021; "Myanmar's Military Junta Kills, Detains Youths in Crackdown on Protest Movement" *Radio Free Asia* (June 5, 2021) <<https://www.rfa.org/english/news/myanmar/youths-05072021164621.html>> accessed June 22, 2021; "Two Women Filed Lawsuits Under Section 505-a Of Penal Code Arrested" *Global New Light Of Myanmar* (May 1, 2021) <<https://www.gnlm.com.mm/two-women-filed-lawsuits-under-section-505-a-of-penal-code-arrested/>> accessed June 21, 2021.

⁷¹ FEM, "Legislation Amending the Electronic Transactions Law [Unofficial Translation]" (n 19). [Quote edited for clarity].

⁷² UNHRC "General Comment No. 34: Article 19: Freedoms of Opinion and Expression" (n 33) [22], [34]. See also, Human Rights Watch, "Myanmar: Post-Coup Legal Changes Erode Human Rights" (*Human Rights Watch*, March 2, 2021) <<https://www.hrw.org/news/2021/03/02/myanmar-post-coup-legal-changes-erode-human-rights>> accessed May 24, 2021.

⁷³ FEM, "Legislation Amending the Electronic Transactions Law [Unofficial Translation]" (n 19) s 2 (a), 2(l), 38 (b).

⁷⁴ UNHRC "General Comment No. 34: Article 19: Freedoms of Opinion and Expression" (n 33) [23].

⁷⁵ FEM, "Legislation Amending the Electronic Transactions Law [Unofficial Translation]" (n 19). [Quote edited for clarity].

The vague and undefined terms, “misinformation and disinformation” and “public panic, loss of trust or social division”, are incompatible with the meaning of “law” under human rights standards. Restrictions must be formulated with sufficient precision such that individuals are able to regulate the content that they produce and publish in the digital space.⁷⁶ The current formulation would allow authorities “unfettered discretion”⁷⁷ in using the law to retaliate against journalists, activists and academics who expose the SAC’s human rights violations.⁷⁸

Section 38 (d): “Any person who is convicted of [cybercrimes] such as preventing or making it difficult to access a cyber resource; or attempting to hack into a cyber source without permission; or using more than permitted; and inserting or installing dangerous malware with the intent to hurt someone; [or] with an intent to threaten or disturb national sovereignty, security, peace and stability, rule of law, and national solidarity, shall be punished by imprisonment for a term of 2 to 5 years [...].”⁷⁹

Section 38 (e): “Any person who commits acts of cyber-attack on cyber resources which have been kept confidential for reasons of national or international security, such as attempting to access without authorization into or hacking into such cyber resources, with the intent to deteriorate the relationship between the country and other foreign countries, or on behalf of the interest of a foreign country, shall be punished by imprisonment for a term of 3 to 7 years [...].”⁸⁰

The provisions in section 38 (d) and section 38 (e) criminalize a wide range of conduct in the digital space by employing justifications of “national sovereignty, security, peace and stability, rule of law, national solidarity”, as well as the protection and preservation of Myanmar’s foreign relations.⁸¹ Chiefly, these imprecise and overbroad exceptions under the pretext of national security are in non-conformity with human rights standards requiring that restrictions be “provided by law”⁸² and be “proportionate”.⁸³ In turn, these “amorphous” notions of national security serve as a weapon for the SAC to curtail the enjoyment of legitimate free expression.⁸⁴ For instance, it is unclear what types of conduct section 38 (d) covers when it criminalizes “preventing or making it difficult to access a cyber resource [...] or using more than permitted”⁸⁵ under the pretext of national security. Free Expression Myanmar has suggested that the provision could be used to prosecute journalists and activists for using a VPN to bypass the SAC’s internet restrictions or for using encryption when working to expose and report on the SAC’s human rights violations.⁸⁶

⁷⁶ UNHRC “General Comment No. 34: Article 19: Freedoms of Opinion and Expression” (n 33) [25].

⁷⁷ *ibid.*

⁷⁸ A former member of the Myanmar Press Council stated in reaction to section 38 (c): “If they are not happy with the way a journalist reports on a certain subject—or indeed, even if it is an ordinary person who posts something that they don’t like on social media—they can arrest him right away by accusing him of causing alarm or defaming somebody”, at “Amended Law Throws Myanmar Back into Media Dark Age” *Myanmar NOW* (February 19, 2021) <<https://www.myanmar-now.org/en/news/amended-law-throws-myanmar-back-into-media-dark-age>> accessed June 15, 2021. See also, UNHRC “General Comment No. 34: Article 19: Freedoms of Opinion and Expression” (n 33) [30] (stating that the national security exception to the exercise of the right to freedom of expression must not be used as a justification to prosecute journalists and researchers for disseminating information of legitimate public interest that do not in fact harm national security.).

⁷⁹ FEM, “Legislation Amending the Electronic Transactions Law [Unofficial Translation]” (n 19). [*Quote edited for clarity*].

⁸⁰ *ibid.* [*Quote edited for clarity*].

⁸¹ *ibid.*

⁸² UNHRC “General Comment No. 34: Article 19: Freedoms of Opinion and Expression” (n 33) [22], [25].

⁸³ *ibid.* [34].

⁸⁴ UN Human Rights Council “Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue” (April 17, 2013) UN Doc A/HRC/23/40 [60].

⁸⁵ FEM, “Legislation Amending the Electronic Transactions Law [Unofficial Translation]” (n 19).

⁸⁶ “Myanmar’s New Electronic Transactions Law Amendment” (*Free Expression Myanmar*, February 18, 2021) <<https://freeexpressionmyanmar.org/myanmars-new-electronic-transactions-law-amendment/>> accessed July 7, 2021.

6. RECOMMENDATIONS

The grim reality is that unless the SAC steps down from power it will continue to perpetrate atrocities against the people of Myanmar and oppress the country with these illegitimate “laws”. This reality signifies the need for relevant actors to stand with the people of Myanmar in their resistance to the SAC. To this end, we have identified measures that ASEAN, the National Unity Government, and states can take to validate the human rights of the people of Myanmar through the international human rights protection regime.

Recommendation to ASEAN:

- In addition to pursuing the Five-Point Consensus,⁸⁷ member states in their engagements with the SAC must make the promotion and protection of human rights provided for in the AHRD a central part of their diplomatic efforts. Notwithstanding the non-binding nature of the AHRD, the enshrined principles including those identified here are minimum human rights standards afforded to the people of Myanmar that member states have a stake in promoting and protecting should the AHRD be recognized as a credible regional human rights instrument.

Recommendations to the National Unity Government:

- Declare that the SAC’s amendments following the events of February 1 are null and void as a matter of domestic law. As an illegal entity under Myanmar’s constitution, the SAC is unauthorized to amend or enact laws. At the same time, the SAC’s “laws” contravene Myanmar’s human rights obligations under treaty law and customary international law.
- Commit to ratifying the outstanding international human rights treaties beginning with the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention for the Protection of All Persons from Enforced Disappearance, and the International Convention on the Elimination of All Forms of Racial Discrimination.
- Commit to ratifying the Rome Statute of the International Criminal Court as a first step to pursuing accountability for past and present alleged international crimes including crimes against humanity, genocide, and war crimes.

Recommendation to states:

- Adhere to the principle of non-refoulement under international law. Meaning that anyone who faces a real risk of being arbitrarily detained, tortured, or murdered by the SAC should not be involuntarily returned, expelled, or extradited to Myanmar.

⁸⁷ The “five-point consensus” is an agreement on the military coup reached by ASEAN leaders during the April 24, 2021 ASEAN Leaders’ Meeting. ASEAN leaders reached consensus on the following five-points: 1) “There shall be an immediate cessation of violence in Myanmar and all parties shall exercise utmost restraint”; 2) “constructive dialogue among all parties concerned shall commence to seek a peaceful resolution in the interests of the people”; 3) “a special envoy of the ASEAN Chair shall facilitate mediation of the dialogue process, with assistance of the Secretary-General of ASEAN”; 4) “ASEAN shall provide humanitarian assistance through the AHA Centre”; and 5) “the special envoy and delegation shall visit Myanmar to meet with all parties concerned,” see at ASEAN Secretariat “Chairman’s Statement on the ASEAN Leaders’ Meeting” (April 24, 2021) <<https://asean.org/storage/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf>> accessed July 14, 2021.