

JUSTICE IN BURMA

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INTRODUCTION.....	668
I. THE INTERNATIONAL CRIMINAL COURT.....	671
A. The Buildup to ICC Creation	671
B. An Overview of ICC Structure.....	675
1. <i>Substantive Structure</i>	675
2. <i>Procedural Structure</i>	677
II. ICC JURISDICTION AND ADMISSIBILITY.....	681
A. Generally	681
1. <i>Jurisdiction</i>	681
2. <i>Admissibility</i>	683
B. Application to the SPDC	684
III. THE INVESTIGATION AND OTHER PRE-TRIAL ACTIONS.....	689
A. The Investigative Process.....	689
B. The Process of Arrest.....	690
IV. THE ICC TRIAL OF SPDC LEADERSHIP	692
A. Initial Trial Aspects.....	692
B. Crimes Against Humanity.....	694
1. <i>Rome Statute Definition</i>	694
2. <i>Murder</i>	695
3. <i>Torture</i>	697
4. <i>Imprisonment</i>	699
5. <i>Sexual Violence</i>	701
6. <i>Forced Displacement</i>	703
C. War Crimes.....	706
1. <i>Rome Statute Definition</i>	706
2. <i>Application to Burma</i>	708
3. <i>Murder</i>	708
4. <i>Torture</i>	709
5. <i>Sexual Violence</i>	710
6. <i>Forced Displacement</i>	711
7. <i>The Use of Child Soldiers</i>	712
8. <i>War Crime Defenses</i>	715
V. AFTERMATH OF THE TRIAL.....	715
A. Probable Trial Chamber Decision	715
B. Sentencing and Appeal.....	716
C. Incarceration.....	718
CONCLUSION	718

The words ‘law and order’ have so frequently been misused as an excuse for oppression that the very phrase has become suspect in countries which have known authoritarian rule . . . There is no intrinsic virtue to law and order unless ‘law’ is equated with justice and ‘order’ with the discipline of a people satisfied that justice has been done . . . The true measure of the justice of a system is the amount of protection it guarantees to the weakest. Where there is no justice there can be no secure peace.

-Daw Aung San Suu Kyi¹

INTRODUCTION

One of civil society’s most enduring beliefs has been that “fundamental values of the human spirit” lie at the core of all humanity.² This notion, that a “common denominator of behaviour [exists], even in the most extreme circumstances,” has been a bedrock element of civilization since at least the time of the ancient Greeks.³ In protection of these societal values, behavioral codes have been established and penalties enforced against those who have committed wrongs against their fellow man; this fact has been noted by historians, philosophers, and ruling authorities from countless time periods throughout recorded history.⁴ Yet even well-intentioned attempts at

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Mr. Nowak’s presentation of *Justice in Burma* earned one of eight first place awards in the oral presentation category at Michigan State University’s March 25, 2011 Graduate Academic Conference. After being selected as the top first place winner from amongst the eight, Mr. Nowak was invited to present *Justice in Burma* to Michigan State University’s Board of Trustees on April 15, 2011.

1. AUNG SAN SUU KYI, FREEDOM FROM FEAR AND OTHER WRITINGS 176–77 (Michael Aris ed. 1991) (quote selected from Aung San Suu Kyi’s essay, *In Quest of Democracy*) [hereinafter FREEDOM FROM FEAR].

2. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT I (2001).

3. *Id.*

4. *See, e.g.*, DEUTERONOMY 5:17 (NIV) (stating that the Hebrew Ten Commandments—said to have been specified by God and established as law for the Israelites—included “[y]ou shall not murder.”). One way in which this Commandment was enforced by the Israelites is spelled out in DEUTERONOMY 19:11–13 (NIV):

But if a man hates his neighbor and lies in wait for him, assaults and kills him, and then flees to [another] cit[y], the elders of his town shall send for him, bring him back from the city, and hand him over

implementing justice have not been without issue, as traditionally penalties have been enforced by a dominant group—or a war’s victor—and often reflected significant elements of partiality.⁵

It was with these societal values in mind—as well as a desire for principled, legal fairness—that the global community sought to create a judicial body where humanity-based justice would not be obstructed by unbridled ferocity, structural bias, or ineffective action. In essence, the nations of the world intended to build on the past strengths of societal justice and eradicate—to the best of their abilities—the obvious limitations of earlier enforcement systems.⁶ Building off the essential codification of humanity’s fundamental values in the *Universal Declaration of Human Rights*⁷—as well as the reiterated need for a global institution to provide justice in the midst of atrocities like those committed by the Nazis or those perpetrated in Yugoslavia and Rwanda⁸—the International Criminal Court (“ICC” or “the Court”) would be definitively established in 2002.⁹

to the avenger of blood to die. Show [this murderer] no pity. You must purge from Israel the guilt of shedding innocent blood, so that it may go well with you.

The philosopher John Locke also suggests that the binding moral codes of mankind are of significant importance—and are worthy of being enforced by threat of consequence:

[A]nd thus it is, that every man, in the state of nature, has a power to kill a murderer, both to deter others from doing the like injury, which no reparation can compensate . . . and also to secure men from the attempts of a criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security: and upon this is grounded that great law of nature, Whoso sheddeth man’s blood, by man shall his blood be shed.

JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT Ch. II, § 11 (1690), *available at* <http://www.constitution.org/jl/2ndtr02.txt>.

5. SCHABAS, *supra* note 2, at 1.

6. *See infra* text accompanying notes 22 and 23.

7. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. Doc. A/810 (1948).

8. SCHABAS, *supra* note 2, at 10–11 (“[In 1993, w]hile the draft statute of an international criminal court was being considered in the International Law Commission, events compelled the creation of a court on an *ad hoc* basis in order to address the atrocities being committed in the former Yugoslavia.”); *Id.* at 11 (noting that a second *ad hoc* tribunal was also created for the nation of Rwanda in 1994).

9. *See generally* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

While nearly a decade old at the time of this Article, the ICC represents a streamlining of humanity's past efforts to protect its most sacred behavioral constraints. In fact, one of the ICC's principle goals is to "put an end to impunity for the perpetrators of . . . crimes [that concern the international community] and thus . . . contribute to the prevention of such crimes."¹⁰ Taken in this light, "[t]he International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations."¹¹

Despite this apparent mandate for the Court to hold accountable all criminal perpetrators whose actions rise to international attention, the Rome Statute "emphasiz[es] that the International Criminal Court . . . shall be complementary to national criminal jurisdictions."¹² It is only when a nation's judicial system is unable to—or worse—is perversely unwilling to prosecute a perpetrator for mankind's heinous crimes that the ICC is able to exert jurisdiction over the matter.¹³ Regrettably, the Republic of the Union of Myanmar—known more commonly as Burma—is one such nation unwilling to prosecute its criminal perpetrators due to their ruling leadership's rampant corruption.

Burma is a nation that—since 1990—has been illegitimately controlled by a military junta¹⁴ known as the State Peace and Development Council ("SPDC" or "the Regime").¹⁵ During its rule, the world has been witness to "severe, indeed widespread and systematic abuses [of the Burmese people] that appear to rise to the level of state policy."¹⁶ The dire situation existing within Burma was thoroughly detailed in a report by the International Human Rights Clinic at Harvard Law School, entitled *Crimes in Burma*. Their research helps expose the SPDC's heinous crimes and advocates for the United Nations Security Council to do the following:

10. *Id.* pmb1.

11. SCHABAS, *supra* note 2, at 20.

12. Rome Statute, *supra* note 9, pmb1.

13. SCHABAS, *supra* note 2, at 54–55.

14. See *White House: U.S. To Support U.N. Inquiry in Myanmar*, U.S. NEWS (Aug. 18, 2010) ("[SPDC General] Than Shwe's loyalists overturned election results in 1990 that favored the political party of Aung San Suu Kyi."), available at <http://www.usnews.com/news/articles/2010/08/18/white-house-us-to-support-un-inquiry-in-myanmar.html>. *NDI Condemns Conviction of Aung San Suu Kyi*, NAT'L DEMOCRATIC INST. (Aug. 12, 2009), <http://www.ndi.org/node/15684>. National Democratic Institute Chairman—and U.S. Secretary of State in the Clinton Administration—Madeleine K. Albright referred to SPDC leadership in Burma as "despotic and illegitimate."

15. MICHAEL W. CHARNEY, A HISTORY OF MODERN BURMA xiii, 179 (2009) ("In November 1997, the SLORC [State Law and Order Restoration Council] was dissolved and replaced by the State Peace and Development Council (SPDC) . . . [m]ost foreign observers of Burma view the replacement of the SLORC with the SPDC as merely a cosmetic change.")

16. INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., *CRIMES IN BURMA* 4 (2009) [hereinafter *CRIMES IN BURMA*].

Declare that the situation in Burma constitutes a threat to international peace and security and initiate a formal investigation through a Commission of Inquiry to investigate crimes committed in Burma . . . [f]urther, the Security Council should be prepared to act upon findings and recommendations made by such a Commission, including a potential referral to the International Criminal Court.¹⁷

Essentially, *Crimes in Burma* acts as an indictment of the SPDC for violations of humanitarian law and human rights. The goal of this Article is to expand on this Report and other global accusations against the Regime. More specifically, this Article intends to detail how the actual trial of SPDC leadership—namely Generals Than Shwe, Maung Aye, and Thura Shwe Mann (“the SPDC Generals,” “the Defendants,” or “the Generals”)—would unfold before the International Criminal Court.

Part I of this Article will detail the historical progress that led to the creation of the ICC, as well as a general overview of the Court’s structure. Part II will highlight the ICC’s jurisdiction and admissibility, which will then be applied contextually to the alleged SPDC crimes. Pre-trial investigation and other requisite actions will be covered in Part III, and the actual trial of the Regime’s leadership will be assessed in Part IV. Namely, Part IV will address the Prosecutor’s allegations of war crimes and crimes against humanity, the application of each charged crime’s criminal elements to the actions of the Defendants, and the defenses that the Defendants will likely put forth. Part V will be a prediction as to their guilt or innocence, as well as an analysis of the punishments that may result. Part V will also highlight the appeals process should it be applicable to the case of the Defendants. Concluding remarks on a speculative ICC trial and the current state of Burma will then follow.

I. THE INTERNATIONAL CRIMINAL COURT

A. The Buildup to ICC Creation

As noted in this Article’s introduction, the civilized world holds a long-standing desire to protect its basic principles, yet—in terms of actual prosecution—history shows this guarding of mankind’s core values on more of a culture-specific¹⁸ or erratic level.¹⁹ In fact, it was not until the mid-

17. *Id.* at 4. See also *White House: U.S. To Support U.N. Inquiry in Myanmar*, *supra* note 14. Some of the same suggestions announced in *Crimes in Burma* have gained notable traction with world leaders, as “[t]he Obama administration has decided to support the creation of a United Nations commission to look into alleged crimes against humanity and war crimes in Myanmar.” This will hopefully help lead to the situation in Burma being referred to the ICC for trial—the central theme of this Article.

18. See *Deuteronomy* 5:17, 19:11–13 (NIV).

19. SCHABAS, *supra* note 2, at 1 (“The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474

Nineteenth Century that holding people judicially responsible for their abuses against humanity began to emerge as a more formalized, global concept. The first idea for a formal international criminal court was vocalized in the 1860s by Gustav Monnier—a founder of the Red Cross.²⁰ While the idea was apparently too revolutionary for its time, its legacy would help influence actions similar in spirit to the modern ICC—including a limited commission of inquiry investigating the “atrocities committed during the Balkan Wars.”²¹ However, since commissions like this were only inspective in nature—meaning they lacked any true global mandate for administering prosecutorial justice—credible international prosecution for abuses of humanity “would have to wait until Nuremburg.”²²

The trial of Nazi war criminals following World War II would act as the first contemporary experiment in true criminal prosecution at a global level.²³ This series of tribunals—known commonly as the Nuremberg Trials—sought to punish the Nazis for instigating the War—specifically their “offences against the laws and customs of war,”²⁴ as well as for crimes against humanity²⁵—namely their barbaric, cruel treatment of Europe’s Jewish population. While the prosecution and subsequent punishment of

for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.”). Linda Grant, *Exhibit Highlights the First International War Crimes Tribunal*, HARVARD LAW BULLETIN (Spring 2006), <http://www.law.harvard.edu/news/bulletin/2006/spring/gallery.php> (“Von Hagenbach, appointed governor by Charles the Bold, Duke of Burgundy, was told to keep order in Austria’s territories on the upper Rhine. In fulfilling the [D]uke’s directive, von Hagenbach terrorized the population. . . . Charged with violation of ‘the laws of God and man,’ specifically murder, rape and perjury, among other crimes,” von Hagenbach faced judgment from 28 judges assembled from across the numerous states of the Holy Roman Empire.)

20. SCHABAS, *supra* note 2, at 2.

21. *Id.*

22. *See id.* at 3–4. Following World War I, the Versailles Treaty did in fact allow for the German army to be subject to war crimes tribunals—which became known as the “Leipzig Trials.” However, “[t]he trials looked rather more like disciplinary proceedings of the German army than any international reckoning.” Due to German misgivings, the Allied powers allowed for the trials to be held before German courts and merely “prepared lists of German suspects”—lists that started at around 900 individuals but would only result in roughly one dozen trials and merely a handful of limited imprisonment terms. This evidences that international prosecution *technically* took place before the Nuremberg Trials of World War II, but this Article argues that genuine, international prosecution was non-existent in the Leipzig Trials—as the application of justice in this war crimes tribunal was effectively a façade due to the hesitations and biases present on each side of the Leipzig Trials. In a sense, the entire situation merely paid lips service to the protection of society’s behavioral values.)

23. *Id.* at 7. The Pacific Theatre also held an international criminal tribunal: the International Military Tribunal for the Far East—known more commonly as the Tokyo Trials. With both the Nuremberg Trials and the Tokyo Trials taking place concurrently, it is necessary to mention that both *together* are the first contemporary international criminal prosecutions, but for the purposes of this Article I will only detail Nuremberg—based on its immense notoriety—to effectuate my point.

24. *Id.* at 2.

25. *Id.* at 7.

countless Nazis by way of the Nuremberg Trials was *unquestionably* deserved—which is important to mention as the steadfast opinion of this Article’s author—it must also be noted that these criminal prosecutions were conducted by World War II’s victors, the Allied Powers. Although the Nuremberg Trials were the first contemporary prosecutions at a structured, international level—a powerful milestone in world history—it is also fair to assert that partiality could never be fully removed from the Tribunal as a result of the prosecutorial role of the conflict’s victors. However, while Nuremberg perhaps held slight biases, the Tribunal’s presence in itself marked an important step forward in the goal of protecting societal values—as the winning side of the international community made clear that they considered valued social norms relevant even in the midst of global war.

In the wake of Nuremberg, the world recognized that the time had come to express a unified front regarding the condemnation of crimes against humanity and the protection of civilized behavioral values. This global guilt of conscience arose out of the fact that—from the planned eradication of the Jewish ethnicity to the intended purge of the mentally retarded and handicapped—millions of innocent people had lost their lives in the wake of Nazi occupation. In the hope that a tragedy of such magnitude could feasibly be deterred in the future—or at least be suitably prosecuted, “the [United Nations] General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide” (CPPCG).²⁶

The CPPCG not only elementally defined the crime of genocide and listed its prosecutorial requirements, but it also stated that future trials for genocide would occur in “a *competent* tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”²⁷ Following the enactment of the CPPCG, the United Nations (“UN”) General Assembly would task a Commission and a Committee with the drafting of a statute for such an international criminal court, as well as a penal code of crimes that would be applied in the court’s

26. SCHABAS, *supra* note 2, at 7 (noting that the term genocide first saw judicial use in the Nuremberg Trials as a charge leveled against Nazi war criminals by the Prosecutor. However, the term did not appear in the convictions of the defendants. Instead, these war criminals were convicted of a charge seen as parallel: crimes against humanity.). *See also 2007 Global Conference on the Prevention of Genocide—What is Genocide*, MCGILL FACULTY OF LAW, http://efchr.mcgill.ca/WhatIsGenocide_en.php?menu=2 (last visited Nov. 13, 2010) (“The word ‘genocide’ was coined by Raphael Lemkin (1900–1959), a Jewish Polish lawyer, following the Nazi destruction of the Jews of Europe. He used a combination of Greek and Latin words: *geno* (race or tribe) and *cide* (killing). Lemkin was describing ‘a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.’”). *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (1951).

27. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 26, art. VI; SCHABAS, *supra* note 2, at 7–8.

jurisdiction.²⁸ Yet while the United Nations had moved relatively fast to codify the genocide problem that World War II brought to the international forefront, the process of acting on the UN's instructed measures would take much longer. This delay in drafting a statute for an international criminal court and its provisional codes can be attributed in no small part to the rising Cold War that engulfed international relations in the post-World War II era. In fact, the respective work of the UN-established Commission and Committee was stagnated from 1954-1981 as a result of this and other bureaucratic issues of the United Nations.²⁹ Moreover, it was not until 1989—following the fall of the Berlin Wall and the impending collapse of the Soviet Union—that the international criminal court conception would even appear to be within reach instead of some distant notion.³⁰ In essence, the UN stopped delaying its own progress and began to focus more closely on establishing the ICC—a global, judicial body intended to implement justice, promote fairness, and hopefully limit the prosecutorial biases of old.

Numerous meetings of the UN's *Ad Hoc* Committee would take place in the mid-1990s. This body was instituted to streamline the progress made by the UN Committee and Commission noted *supra*. The *Ad Hoc* Committee's productive work would lead to “the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court conven[ing] on 15 June 1998 in Rome”—a global conference intended to finalize provisions for the ICC.³¹ “The enthusiasm was quite astonishing, with essentially all of the delegations expressing their support for the concept [of an international criminal court].”³² Over the course of the Conference, however, it became evident that the global community still held

28. SCHABAS, *supra* note 2, at 8 n. 25, 8-9 (The UN General Assembly established the Committee on International Criminal Court Jurisdiction (Committee) to draft a statute for an international criminal court; the General Assembly tasked the International Law Commission (Commission) with drafting criminal codes for the court. Specifically, the Commission would create the “Nuremberg Principles” and the “Code of Crimes Against the Peace and Security of Mankind.”).

29. *Id.* at 9. Another bureaucratic issue included the UN's methodical attempts at defining a “crime of aggression” for the future CPPCG-based court's penal code. For more information on the “crime of aggression,” see *infra* note 40.

30. See *id.* at 9. The idea for a criminal court with permanent international jurisdiction was re-raised in 1989 by Trinidad and Tobago through Resolution 44/89 in the UN General Assembly. Trinidad and Tobago sought to have its problems related to narcotics trafficking addressed by such a court—at this point the Court itself had been discussed for generations but never had gained enough traction to be a true reality. Ironically, as of this Article the ICC does not hold jurisdiction over the illegal drug trade, but regardless Trinidad and Tobago may be thanked for breathing new life into the international criminal court idea. See also *id.* at 9-11. Despite the UN's re-energized goal of establishing an international criminal court, the drafting process would not be finished quickly enough to prosecute the crimes taking place in the former Yugoslavia and Rwanda in the 1990s; instead, *ad hoc* tribunals were created to handle the situations in the absence of a permanent ICC).

31. *Id.* at 15.

32. SCHABAS, *supra* note 2, at 15.

issue with many key elements of the ICC, including “the role of the [UN] Security Council, the list of ‘core crimes’ over which the court would have inherent jurisdiction and the scope of its jurisdiction over persons who were not nationals of State parties.”³³ Eventually, a consensus would be reached between more than the two-thirds of States needed for adoption of an ICC treaty, and by a vote of 120 in favor to 7 against (with 21 abstentions) the Rome Statute of the International Criminal Court was adopted on July 17, 1998 by the world forum.³⁴ The Statute’s adoption made it a “non-binding international treaty”—despite its support from “an overwhelming majority of the States that attended the Rome Diplomatic Conference”—until it entered into force by the ratification of 60 States on July 1, 2002.³⁵

B. An Overview of ICC Structure

1. Substantive Structure

According to the Rome Statute of the International Criminal Court, “[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community.”³⁶ These crimes are: genocide,³⁷ war crimes,³⁸ crimes against humanity,³⁹ and criminal aggression.⁴⁰ The

33. *Id.* at 17.

34. *Id.* at 17–18. Israel, the People’s Republic of China, and the United States were notable votes against the Rome Statute.

35. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; Rome Statute, *supra* note 9, art. 126 (stating that “[the Rome] Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of [State] ratification, acceptance, approval or accession with the Secretary-General of the United Nations.”). See also Letter from John R. Bolton, Undersecretary of State for Arms Control and International Security, to Kofi Annan, Secretary General of the United Nations (May 6, 2002), available at <http://amicc.org/docs/bolton.pdf> (noting that the United States’ December 31, 2000 signature of the Rome Statute was subsequently suspended on May 6, 2002; the United States, while once a signatory, never officially ratified the Statute and stated via Bolton “its intention not to become a party” to the Court); see also *Administration Update*, THE AMERICAN NON-GOVERNMENTAL ORGS. COALITION FOR INT’L CRIM. COURT, <http://amicc.org/usinfo/administration.html#null> (last visited Nov. 16, 2010) (explaining that U.S. concerns over ratification of the Rome Statute have included the trial of U.S. citizens without consent from the United States government, the potential of the ICC to try U.S. leaders for crimes of aggression, political motivations by the ICC against U.S. citizens and leaders, and potential conflict between the ICC and U.S. Constitution on due process rights for defendants).

36. Rome Statute, *supra* note 9, art. 5(1).

37. *Id.* arts. 5(1)(a), 6.

38. *Id.* arts. 5(1)(c), 8.

39. *Id.* arts. 5(1)(b), 7.

40. *Id.* arts. 5(1)(d), 5(2). See also Aaron Gray-Block, *ICC States Reach Compromise on Crime of Aggression*, REUTERS.COM (June 11, 2010), <http://www.reuters.com/article/idUSTRE65A6SE20100611> (noting that the recent

prosecution of these crimes at a fixed, global level raises many important discussion points. First, it must be recalled that the ICC was established as merely a complementary criminal court to those existing at national levels.⁴¹ By noting its balancing status, it should also be remembered that the ICC will only exert its jurisdiction where such crimes exist and a State is unable or unwilling to prosecute due to corruption. From this concept, it may be inferred that these crimes are addressed by the ICC for two key purposes: the international community feels cooperation at a global level may be needed to suppress such crimes and—more significantly—it appears the global population is finally ready to stand unified in their handling of mankind’s most dreadful actions. This latter point is particularly momentous as “violations of human rights . . . were once considered to lie within the exclusive prerogatives of State sovereignty”—yet now the ICC is capable of safeguarding these rights should it be necessary to do so in the absence of sincere State action.⁴²

As well, the historical buildup to the ICC’s creation is due in large part to the evolution of customary international law, and knowing this the drafters of the Rome Statute left significant room for its further development.⁴³ As highlighted in Part I (A) of this Article, human rights and basic behavioral values of the global community have typically been acknowledged through the tribulations of past atrocities and the customary legal developments that have occurred as a result. The Rome Statute’s drafters knew it would be irrational for them to believe that the ICC’s creation would mark the highest level of behavioral development possible in our global condition. Thus, they made sure that the ICC’s statutory guidelines would never hinder the further social improvements of humanity. For some, this statement may signal that other crimes may one day be defined and prosecuted by the ICC; for others, this assertion may invoke that elements of existing crimes may change. Overall, the protection and reverence for international customary law shows that the ICC is fluid in structure and willing to develop alongside the values and norms of the international order—an astute concept that will undoubtedly keep the ICC relevant and noteworthy for years to come.

compromise adopted for crimes of aggression—a compromise that finally permits crimes of aggression to be investigated by the ICC—allows for the shielding from liability of permanent UN Security Council nations like Russia, the People’s Republic of China, and the United States, who will be able to prevent their own actions from being investigated).

41. Rome Statute, *supra* note 9, pmbl.

42. SCHABAS, *supra* note 2, at 22.

43. Rome Statute, *supra* note 9, art. 10.

2. Procedural Structure

“The ICC is an independent international organisation, and is not part of the United Nations system.⁴⁴ Its seat is at The Hague in the Netherlands. Although the Court’s expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities.”⁴⁵ Four notable branches make up the bulk of the Court’s composition: the Presidency, Registry, Office of the Prosecutor, and the Judicial Divisions.⁴⁶

a. The Presidency

The Presidency consists of three judges elected to oversee the activities of the ICC. These judges—the ICC President and First and Second Vice Presidents—are elected by a majority vote of their ICC judicial colleagues for a three year term to direct the Court’s administrative activities, external affairs, and “judicial/legal functions.”⁴⁷ Essentially, the Presidency’s role can be summarized as follows:

In the exercise of its judicial/legal functions, the Presidency constitutes and assigns cases to Chambers, conducts judicial review of certain decisions of the Registrar and concludes Court-wide cooperation agreements with States. With the exception of the Office of the Prosecutor, the Presidency is responsible for the proper administration of the Court and oversees the work of the Registry. The Presidency will coordinate and seek the concurrence of the Prosecutor on all matters of mutual concern. Among the Presidency’s responsibilities in the area of external relations is to maintain relations with States and other entities and to promote public awareness and understanding of the Court.⁴⁸

b. The Registry

Additionally, the Registry is headed by the Registrar—under the Registrar’s direction “[t]he Registry provides judicial and administrative

44. *Structure of the Court*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court> (last visited Nov. 17, 2010) [hereinafter *ICC, Structure of the Court*]. The ICC does, however, maintain a “cooperative relationship with the U.N.” See discussion *infra* Part II.

45. *About the Court*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Nov. 16, 2010).

46. *ICC, Structure of the Court*, *supra* note 44.

47. *The Presidency*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Presidency/The+Presidency.htm> (last visited Nov. 18, 2010) [hereinafter *ICC, The Presidency*].

48. *Id.*

support to all organs of the Court.”⁴⁹ As a neutral ICC branch, the Registry provides the Court with assistance for its basic functions—aiming to further ICC goals by conducting its activities with “quality, efficiency, transparency and timeliness.”⁵⁰ Some of the Registry’s key areas of focus include: assistance for the defense council, preparation of victims and witnesses who will testify before the Court, management of the ICC temporary detention center where ICC-detained individuals are held, and the handling of the Court’s outreach to the global community.⁵¹

c. The Office of the Prosecutor

The Office of the Prosecutor (“OTP”) is itself a unique branch of the ICC structure. OTP is divided into three groups: the Investigation Division (“ID”), Prosecution Division (“PD”), and Jurisdiction, Complementarity and Cooperation Division (“JCCD”)—each operates under the overall direction of the Prosecutor.⁵² As noted prior, OTP is unique in that it is independent of the Presidency’s administrative control.⁵³ This allows OTP’s ID to examine alleged crimes within the ICC’s jurisdiction in an unbiased fashion. Nevertheless, many restrictions do apply to the alleged crimes that may be investigated. Aside from the requirement of ICC jurisdiction,⁵⁴ ID may only investigate an alleged crime if the State’s judicial power is unable or unwilling to do so in light of systematic corruption.⁵⁵

In order to initiate an investigation, ID must first complete a preliminary analysis of the alleged crime. In this preliminary analysis, it must be determined whether an investigation would be in the interests of justice, the gravity and complementarity of the alleged crime, and whether there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed.”⁵⁶ Also, during the preliminary analysis ID enlists the expertise of JCCD—a collection of “analysts, international Cooperation Experts and lawyers”—who offer their advice on

49. *Registry*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/The+Registry.htm> (last visited Nov. 17, 2010).

50. *Id.*

51. *Id.*

52. *Office of the Prosecutor*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor> (last visited Nov. 18, 2010). More specifically, while the Prosecutor is the overall leader of OTP, PD is headed by the Deputy Prosecutor and JCCD and ID have a Director/Head in charge of their operations respectively.

53. *See ICC, The Presidency*, *supra* note 47.

54. *See infra* Part II.

55. SCHABAS, *supra* note 2, at 54–55.

56. Rome Statute, *supra* note 9, art. 53(1)(a).

the appropriateness of ICC jurisdiction and admissibility for potential prosecution of the alleged crime at hand.⁵⁷

If an investigation is deemed worthy,⁵⁸ it will be conducted by ID—which will gather evidence and witness statements to try and corroborate details of the alleged crime.⁵⁹ Once an investigation is complete, ID's findings will be presented to the judges of the Judiciary by the Prosecutor. Should the judges find that the evidence compels ICC action, the judges will issue summonses and/or arrest warrants for the accused perpetrators of the crimes.⁶⁰ Once these defendants appear before the Court, PD will officially take over the case from ID. The charges may then be confirmed for the defendants, and if this occurs PD will begin their prosecution of the defendants before an ICC trial court.⁶¹

d. The Judicial Divisions

The final branch of the ICC is the Judiciary, which maintains three distinct divisions: Pre-Trial, Trial, and Appeals.⁶² The Pre-Trial Division⁶³ is crucial to the initial proceedings against an individual of ICC interest—until the Prosecutor confirms or refutes the applicable charges against the defendant.⁶⁴ In this timeframe, a Pre-Trial Chamber consisting of either one or (usually) three judges who will review the Prosecutor's investigation authorization request to determine whether a reasonable basis exists for further examination into a defendant's allegedly criminal conduct.⁶⁵ Should it authorize an investigation, the Pre-Trial Chamber will then focus on establishing communication and cooperation with relevant States—as well

57. *Frequently Asked Questions*, INT'L CRIM. COURT, http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID={A6F14A19-D07F-4B3D-8B2A-E1ED0D29F434}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/FAQ/FAQ.htm&NRCACHEHINT=Guest#id_3 (last visited Nov. 19, 2010) [hereinafter *ICC, Frequently Asked Questions*].

58. See Rome Statute, *supra* note 9, art. 53(1).

59. *ICC, Frequently Asked Questions*, *supra* note 57. It is important to note that evidence and statement gathering may prove difficult—as typically these alleged crimes have taken place in volatile regions of the world. In some cases—like the ICC's investigation into alleged crimes in Darfur—investigators have been allowed to work from afar and not even enter the dangerous region.

60. *Id.*

61. See *id.*

62. *Chambers*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers> (last visited Dec. 29, 2010).

63. The Pre-Trial Division consists of two Pre-Trial Chambers that divide case responsibilities for ICC's proceedings. See *Pre-Trial Division*, INT'L CRIM. COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/chambers/Pre+Trial+Division/> (last visited Mar. 25, 2011) [hereinafter *ICC, Pre-Trial Division*].

64. *Id.*

65. *Id.* See Rome Statute, *supra* note 9, art. 53(1)(a). Note that the Prosecutor's authorization request for an investigation is grounded in ID's preliminary analysis of the alleged crime committed by the defendant.

as protecting the rights of the defense, the efficiency of the ICC, and the interests of witnesses and alleged victims alike.⁶⁶ Essentially, the Pre-Trial Chamber acts in paternalistic fashion to make sure OTP conducts the investigation competently and appropriately in accordance with the Rome Statute and the Court's own established rules for Procedure and Evidence.

The Pre-Trial Chamber is also the body that determines whether the Prosecutor's investigation necessitates an arrest warrant for the accused sought. Upon a defendant's surrender or proffered appearance stemming from an arrest warrant, the Prosecutor must prove to the Pre-Trial Chamber that the evidence found during investigation is adequate to "establish substantial grounds to believe that the [accused] committed the crime charged."⁶⁷ At this hearing, the defendant will be allowed to refute the Prosecutor's evidence if possible, as well as present his or her own contrary evidence.⁶⁸ This hearing will determine whether charges will be confirmed against a defendant; should this occur the case will be moved to the Trial Division by order of the ICC Presidency.⁶⁹

Upon confirmation of charges against a defendant, a Trial Chamber will be established to determine his or her guilt or innocence.⁷⁰ As well, the trial of the accused will be held publically unless this requirement would lead to a lack of adequate protection for witnesses, victims, evidence, or the general rule of law.⁷¹ In summary, "[t]he major role of the Trial Chamber . . . is adopting all the necessary procedures to ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses."⁷² Should the accused be found guilty, the three judges presiding over the Trial Chamber and its case will be able to enforce a term of imprisonment—"which may not exceed a maximum of thirty years or a term of life imprisonment."⁷³ Victim restitution and rehabilitation are also penalties the judges may impose on a guilty party,⁷⁴ as well as other financial punishments.⁷⁵

ICC Appeals Chambers hold responsibility for reviewing case decisions made by the Trial Chamber judges. The five judges of the Appeals Division together may hear petitions from both the Prosecutor and the defendant on a range of topics during every stage of a case. Some of the options include

66. ICC, *Pre-Trial Division*, *supra* note 63.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Trial Division*, INT'L CRIM. COURT, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> (last visited Dec. 30, 2010) [hereinafter *ICC, Trial Division*]; Rome Statute, *supra* note 9, art. 61(11).

71. See Rome Statute, *supra* note 9, art. 68.

72. *ICC, Trial Division*, *supra* note 70; see also Rome Statute, *supra* note 9, art. 64.

73. *ICC, Trial Division*, *supra* note 70.

74. Rome Statute, *supra* note 9, art. 75(2).

75. *Id.* art. 77.

appeals concerning “decisions with respect to jurisdiction and admissibility,” “decision[s] of conviction or acquittal on grounds of procedural error, error of fact or error of law,” and rulings concerning “any other ground[s] that affect[] the fairness or reliability of the proceedings or decision.”⁷⁶ As the definitive decision-maker in the ICC, the Appeals Chamber is entrusted with maintaining the fairness of each case—this power is exemplified in their ability to evaluate and alter established sentences, determine severe judicial misconduct, and rule on the fate of contested evidence.⁷⁷ The judges in an ICC Appeals Chamber are supposed to ensure justice has been present in the actions of the lower courts—as the fate of those charged with crimes ultimately rests in their hands.

II. ICC JURISDICTION AND ADMISSIBILITY

A. Generally

While interrelated, the concepts of admissibility and jurisdiction are differentiated by the ICC’s governing treaty, the Rome Statute.⁷⁸ Put simply, “[j]urisdiction refers to the legal parameters of the Court’s operations” while admissibility “seeks to establish whether matters over which the Court properly has jurisdiction should be litigated before it.”⁷⁹ Thus, it may be possible for the ICC to have appropriate jurisdiction over a case but not be the proper forum for justice.

1. *Jurisdiction*

Briefly alluded to in Part I (B)(1), the ICC is limited in subject matter jurisdiction to war crimes, the crime of genocide, crimes against humanity, and the crime of aggression.⁸⁰ Accordingly, if any of these crimes allegedly exist, then one factor for ICC jurisdiction has been met. A second—and also necessary—element for Court jurisdiction is the condition that the applicable crime be committed following the Rome Statute’s entry into force.⁸¹ By requiring this temporal jurisdiction, the Rome Statute eliminates

76. *Appeals Division*, INT’L CRIM. COURT, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/appeals%20division/appeals%20division?lan=en-GB> (last visited Jan. 2, 2011). It is important to note that the ICC President is one of the five judges of the Appeals Division.

77. *Id.*

78. See Rome Statute, *supra* note 9, arts. 11–14, 17–20.

79. SCHABAS, *supra* note 2, at 55.

80. Rome Statute, *supra* note 9, art. 5(1). For more specifics on developments with the crime of aggression, see Gray–Block, *supra* note 40.

81. Rome Statute, *supra* note 9, art. 11(1). See also *id.* art. 11(2). Typically the ICC will only have appropriate jurisdiction and admissibility over crimes that are committed after a State *personally* enters the Rome Statute into force via ratification; however, a UN Security

its own ability “to reach into the past and prosecute atrocities committed prior to its coming into force.”⁸² While some may consider this counterproductive, the inclusion of this jurisdictional obligation is perhaps one of the most significant reasons why the ICC was allowed to come into existence. It is not hard to imagine why either. No State wants to allow for all of their past mistakes to be held against them and their citizens in a newly created court—a legal entity which did not exist when they committed their crimes, and for mistakes that may have been the transgressions of past generations. Besides, national courts are still able to prosecute these crimes as they please—despite the lack of ICC jurisdiction. In theory, this should prevent a free pass from being given to the offenders of such atrocious crimes, but reality does make evident that some crimes will inevitably slip through the proverbial cracks of justice. Regardless, the establishment of a temporal jurisdiction requirement helped allow for the ICC’s ultimate creation—a noble criminal deterrent that will benefit the world greatly despite its imperfect nature.

The ICC must also meet one of two final requirements in order to have appropriate jurisdiction over a crime—personal or territorial jurisdiction. If a crime meeting the Court’s temporal and subject matter jurisdiction requirements is committed on the territory of a State that has ratified the Rome Statute, then the ICC will hold territorial jurisdiction.⁸³ This is “regardless of the nationality of the offender.”⁸⁴ The Court “will also have jurisdiction over crimes committed on the territory of States that accept its jurisdiction on an *ad hoc* basis and on territory designated by the [UN] Security Council.”⁸⁵ Essentially the same requirements exist for ICC investigations seeking personal jurisdiction. The Court has personal jurisdiction for State nationals⁸⁶ that are accused of committing crimes⁸⁷ meeting the ICC’s subject matter jurisdiction and temporal jurisdiction requirements as long as the national’s State has ratified the Rome Statute,⁸⁸

Council exception exists in Article 13(b) and a willing non-party State exception is in Article 12(3).

82. SCHABAS, *supra* note 2, at 57.

83. Rome Statute, *supra* note 9, art. 12(2)(a).

84. SCHABAS, *supra* note 2, at 62.

85. *Id.*; see *supra* note 81 for remarks on Articles 12(3) and 13(b) of the Rome Statute.

86. Article 10 of the Rome Statute is a provision that allows customary international law—both developing and existing rules—to remain an element the ICC should take into account for decision-making. The determination of a person’s nationality is an excellent example of Article 10’s intended use. See SCHABAS, *supra* note 2, at 64 (“In accordance with general principles of public international law, the International Criminal Court should look at whether a person’s links with a given State are genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship.”).

87. Rome Statute, *supra* note 9, art. 12(2)(b).

88. *Id.*

accepted ICC *ad hoc* jurisdiction,⁸⁹ or the matter was referred to the Court by the UN Security Council.⁹⁰

Only certain immunities may prevent the ICC from exercising its overall jurisdiction—these include the inability to prosecute some diplomats and senior state officials according to international legal agreements, as well as the inability to prosecute individuals who were under eighteen years of age when they allegedly committed their crime.⁹¹ The Court may also be prevented from employing its jurisdiction by UN Security Council resolution under Chapter VII of the UN Charter.⁹² While some of these jurisdictional roadblocks—like previous conditions mentioned—may appear detrimental to justice, it must be remembered that customary international laws, global treaties, and transnational compromises are part of the civilized order we seek to preserve. They even helped lead the ICC itself into existence. Without some concessions to accommodate the States who create these devices, a court of such global magnitude would fall apart like a house of cards.

2. Admissibility

It is the dynamic nexus between the ICC and State legal systems that sets the stage for whether the ICC may hear a jurisdictionally sound case. Article 1 of the Rome Statute—according to the undertones of Article 17—asserts a central theme for admissibility: the ICC “shall be complementary to national criminal jurisdictions” when in the proper interests of justice.⁹³ In other words, it is encouraged and expected that national legal systems exercise their sovereign authority to apply civil society’s justice. Thus, guidelines for what makes ICC jurisdiction *inadmissible* are predominant in the Rome Statute⁹⁴—the intention of the Court is to assert jurisdiction only when a State’s legal structure is unable⁹⁵ or corruptly unwilling⁹⁶ to prosecute accused culprits for crimes found heinous by our global society.⁹⁷

89. *Id.* art. 12(3).

90. *Id.* art. 13(b).

91. SCHABAS, *supra* note 2, at 64.

92. Rome Statute, *supra* note 9, art. 16. A UN Security Council resolution may put ICC action on hold for a period of 12 months by what is known as “deferral.” Since Article 16 allows for this deferral to be renewed without expressed time limits, it may be argued that the UN Security Council has an indefinite ability to veto ICC prosecutions.

93. *Id.* art. 1.

94. *See id.* art. 17.

95. *See id.* art. 17(3) (“In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”).

96. *See id.* art. 17(2)(a)–(c). Notable “unwillingness” elements include shielding people from criminal responsibility for crimes within ICC jurisdiction, unjustified delays in state court proceedings, and a lack of independence and impartiality in state court litigation.

97. *See supra* notes 12–13.

As such, if a State is investigating or prosecuting a case over which they have jurisdiction, the ICC will not typically interfere with the State's litigation process—the Court will only supersede state action if a “State is unwilling or unable genuinely to carry out the investigation or prosecution.”⁹⁸ Ultimately, ICC action in this scenario will depend on the intentions and competency of the state legal system in question. This should not be interpreted, however, as the Court attempting to question the intelligence of state court methods.

Nor will the ICC be able to simply step in and prosecute an individual whom a State court has decided not to charge with a crime following an investigation—an option for Court intervention would only be available to the ICC should the State court's “decision result[] from [an] unwillingness or inability of the State *genuinely* to prosecute.”⁹⁹ In keeping with the principle that the ICC “shall be complementary to national criminal jurisdictions,”¹⁰⁰ it is apparent that the Court's powers of admissibility here should also depend on the State court's abilities and intentions and never include second-guessing the legal integrity of State court rulings due to basic differences in judicial opinion.¹⁰¹

B. Application to the SPDC

Part I (B)(2)(c) of this Article introduced the idea of the preliminary analysis—a process shouldered by the Investigation Division of the Office of the Prosecutor. In summary, preliminary analysis results determine whether the Prosecutor will request authorization from the judges of the Pre-Trial chamber to investigate a specific case. One of the main factors ID seeks to confirm in preliminary analysis is whether or not a reasonable basis exists to show that the alleged crimes and culprits in question fall under the jurisdiction and admissibility of the ICC.¹⁰²

When considering the actions of Burma's ruling junta—the SPDC—the simplest jurisdictional element to meet by reasonable basis will be subject matter jurisdiction. For decades “UN resolutions and Special Rapporteurs have spoken out about the abuses [in Burma] that have been reported to them”—abuses that appear to be Regime policy.¹⁰³ A myriad of advocacy

98. Rome Statute, *supra* note 9, art. 17(1)(a).

99. *Id.* art. 17(1)(b) (emphasis added).

100. *See id.* art. 1 (noting the idea of complementarity).

101. *See* Rome Statute, *supra* note 9, arts. 17(1)(c), 20(1)–(3) (preventing double jeopardy—only in cases where prior trials were conducted without independence and impartiality may the ICC re-try a case already litigated).

102. *See supra* Part I (B)(2)(c).

103. CRIMES IN BURMA, *supra* note 16, at IV; *see* U.N. Security Council, Report of the Secretary-General on Children and Armed Conflict in Myanmar, U.N. Doc. S/2007/666 (Nov. 16, 2007); *see* Human Rights Council Res. 7/31, Situation of Human Rights in Myanmar (Mar. 28, 2008), *available* at <http://www.altsean.org/Docs/UNHRC%20Resolutions/HRC%202008%207-31.pdf>.

groups¹⁰⁴ and nations worldwide—including the United States government—have also denounced the social injustices attributed to the SPDC.¹⁰⁵ Notwithstanding their disputed authority to govern Burma, the Regime has been repeatedly accused of crimes considered atrocious by the civilized world—including the forced displacement of persons,¹⁰⁶ extrajudicial killings and torture,¹⁰⁷ political imprisonments,¹⁰⁸ the use of child soldiers,¹⁰⁹ violent sexual crimes,¹¹⁰ and many other wicked deeds. In light of the various reports, observations, and witnesses claiming to corroborate these actions, there is little doubt that ICC subject matter jurisdiction exists. Specifically, a reasonable basis exists for examining whether war crimes and/or crimes against humanity have actually occurred as a result of Regime policy.

With regard to temporal jurisdiction, ID and the rest of the Prosecutor's Office must be careful to lay distinction between criminal allegations arising from *before* and *after* the Rome Statute's entry into force.¹¹¹ This distinction must be made because crimes allegedly committed by SPDC

104. See, e.g., THE BURMA CAMPAIGN UK, <http://www.burmacampaign.org.uk> (last visited Mar. 14, 2011); see *Homepage*, ALTSEAN BURMA, <http://www.altsean.org> (last visited Jan. 5, 2011); see *Burma*, HUMAN RIGHTS WATCH, <http://www.hrw.org/asia/burma> (last visited Jan. 5, 2011).

105. Steven Lee Myers, *Bush, at U.N., Announces Stricter Burmese Sanctions*, N.Y. TIMES (Sept. 26, 2007), <http://www.nytimes.com/2007/09/26/world/26prexy.html> (noting that before a session of the UN General Assembly, U.S. President George W. Bush "outlined a tightening of economic sanctions . . . to aim at specific individuals [of Burma's SPDC] for the first time. He also announced a ban on visas of those 'responsible for the most egregious violations of human rights' and their families. 'Basic freedoms of speech, assembly and worship are severely restricted [in Burma],' Mr. Bush said. 'Ethnic minorities are persecuted. Forced child labor, human trafficking and rape are common.'"); *White House: U.S. To Support U.N. Inquiry in Myanmar*, *supra* note 14 ("The Obama administration has decided to support the creation of a United Nations commission to look into alleged crimes against humanity and war crimes in Myanmar. . . . The White House said in a statement [] that it believes the commission could advance the cause of human rights in Myanmar, also known as Burma, by 'addressing issues of accountability for responsible senior members of the Burmese regime.'").

106. See CRIMES IN BURMA, *supra* note 16, at 39–51.

107. *Id.* at 64–74.

108. Thomas Fuller, *Group Helps Political Prisoners in Myanmar*, N.Y. TIMES (Jan. 18, 2009), <http://www.nytimes.com/2009/01/18/world/asia/18iht-prisoner.1.19455492.html>.

109. *Burma Army 'Recruiting Children,'* BBC NEWS (Oct. 31, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/7069920.stm>.

110. See CRIMES IN BURMA, *supra* note 16, at 51–64.

111. See also Rome Statute, *supra* note 9, art. 11(2) ("If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State."). Since Burma is not a State party to the ICC—and unlikely to accept *ad hoc* Court jurisdiction due to the many criminal accusations they have acquired—they will only be able to face ICC jurisdiction through UN Security Council referral. The Rome Statute's entry into force date—July 1, 2002—is thus used for temporal jurisdiction since no State-based date exists for when Burma itself entered the Rome Statute into force.

leadership on or before July 1, 2002 will lack jurisdiction with the ICC.¹¹² This is obviously disconcerting because the national judiciary in Burma has exhibited significant partiality for the Regime—a sign that these prior crimes may never see their day of fair judgment. Nevertheless, global accusations like *Crimes in Burma* have made clear that July 1, 2002 came and went with little impact on the egregious crimes taking place in Burma—these crimes occurred before the Rome Statute’s entry into force as well as after.¹¹³ Put simply, while a Burmese family may not be able to see Regime leaders brought to ICC trial for the extrajudicial killing of their son in 1997, the father will hopefully see the leaders in question face trial on different alleged criminal charges that fulfill temporal jurisdiction.

Perhaps the most intriguing (and unstable) prerequisite for ICC jurisdiction over Burma will be territorial/personal jurisdiction. With Burma not being a member State to the ICC’s Rome Statute, the actions of SDPC leaders personally—as well as any crime committed on Burmese territory—will not automatically fall under the jurisdiction of the Court. Since it is highly unlikely the SDPC would ratify the Rome Statute for Burma or accept its *ad hoc* jurisdiction—in light of these notable criminal accusations made against them—the matter of territorial/personal jurisdiction will rest in the hands of the UN Security Council.¹¹⁴ The body, which includes five permanent members with absolute veto power,¹¹⁵ would have to vote to refer the situation in Burma to the International Criminal Court—a daunting task considering the close relationship between the SPDC and the People’s Republic of China,¹¹⁶ as well as between Russia and the Regime.¹¹⁷ The author of this Article sees this as the most formidable roadblock for justice in Burma. With China and Russia having the ability to veto any referral resolution of ICC jurisdiction for Burma, the ability for these atrocious

112. The Rome Statute entered into force by State ratification on July 1, 2002. *See also* Rome Statute, *supra* note 9, art. 126.

113. *See* CRIMES IN BURMA, *supra* note 16, at 6. In fact, *Crimes in Burma* states that its statistics and findings from Burma “center[] on events since 2002” in order to use the Rome Statute’s temporal jurisdiction requirements as an “evaluative tool.”

114. *See* Rome Statute, *supra* note 9, art. 13(b) (establishing UN Security Council *referral* authority); *id.* art. 16 (establishing UN Security Council *deferral* authority).

115. The five permanent members of the UN Security Council are the United States, Russia, Great Britain, France, and the People’s Republic of China. *See* UN Charter art. 27. While not expressly stated, it is implied in the UN Charter that a veto by any of the five permanent members will put an end to a potential resolution—however, it is also implied that absence from a vote or abstention by one of the permanent five members will allow a resolution to be passed.

116. *See* Michael Bristow, *Chinese Dilemma Over Burma Protests*, BBC NEWS (Sept. 25, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/7011746.stm> (noting that “China’s ties with the military junta ruling Burma go deep, and include expanding trade links, the sale of military hardware and diplomatic support.”).

117. *See* *Russia and Burma in Nuclear Deal*, BBC NEWS (May 15, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/6658713.stm>.

crimes to be fairly assessed in a court of law may remain an idealistic dream.

Despite this, this Article's author believes it is not impossible to sway the minds of Russian and Chinese leadership with international pressure. First off, it is evident that the People's Republic of China desires global influence and prestige—their ornate hosting of the 2008 Olympic Summer Games in Beijing is one of many examples suggesting this.¹¹⁸ By vocalizing a demand for criminal accountability in Burma, the nations of the world may be able to convince China to rebuke their SPDC allies. In the past few years “China has shown signs of promoting reform in Burma,” yet the reforms suggested have only hinted at “national reconciliation” and a restoration of “internal stability.”¹¹⁹ While an important step forward, this language may also be construed as China wanting the SPDC to end their alleged crimes and the Burmese people to simply forgive and forget what has happened. If the SPDC leadership were to do this, it would certainly be an encouraging gesture. However, what real change can take place by leaving allegedly vicious leaders in power? And what about the Burmese victims who wish to experience justice fulfilled in a court of law? Even though China has previously prevented the UN from criticizing Burma for its record on human rights,¹²⁰ it remains slightly uncertain how global pressures may affect China's future approach to an ICC referral vote. One thing is certain though—it may be argued that China has been swayed by global pressure before; they allowed the UN Security Council to refer the crimes in Darfur to the ICC¹²¹ despite their existing economic relationship with the Sudan.¹²² Thus, advocacy groups and countries alike must continue

118. See Victor Matheson, *Great Games, Great Bills*, N.Y. TIMES (Aug. 22, 2008), <http://www.nytimes.com/2008/08/22/opinion/22iht-edmatheson.1.15546378.html> (emphasizing the great lengths China went to in order to host an Olympics that would “announce its arrival as a major political and economic power.”).

119. Bristow, *supra* note 116. Chinese Foreign Policy Advisor Tang Jiaxuan has stated that China “hoped Myanmar would restore internal stability as soon as possible, properly handle issues and actively promote national reconciliation.” *Id.*

120. See also Colum Lynch, *Russia, China Veto Resolution on Burma*, THE WASH. POST, Jan. 13, 2007, at A12.

121. See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). China abstained from voting instead of vetoing the Resolution; this allowed the Resolution an opportunity to be passed despite their obvious objections. See also Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court; Resolution 1593 (2005) Adopted by Vote of 11 in Favour to None Against, with 4 Abstentions (Algeria, Brazil, China, United States), U.N. Press Release SC/8351 (Mar. 31, 2005).

122. See Moira Herbst, *Oil for China, Guns for Darfur*, BUSINESSWEEK (Mar. 14, 2008), http://www.businessweek.com/globalbiz/content/mar2008/gb20080314_430126.htm?chan=globalbiz_asia+index+page_economics+%2Bamp%3B+policy (noting that “Sudanese oil shipments to China increased 63% from 2003 to 2006. . . . In 2007, China purchased 40% of Sudan's 25-million-ton annual output of oil, accounting for about 6% of all Chinese oil imports.”).

to put the Burmese atrocities before the eyes of China and remind them that true global leadership depends on action as well as desire.

On the other hand, Russia may be the more difficult UN Security Council member to persuade—due largely in part to the fact that, unlike China, they have never publically questioned their support for the SPDC and its policies. In fact, Russian Ambassador Vitaly I. Churkin has stated that “the situation in [Burma] does not pose any threat to international or regional peace. . . . attempts aimed at using the [UN] Security Council to discuss issues [like human rights in Burma] are unacceptable.”¹²³ While incredibly difficult, it may not be impossible to persuade Russia into allowing ICC jurisdiction. Two strategies are noted *infra*.

The first strategy would be exposing Russia’s flawed, public conviction that the situation in Burma is not a threat to regional peace. While the SPDC has not been accused of warring with area states like Thailand or Laos, threats to peace have occurred in the region due to the number of refugees that have fled Burma to these nearby states.¹²⁴ In Thailand alone, “some 140,000 [Burmese] refugees live in nine remote camps.”¹²⁵ Not only is the staggering number of refugees disconcerting, but there is also evidence that many Burmese refugees have experienced abuse at the hands of the Thai military. One horrendous accusation includes “refugees . . . being towed out to sea, cut loose and abandoned.”¹²⁶ It is hard to imagine the plight of these people, as they have faced horrors in Burma as well as in the places they have sought shelter. This chaotic, violent instability suggests a real danger to peace in the region, and it is facts like these that must be publically conveyed to Russia. As noted with the People’s Republic of China, public sentiment is a powerful instrument. By exposing these crimes to Russia, and addressing them in a way where Russia must publically respond, these situations may compel Russia to change its view on Burma’s overall stability—potentially allowing the SPDC to face ICC jurisdiction.

The second strategy would be to raise the public’s awareness of Russian economic ties to Burma. If global society was more conscious of the fact that Russia is entering into major business contracts with a military junta accused of outrageous crimes, then this might be enough to turn public opinion against Russian interests. This seems particularly feasible due to Russia’s standing contract with the SDPC to build a Burmese nuclear research center—a subject of general concern when in the hands of unstable

123. *Russia and Burma in Nuclear Deal*, *supra* note 117.

124. Peter Biro, *On the Border: A Generation of Burmese Refugees in Thailand*, INT’L RESCUE COMM. (June 27, 2009), <http://www.ircuk.org/about-irc-uk/media-centre/news/article/date/2009/06/on-the-border-a-generation-of-burmese-refugees-in-thailand>.

125. *Id.*

126. Dan Rivers, *Probe Questions Fate of Refugees in Thailand*, CNN.COM (Jan. 26, 2009), <http://www.cnn.com/2009/WORLD/asiapcf/01/25/thailand.refugees/index.html#cnnSTCText>.

nations like Burma.¹²⁷ If pressure was mounted against the Russians to end these problematic business ventures, it may also lead Russia to cave to proponents of ICC jurisdiction for Burma—a move that could allow Russia to recover politically from the negative press mounted against its dealings with the SPDC. Essentially, if enough people, nations, and organizations were alarmed about the Russia–Burma relationship—especially their nuclear dealings—and broadcasted their disdain around the world, Russia might feel compelled to salvage its reputation like China did with Darfur.¹²⁸ What better way to show their “disgust” with the SPDC’s alleged actions than to allow for the crimes in Burma to face ICC jurisdiction?

While convincing China and Russia to allow for Court jurisdiction may be seen as a long shot, the interests, allies, and opinions of countries do change frequently in the contemporary world. Should Russia, China, and the other UN Security Council nations decide to refer the situation in Burma to the ICC,¹²⁹ the Court will add territorial/personal jurisdiction over the SPDC and Burma to the already established subject matter and temporal jurisdictions. As such, the ICC would have proper jurisdiction over the case¹³⁰—along with suitable admissibility. Burma’s judiciary has shown no desire to investigate the human rights violations alleged against the Regime. When considering the amount of concern being exhibited by the global community over these crimes, it is evident that Burma is a country unwilling to investigate its accused leaders. Thus, an ICC investigation of the crimes in Burma would also be admissible if merely allowed.

III. THE INVESTIGATION AND OTHER PRE–TRIAL ACTIONS

A. The Investigative Process

Should the Pre–Trial Chamber determine that a reasonable basis exists for jurisdiction and admissibility over the crimes allegedly committed by the SPDC Generals in Burma, the ICC Prosecutor and OTP will then initiate an investigation of the case.¹³¹ Distinct from common law jurisdictions like the United Kingdom and United States, the role of the ICC Prosecutor is more impartial and neutral than adversarial.¹³² In fact, an appropriate parallel would be to compare the Prosecutor to an investigating magistrate

127. *Russia and Burma in Nuclear Deal*, *supra* note 117.

128. *See supra* notes 121–22 and accompanying text (noting China’s handling of Darfur with the UN Security Council despite their economic ties).

129. Rome Statute, *supra* note 9, art. 13(b).

130. Additionally, no international agreements exist to shield senior SPDC officials from ICC jurisdiction.

131. *See* Rome Statute, *supra* note 9, art. 15(1). Should the Pre–Trial Chamber reject OTP’s requested investigation authorization, the ICC Prosecutor may act *proprio motu* to initiate an investigation based on criminal “information” known to the Prosecutor. This clause maintains a level of independence for OTP and helps to prevent judicial bias.

132. SCHABAS, *supra* note 2, at 103.

in civil law jurisdictions.¹³³ As an investigator, the Prosecutor is presented with a high level of trust—as well as the responsibility to probe a situation’s “incriminating and exonerating circumstances equally.”¹³⁴ During this investigation stage, the Prosecutor and OTP will examine every facet of the case to ascertain whether criminal responsibility exists under the Rome Statute for the crimes in question.¹³⁵ The process may be grueling, as it will include locating and questioning witnesses and victims alike,¹³⁶ gathering and reviewing evidence,¹³⁷ and—when necessary—even “seek[ing] the cooperation of States or intergovernmental organizations.”¹³⁸

What should happen then, if the SPDC were to be uncooperative with the Prosecutor’s investigative duties in Burma? *Prima facie*, it appears as if the Regime could stop the ICC Prosecutor’s case from ever advancing to a trial by preventing or stalling the investigative process inside the State. If it is determined that OTP would be unable to investigate alleged crimes in Burma due to SPDC tactics—a likely result should the case be probed there—then the Prosecutor may ask the Pre-Trial Chamber to authorize their investigation in Burma without the Regime’s consent.¹³⁹ In reality, one must ask whether this is realistic. Even if the Prosecutor was given permission to investigate from the Pre-Trial Chamber, there is no real guarantee of individual safety—entry into Burma by OTP personnel would undoubtedly invoke hostility and potential violence against them. It is the opinion of this Article’s author that the ICC and its State parties have begun to recognize this shortcoming in the Rome Statute, and have wisely sought ways to circumvent it. One way is to allow the investigation to take place outside of Burma—OTP’s investigation into crimes in the Sudan was conducted in this fashion and thus sets precedent for such an action.¹⁴⁰ This may result in a lack of certain witness/victim testimony and some portions of evidence, but it helps prevent exposing investigators and victims/witnesses alike to retribution that would be a major risk in Burma.

B. The Process of Arrest

“At any time after the initiation of an investigation, the Prosecutor may seek a warrant of arrest from the Pre-Trial Chamber.”¹⁴¹ In order to

133. *Id.*

134. Rome Statute, *supra* note 9, art. 54(1)(a); *see also id.* art. 53(1)(c) (noting that the Prosecutor is also trusted with the power to halt an investigation if it “would not serve the interests of justice.”).

135. *Id.* art. 54(1)(a).

136. *Id.* art. 54(3)(b).

137. *Id.* art. 54(3)(a).

138. *Id.* art. 54(3)(c).

139. *See* Rome Statute, *supra* note 9, art. 57(3)(d).

140. *ICC Issues Darfur Arrest Warrants*, BBC NEWS (May 2, 2007), <http://news.bbc.co.uk/2/hi/africa/6614903.stm>.

141. SCHABAS, *supra* note 2, at 109.

convince the Pre-Trial Chamber that the arrest of a suspect is needed, the Prosecutor must provide them with evidence to show that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”¹⁴² The Prosecutor must also show that an arrest of the suspect appears necessary to guarantee the person will appear at trial, prevent the accused from disturbing Court and investigative actions, or stop the suspect from continuing their allegedly heinous crimes.¹⁴³ Following the issuance of an arrest warrant by the Pre-Trial Chamber, the ICC will communicate this request to the governing authority of the State most intimately involved with the situation. It is the common desire of the ICC that suspects it issues an arrest warrant for will be brought to them by related state authorities for judgment.

With the considerable amount of evidence, witnesses, and victims being generated by the SPDC’s alleged crimes, an investigation should not be *severely* hampered by its management outside of Burma. Consequently, a request by the Prosecutor should lead to arrest warrants being issued for three key figures in the SPDC military council—the Regime’s Chairman, Senior General Than Shwe; Regime Vice-Chairman, General Maung Aye; and General Thura Shwe Mann, former Joint Chief of Staff for the SPDC’s armed forces, known as the Tatmadaw.¹⁴⁴ While Burma’s heinous crimes may not have actually been committed by these three leaders themselves, they do control the SPDC as superior military commanders—meaning “effective authority and control” over their subordinates is both an advantage and burden of their positions.¹⁴⁵ Under the Rome Statute, if military commanders are aware of—or are expected to be aware of—their subordinate military forces committing terrible crimes, and they have not taken all “necessary and reasonable measures within [their] power to prevent or repress [the] commission [of these crimes],” then these military commanders shall be held liable for the actions of their forces.¹⁴⁶ This notion of *respondeat superior*, or command responsibility, will divide the SPDC’s alleged criminal responsibility amongst these three top Generals and establish part of the reasonable grounds for an ICC arrest warrant. The credentials for these arrest warrants will be further bolstered by the fact that without them these Generals would never consider appearing at trial. In fact,

142. Rome Statute, *supra* note 9, art. 58(1)(a).

143. *Id.* art. 58(b)(i–iii).

144. Jacob Leibenluft, *Who’s in the Junta?*, SLATE (June 2, 2008), <http://www.slate.com/id/2192726>. See *Burma’s Than Shwe ‘Remains Senior General,’* BBC NEWS (Aug. 31, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11137293> (noting that “number three leader [] Thura Shwe Mann is said to have stepped down” from his SPDC leadership position) [hereinafter *Burma’s Generals*]. Regardless, this Article’s author believes the ICC should still hold him liable for his alleged criminal actions since July 1, 2002.

145. Rome Statute, *supra* note 9, art. 28(a).

146. *Id.* art. 28(a)(i–ii); see also *id.* art. 27.

the arrest warrants appear to offer the greatest prospect for their Court appearance—as it may be used to leverage other members of the SPDC’s military council into turning the Generals over to the ICC for trial.

With Burma controlled by the SPDC’s military council—and at the highest level General Than Shwe—it would appear improbable for the arrest warrants to be carried out. With the ICC dependent on States to carry out the Court’s arrest warrants, it appears that a deal must be made between lesser members of the Regime’s military council and the ICC. While the SPDC is highly secretive, it is estimated that the military council consists of roughly eleven generals¹⁴⁷—a figure that has probably changed following Burma’s faux elections in 2010.¹⁴⁸ Undoubtedly there are crimes in Burma which trace their decisional roots to these lower military council leaders, and here is where the Court must make a tough decision in the best interests of justice. It is apparent that the ICC was established to judge offenders of the most heinous crimes when a State judiciary would be unable or unwilling to do so due to corruption. Like prosecutors in the United States, the ICC Prosecutor may have to strike a deal with lower level generals in the SPDC in order for the ICC arrest warrant to be carried out against the Regime’s top three. In reaching out to these lesser leaders on the military council, the Prosecutor may be able to persuade them to turn over their superior Generals. The deal could be structured to include an offer for the dismissal of their own criminal liability, as well as possible removal to a willing third party state should they desire it for safety purposes. While contingent on the extradition of these three leading Generals, the deal could also hinge on these lesser generals permanently resigning from power and allowing for free elections within the State. Ultimately, the deal established would be up to the Prosecutor to determine, but regardless of its added specifics it may be the most feasible option for justice.

IV. THE ICC TRIAL OF SPDC LEADERSHIP

A. Initial Trial Aspects

Once transferred to The Hague in The Netherlands—the permanent seat of the ICC—Generals Than Shwe, Maung Aye, and Thura Shwe Mann will

147. Leibenluft, *supra* note 144.

148. See *Burma’s Generals*, *supra* note 144 (claiming that the SPDC’s leadership “reshuffle saw more than a dozen senior military officers [resign] ahead of Burma’s [November 2010] elections.”). See also FREEDOM HOUSE, FREEDOM IN THE WORLD: THE AUTHORITARIAN CHALLENGE TO DEMOCRACY 8 (2011), available at http://www.freedomhouse.org/images/File/fiw/FIW%202011%20Booklet_1_11_11.pdf. In November 2010 the SPDC “oversaw [Burma’s] first elections since 1990. The electoral process was tightly controlled to ensure the government-backed party’s sweeping victory, and the popular opposition National League for Democracy was formally dissolved during the year.” *Id.*

appear before the Pre-Trial Chamber for their confirmation hearing. In order to set criminal charges against the Defendants, the Prosecutor is required to show a sufficient evidential reason for each charge—with sufficiency being determined by the Pre-Trial Chamber.¹⁴⁹ Afterwards, the Chamber will inform these Generals of the crimes they have been adequately charged with, as well as their rights under law, in accordance with the Rome Statute.¹⁵⁰ The Prosecutor will then request continued detention for the Defendants during the trial, as the difficult pretenses that brought them to the ICC—namely betrayal by their subordinate generals—undoubtedly means that the accused will attempt to escape from trial at any cost.¹⁵¹ Once all formalities have been addressed in the confirmation hearing, the substantiated occurrence of war crimes and crimes against humanity will lead the Pre-Trial Chamber to constitute a Trial Chamber for the SPDC Generals.¹⁵² From its inception, both the Prosecution and the Defense must begin the process of disclosure—in other words both sides will inspect the evidence that the other plans to use at trial. “The Prosecutor must also disclose any such items that may assist the defence, although a comparable duty is not imposed upon the defence to disclose items that might assist the prosecution.”¹⁵³ Once evidence has been reviewed and voluntary witnesses have been located,¹⁵⁴ the Court will officially begin the trial of the Defendants.

The trial will commence with a re-reading of the charges confirmed against the Generals in the Pre-Trial Chamber. Following this, each of the accused will be asked to plead guilty or not guilty—the Defendants themselves will likely plead not guilty.¹⁵⁵ This process, however, is unique under the Rome Statute—as it does not follow a typical civil law or common law approach.¹⁵⁶ Instead, a guilty plea before the ICC Trial Chamber will be assessed by the judges for its context. Guilty pleas made “voluntarily after sufficient consultation with counsel [and with the support

149. SCHABAS, *supra* note 2, at 116.

150. *Id.* at 113.

151. *Id.*

152. *See id.* at 116. If criminal charges were not properly supported with evidence, then the Pre-Trial Chamber could simply decline to establish a Trial Chamber; the Prosecutor could also amend the charges with new evidence and attempt to have the defendants charged at a future confirmation hearing.

153. SCHABAS, *supra* note 2, at 117; *see also* ICC Rules of Procedure and Evidence, Rules 77–78, available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.

154. SCHABAS, *supra* note 2, at 127. Witnesses may not be compelled to testify by *subpoena*—their presence before the Court must initially be voluntary.

155. Rome Statute, *supra* note 9, art. 64(8)(a).

156. *See* SCHABAS, *supra* note 2, at 124 (noting that common law uses the guilty plea to sometimes offer a defendant a less severe charge and/or sentence to avoid or accelerate the process of trial; under continental (civil) law a guilty plea is basically irrelevant, as guilt or innocence is heavily based on the evidence presented at trial).

of] the facts of the case” will be assessed to a defendant.¹⁵⁷ However, if the Trial Chamber judges do not believe these stipulations have been achieved, the admission of guilt may be withdrawn and the trial will continue.

Other ICC rules and procedures admittedly differ from both the common law and civil law systems found across the world. There are other times where they will be more similar to one legal system than the other, like the Court’s allowance of indirect evidence and hearsay evidence when considered *prima facie* reliable and vital to the detection of truth—a tribute to civil law.¹⁵⁸ These differences and similarities will be detailed where relevant in this Article, but this Article’s focus remains on the crimes and trial of Generals Than Shwe, Maung Aye, and Thura Shwe Mann themselves. In Parts IV(B) and IV(C) *infra*, the specific war crimes and crimes against humanity that have been alleged against the Defendants will be reviewed in light of the elements that must be met for conviction. Moreover, the appropriate defenses—if any—that the SPDC Generals may assert will also be assessed to determine whether their innocence will or will not prevail.

B. Crimes Against Humanity

1. Rome Statute Definition

Under the Court’s guiding law—the Rome Statute—crimes against humanity are atrocities that share these common characteristics: acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁵⁹ The components of this statutory language may be broken down into five required elements: (1) an attack is needed, (2) “the ‘attack’ must be ‘directed against’ a ‘civilian population,’” (3) the perpetrator’s conduct “must be ‘part of’ the attack,” (4) the perpetrator must have “knowledge” that their conduct is an aspect of the attack, and (5) “the attack must be ‘widespread or systematic.’”¹⁶⁰ For purposes of clarity, relevant text within Part IV(B) will be distinguished with numbers to help connect analysis with its corresponding element (i.e. (1), (2), (3), etc.). The same will be done in Part IV(C) *infra*. Article 7(1) of the Statute goes on to list the specific acts that are connected to the crimes against humanity definition; the acts in question are:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;

157. *Id.* at 125.

158. *See id.* at 125–26.

159. Rome Statute, *supra* note 9, art. 7(1).

160. CRIMES IN BURMA, *supra* note 16, at 24–25; *see* Rome Statute, *supra* note 9, art. 7.

- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Expanded definitions of these acts and their terminology are noted in Articles 7(2) and 7(3), as well as in the ICC–approved document *Elements of Crimes of the International Criminal Court*.¹⁶¹ It is this overarching framework that will be applied to determine guilt or innocence for the SPDC Generals. With the elements of these crimes established, the Prosecutor will be required to prove to the Court that each defendant is guilty “beyond [a] reasonable doubt.”¹⁶²

2. Murder

“[T]he prohibited act of murder refers to . . . unlawful[ly] . . . killing or causing the death of one or more [people].”¹⁶³ Since 2002, countless extrajudicial killings of this magnitude have been documented in Burma by UN–authorized Rapporteurs. The Rapporteur findings have shown that these (1) murderous attacks have frequently been (2) directed at civilian populations by SPDC soldiers.¹⁶⁴ With numerous Rapporteur findings in existence, it would also be impossible for the Defendants to deny (3) knowledge over the frequent murders committed by their soldiers—or for

161. See generally Int’l Crim. Ct., *Elements of Crimes*, UN Doc. ICC–ASP/1/3 (adopted Sept. 9, 2002) [hereinafter *Elements of ICC Crimes*].

162. See Rome Statute, *supra* note 9, art. 66. Article 66(2) says it is the Prosecutor’s “onus” to determine guilt, Article 66(3) sets the “beyond reasonable doubt” standard, and Article 66(1) presumes the innocence of the defendants until they are proven guilty. *Id.* The same standard will apply to the war crimes discussed *infra*.

163. CRIMES IN BURMA, *supra* note 16, at 33; *Elements of ICC Crimes*, *supra* note 161, art. 7(1)(a)(1), n. 7.

164. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions*, ¶ 41, Comm’n on Human Rights, U.N. Doc. E/CN.4/2004/7 (Dec. 22, 2003) (by Asma Jahangir).

them to deny (4) having a part in these recurrent atrocities, as they would be held responsible as the commanding generals. It also is relevant to note that the UN Rapporteurs have sent letters to the SPDC leadership detailing these grisly actions.¹⁶⁵ Finally, it should not be very difficult to prove that (5) these murders are systematic—in other words highly organized or meticulously planned—or that the Regime’s attacks have been widespread—generally meaning on a large scale with many victims. From SPDC troops brutally beating a 17-year-old girl to death in Ta-Khi-Laek town¹⁶⁶—to soldiers shooting and killing a man fetching water near Paang Sa village,¹⁶⁷ as well as many other horrific stories—these incidents have undoubtedly been widespread. These are only two examples of the junta-driven murders taking place throughout Burma, but the UN Rapporteurs have conveyed that at the very least it has been a “deliberate strategy” for the SPDC to murder civilians believed to help armed rebel groups,¹⁶⁸ and with apparent impunity.¹⁶⁹

With SPDC soldiers seemingly liable for the elements of murder—and thus their Generals on trial through command responsibility—these Defendants will have to attempt to put forward a sufficient defense for the countless slayings brought to the Court’s attention. The most obvious choices would be arguments of military necessity or self-defense from militia forces—which may undermine the “unlawful” nature of the killings committed.¹⁷⁰ The Kachin Independence Army, Shan State Army, and other resistance movements seek to end the SPDC’s illegitimate reign in Burma—often through violent means.¹⁷¹ Yet the actions of these rebel groups pale in comparison to the virtual witch hunt the SPDC undertakes in order to root out resistance fighters. From killing innocent civilians “under the guise of

165. CRIMES IN BURMA, *supra* note 16, at 65.

166. CRIMES IN BURMA, *supra* note 16, at 66; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Addendum*, ¶ 472, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006) (by Philip Alston) [hereinafter *Alston Comment*].

167. CRIMES IN BURMA, *supra* note 16, at 66; *Alston Comment, supra* note 166, ¶ 473.

168. CRIMES IN BURMA, *supra* note 16, at 69 See The Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, delivered to the General Assembly*, ¶ 47, U.N. Doc. A/61/369 (Sept. 21, 2006).

169. CRIMES IN BURMA, *supra* note 16, at 69; The Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, delivered to the General Assembly*, ¶ 58 U.N. Doc. A/63/341 (Sept. 5, 2008).

170. Rome Statute, *supra* note 9, art. 31(1)(c).

171. See *Burma Rebel Groups Form New Alliance: Activist*, BANGKOK PRESS (Nov. 11, 2010), <http://www.bangkokpost.com/news/asia/205834/burma-rebel-groups-form-new-alliance-activist>.

dealing with ‘terrorists’¹⁷² to executing civilians—including women and children—merely *thought* to support these rebel coalitions,¹⁷³ the SPDC’s actions will make it extremely difficult for the Generals on trial to effectively argue that these “self-defense” actions were permissible or “militarily necessary.” In other words, the SPDC military response to rebel threats is not being committed rationally or in a manner equivalent to the degree of peril they face.¹⁷⁴

3. Torture

“‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”¹⁷⁵ The humanity-based crime of torture appears to be prevalent in the actions of SPDC soldiers. Examples of people being tortured are abundant under the SPDC, as (2) civilian populations are often tortured mercilessly—(1) attacks so prevalent amongst soldiers that (4) it would be nearly impossible for the Generals on trial to deny knowledge of or (3) a part in their implementation. SPDC actions have (5) been widespread—from accused resistance fighters in Karen State being suffocated with plastic sheets while beaten over the head,¹⁷⁶ to women in Shan State being thrashed close to death with bamboo sticks to retrieve information on unknown boats in the area.¹⁷⁷ A local school teacher in the village of Tagu Seik was also tortured by methods including electric shocks—Regime forces had suspicions the villagers had

172. See CRIMES IN BURMA, *supra* note 16, at 65; See The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, delivered to the UN Econ. & Soc. Council*, Comm’n on Human Rights pursuant to Resolution 2002/36, ¶ 32, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003).

173. CRIMES IN BURMA, *supra* note 16, at 66; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, delivered to the UN Econ. & Soc. Council*, Comm’n on Human Rights, ¶ 41, U.N. Doc. E/CN.4/2004/7 (Dec. 22, 2003).

174. SCHABAS, *supra* note 2, at 90.

175. Rome Statute, *supra* note 9, art. 7(2)(e).

176. CRIMES IN BURMA, *supra* note 16, at 65; The Special Rapporteur of the Comm’n on Human Rights on the Situation of Human Rights in Myanmar, *Interim Rep. of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar, transmitted by Note of the Secretary-General*, ¶ 56, U.N. Doc. A/58/219 (Aug. 5, 2003) (by Paulo Sergio Pinheiro) [hereinafter *Pinheiro Comment August 5*].

177. CRIMES IN BURMA, *supra* note 16, at 66–67; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Addendum, Summary of Cases Transmitted to Governments and Replies Received, delivered to the UN Econ. & Soc. Council*, Comm’n on Human Rights, ¶ 473, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006).

been hiding weapons for a resistance group, but none were ever found.¹⁷⁸ The systematic nature of this torture has also been noted, as it appears that SPDC soldiers use these attacks for three specific purposes—to prevent civilian discussion of social and economic issues in Burma,¹⁷⁹ to root out resistance fighters and their supporters,¹⁸⁰ and generally to strike fear and obedience into the population.¹⁸¹ Once again, this is all conducted “under the guise of dealing with ‘terrorists.’”¹⁸²

When attempting to defend against responsibility for the actions of their soldiers, Generals Than Shwe, Maung Aye, and Thura Shwe Mann will once again assert military necessity or self-defense for the tortures committed against their people.¹⁸³ Basically, the Defendants will claim that their torturous, violent attacks—shown to the Court through the Prosecutor’s physical evidence and witness testimony—are a rational balance against the level of danger the SPDC faces from armed threats. Here, the Generals will again fail in their reasoning. Regardless of the fact that the SPDC Generals have never ratified the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,¹⁸⁴ it appears that under the ICC “no specific purpose need be proved for [torture].”¹⁸⁵ Overall, if torture is shown to be a widespread or systematic method being employed knowingly by the Regime against civilians and enemies alike, it will be impossible for the Generals to avoid guilt for torture—regardless of their alleged purposes for using the practice.

178. CRIMES IN BURMA, *supra* note 16, at 67; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum: Analysis of Country Situations and other Activities of the Special Rapporteur, delivered to the UN Econ. & Soc. Council*, ¶ 60, U.N. Doc. E/CN.4/2006/78/Add.1 (Jan. 18, 2006).

179. CRIMES IN BURMA, *supra* note 16, at 65; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, delivered to the UN Econ. & Soc. Council*, Comm’n on Human Rights pursuant to Resolution 2002/36, ¶ 32, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003).

180. *See* CRIMES IN BURMA, *supra* note 16, at 65; *Pinheiro Comment August 5, supra* note 176, ¶ 56.

181. *See* CRIMES IN BURMA, *supra* note 16, at 65; *Pinheiro Comment August 5, supra* note 176, ¶ 56.

182. CRIMES IN BURMA, *supra* note 16, at 65; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions, delivered to the UN Econ. & Soc. Council*, Comm’n on Human Rights pursuant to Resolution, ¶ 32, 2002/36 U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003).

183. *See* SCHABAS, *supra* note 2, at 90.

184. *See generally* Elements of ICC Crimes, *supra* note 161.

185. Elements of ICC Crimes, *supra* note 161, art. 7(1)(f), n. 14.

4. Imprisonment

For imprisonment to qualify as a crime against humanity, it must—like murder and torture—meet a humanity crime’s basic elements,¹⁸⁶ as well as be a “severe deprivation of physical liberty in violation of fundamental rules of international law.”¹⁸⁷ Perhaps the most well-known example of an SPDC imprisonment would be that of Aung San Suu Kyi—the democratic voice of Burma.¹⁸⁸ It is important to once again consider the entry into force date of the Rome Statute—July 1, 2002. It is within this context that we must look at the imprisonment of Suu Kyi, as before this date there is no ICC accountability.

On May 30, 2003—a date which became known as “Black Friday,” an SPDC–recruited mob violently attacking Burmese citizens who were praising Aung San Suu Kyi and her political party, the National League for Democracy (“NLD”).¹⁸⁹ While more than 100 people were killed or injured in the attack, no one in the mob was ever tried for a crime.¹⁹⁰ “This brutal attack was the [SPDC’s] response to the unwavering support shown to the NLD during Aung San Suu Kyi’s numerous trips through–out [Burma], following her release from 19 months of house arrest in May 2002.”¹⁹¹ As a result, this well-known victim would return to house arrest from May 30, 2003 until November 13, 2010.¹⁹² Suu Kyi’s physical liberties were harshly divested from her, as she was limited to her home and removed from nearly all human contact.¹⁹³ Moreover, “Navi Pillay, the UN high commissioner for human rights, accused Myanmar’s military leaders...of persecuting the Nobel peace laureate [Aung San Suu Kyi]. . . . [Pillay would assert that Suu Kyi’s] continued detention . . . [was a] breach [of] international standards of due process and fair trial.”¹⁹⁴ While Aung San Suu Kyi’s string of house arrests have concluded as of this Article, her detention in itself still

186. Rome Statute, *supra* note 9, art. 7.

187. *Id.* art. 7(1)(e).

188. *See supra* note 14.

189. Ellen Nakashima, *Burma’s Iron ‘Aunty,’* WASH. POST (Oct. 13, 2003), <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A18107-2003Oct12¬Found=true>.

190. *See id.* (stating that it may be assumed that no one in the mob was judicially held accountable for their crimes on “Black Friday,” as the mob was recruited by Burma’s military junta, the SPDC, to carry out these acts of violence).

191. ASEAN INTER–PARLIAMENTARY MYANMAR CAUCUS, THE DEPAYIN MASSACRE 2 YEARS ON, JUSTICE DENIED 1 (2005), *available at* <http://www.aseanmp.org/resources/Depayin%20Massacre.pdf>.

192. *Burma Releases Pro–Democracy Leader Aung San Suu Kyi*, BBC NEWS (Nov. 13, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11749661>.

193. NAT’L DEMOCRATIC INST., *supra* note 14. (noting that the terms of Suu Kyi’s house arrest included a prohibition against visitors to her home without the consent of SPDC leadership).

194. UN: *Suu Kyi Detention ‘Illegal,’* AL JAZEERA (May 16, 2009), <http://english.aljazeera.net/news/asia-pacific/2009/05/20095151449393754.html>.

constitutes an imprisonment crime committed by the SPDC. By itself, it would not constitute a crime against humanity, as it was a crime directed against Suu Kyi and not the civilian population of Burma—despite the immense anguish it caused her supporters. However, when her case is added to the political prisoners still being held by the SPDC—a number estimated at more than 2,200 people¹⁹⁵—the political imprisonments in Burma easily reach the level of a humanity crime before the ICC.

In essence, (1) (2) the attack committed against these civilian prisoners is their imprisonment itself—a deprivation of their physical freedom that was made outside the norms of international law, which requires basic due process and a fair trial. Judicial fairness has not existed for these 2,200+ individuals—who include many NLD members and Buddhist monks who led peaceful anti-SPDC protests in 2007.¹⁹⁶ The vast number of political prisoners, along with their wide array of peaceful affiliations and backgrounds, (5) makes their holding by the Regime a widespread action. The SPDC's decision to imprison virtually anyone who publically opposes their policies makes the situation a systematic action as well. With the Generals on trial before the ICC having (4) specific knowledge of these incarcerations, and (3) openly taking part in their implementation,¹⁹⁷ it is clear that their actions constitute a crime against humanity in the form of imprisonment.

Once again, the Defendants' only option for defense would be self-defense or military necessity. Yet the protests for change and freedoms in Burma have never been violent, nor should they bring concern to the SPDC for their own self-defense. Instead, these peaceful calls for change only strike fear in the hearts of the SPDC Generals for the fact that change would probably mean a loss of their ability to rule over Burma. It emphasizes that the shocking violence brought against these protestors by the Regime has been far from a rational, military necessity. In fact, it is about as far from an appropriate response as is possible, and this basic logic will easily defeat any defense to the Defendants' political imprisonments.

195. *Who are Burma's Political Prisoners?*, BBC NEWS (Nov. 13, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11741612>.

196. *Id.* See also *Burmese Riot Police Attack Monks*, BBC NEWS (Sept. 26, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/7013638.stm>.

197. See NAT'L DEMOCRATIC INST., *supra* note 14 (noting that Aung San Suu Kyi's illegitimate imprisonment extension for violating her "house arrest conditions" was reduced significantly by General Than Shwe, yet this also indicates that he had a part in—and significant knowledge of—its implementation. In other words, General Than Shwe had the ability to suspend Suu Kyi's imprisonment but chose not to do so in defiance of the basic rules of international law).

5. *Sexual Violence*

The Rome Statute's list of crimes against humanity also includes "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."¹⁹⁸ For purposes of this Article, rape will be the predominant focus, as it appears to be the most frequent sexual crime committed against the people of Burma by SPDC soldiers.¹⁹⁹ In order to constitute a criminal charge of rape before the ICC, the elements of a humanity crime must be met,²⁰⁰ as well:

The perpetrator [must have] invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.²⁰¹

This action must also have been:

[C]ommitted by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²⁰²

The UN Rapporteurs for Burma and various UN Committees have consistently stressed that sexual violence, and particularly rape, has been an epidemic during the Regime's control. It is especially concerning because while sexual violence has been labeled "an area of major concern," it is very realistic that "reports are likely to be below the real numbers of abuses."²⁰³ These international investigators have detailed that (1) (2) rape and other sexual attacks by SPDC soldiers have been especially directed at the women of numerous ethnic populations living in rural parts of Burma—including against "the Shan, Mon, Karen, Palaung, and Chin ethnicities."²⁰⁴ Often these populations have been targeted by SPDC soldiers "as 'punishment' for allegedly supporting ethnic armed groups. . . . The [SPDC] authorities sanction violence against women and girls committed by military officers

198. Rome Statute, *supra* note 9, art. (7)(1)(g).

199. See CRIMES IN BURMA, *supra* note 16, at 51–64.

200. Rome Statute, *supra* note 9, art. 7(1).

201. Elements of ICC Crimes, *supra* note 161, art. 7(1)(g)–1(1).

202. Elements of ICC Crimes, *supra* note 161, art. 7(1)(g)–1(2).

203. CRIMES IN BURMA, *supra* note 16, at 57.

204. *Id.*; U.N. Comm. On the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Myanmar*, ¶ 24, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

. . . as a means of terrorizing and subjugating the population.”²⁰⁵ This evidences (5) a blatant, systematic policy—one that traces its roots to higher level agents within the SPDC hierarchy. There is also a widespread practice of rape by the Regime’s soldiers—undoubtedly coordinated by the Defendants’ direct or indirect mandate.²⁰⁶ A multitude of horrifying stories have been reported: two sisters from Wan Zing village were raped by Regime soldiers while they were in the fields reaping rice—their father was tied to a tree to stop him from preventing it.²⁰⁷ Another woman living in Kho Lam village was gang-raped by SPDC troops who accused her of being the wife of a resistance movement soldier.²⁰⁸ And “[i]n 2004, the Myanmar Rapporteur received reports of 125 cases of rape in Karen State alleged to have occurred over a year and a half period.”²⁰⁹ The widespread existence of rape in Burma is beyond troubling, and it is obvious from its targeted nature that (4) Generals Than Shwe, Maung Aye, and Thura Shwe Mann should have immense knowledge of this SPDC policy, as well as (3) a say in its implementation amongst the Regime’s soldiers.

Accordingly, the Generals will have no affirmative defense to prevent the crime of sexual violence, and more specifically rape, from being attributed to them via command responsibility. While the defendants may be able to put forward some form of argument to defend against most crimes against humanity on the basis of arguments like military necessity or self-defense—especially against rival, militarized groups that wish to remove them from power—sexual violence will *never* even remotely be considered a means for defense. Like murder, torture, and imprisonment noted *supra*, sexual violence by the SPDC has generally been used to target civilians—an appalling way to maintain national power. But unlike the three crimes previously discussed, sexual crimes are generally held at a higher level of

205. CRIMES IN BURMA, *supra* note 16, at 57; The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Civil and Political Rights, Including the Questions of Torture and Detention: Addendum: Summary of Information, Including Individual Cases, Transmitted to Governments and Replies Received, delivered to the UN Econ. & Soc. Council*, U.N. Doc. E/CN.4/2006/6/Add.1 (Mar. 21, 2006).

206. Elements of ICC Crimes, *supra* note 161, art. 7(1)(g)–(1–4).

207. CRIMES IN BURMA, *supra* note 16, at 55; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Addendum: Summary of Cases Transmitted to Governments and Replies Received, delivered to the U.N. Econ. Soc. Council, Comm’n on Human Rights*, ¶ 474, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006).

208. CRIMES IN BURMA, *supra* note 16, at 55; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Addendum: Summary of Cases Transmitted to Governments and Replies Received, delivered to the U.N. Econ. Soc. Council, Comm’n on Human Rights*, ¶ 471, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006).

209. CRIMES IN BURMA, *supra* note 16, at 56; The Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, delivered to the General Assembly*, ¶ 30, U.N. Doc. A/61/369 (Sept. 21, 2006).

distain, as often the victims are innocent women or children and the crime involves a destruction of intimate privacy. The author is hopeful that many victims will have the courage to appear before the Court with their accounts. Their personal stories, combined with third-party witness accounts and medical records where available, will be eternally significant in holding the Generals accountable for these appalling policies.

6. *Forced Displacement*²¹⁰

The forced transfer of a population becomes a crime against humanity when a perpetrator meets the requisite humanity crime elements, and transfers by force or deports “one or more persons to another State or location, by expulsion or other coercive acts.”²¹¹ The force needed to trigger ICC liability does not have to be physical either; force may also exist as a threat made by a perpetrator against a victim in the form of a “fear of violence, duress, detention, psychological oppression or abuse of power.”²¹² The elements of forced displacement further require that the victim was “lawfully present in the area from which they were so deported or transferred”²¹³ and that the perpetrator was aware of this lawful presence.²¹⁴

In Burma, the displacement of rural populations has become an epidemic in the last decade. According to reports, these forced internal transfers have been conducted as a “security measure” in response to armed resistance factions who oppose the Regime; for all intents and purposes, (1) (2) the SPDC has sought to displace civilian populations having the mere capability to hide or aid groups that might be detrimental to their power.²¹⁵ In one instance, SPDC soldiers physically attacked Karen State villages when conducting military operations against Karen National Union rebels. The soldiers then ordered the villagers to move to Regime-authorized relocation sites, causing civilians to either follow Regime orders or flee the SPDC and “hide in the forest or seek asylum in Thailand.”²¹⁶ The fear of continued

210. Rome Statute, *supra* note 9, art. 7(1)(d).

211. Elements of ICC Crimes, *supra* note 161, art. 7(1)(d)(1) (if international law customarily permits the grounds upon which a transfer is being made, then it cannot be a humanity crime).

212. *Id.* art. 7(1)(d)(1), n. 12.

213. *Id.* art. 7(1)(d)(2).

214. *Id.* art. 7(1)(d)(3).

215. CRIMES IN BURMA, *supra* note 16, at 43; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum: Summary of Cases Transmitted to Government and Replies Received*, U.N. Doc. A/HRC/4/20/Add.1, 222 (Mar. 12, 2007).

216. CRIMES IN BURMA, *supra* note 16, at 43; The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum: Summary of Cases Transmitted to Government and Replies Received*, U.N. Doc. A/HRC/4/20/Add.1, 222 (Mar. 12, 2007).

violence felt by the villagers—along with the psychological oppression and abuse of power exhibited by the Regime’s soldiers—undoubtedly triggered these sizeable movements.

A myriad of civilians in Burma have experienced involuntary displacement—a process that never includes measurable assistance or compensation from the SPDC.²¹⁷ To make matters worse, “[p]rohibitions are put in place for returning to their villages, and if caught they may be shot on sight.”²¹⁸ “In October 2007, sources estimated that the total number of internally displaced persons in eastern Burma was 503,000. These included 295,000 people in ceasefire zones, 99,000 hiding in the jungle, and 109,000 elsewhere in Burma—including in [Regime–authorized] relocation sites.”²¹⁹ These degrading attacks on the population have led the Myanmar Rapporteur to believe that the practice of forced displacement is (5) unquestionably widespread in Burma—in addition to being a systematic element of SPDC counter–insurgency.²²⁰ The author of this Article strongly believes that involuntary displacement—an aspect of the Regime’s brutal “Four Cuts Policy”²²¹ for counter–insurgency—is far more disastrous for Burma’s civilians than it ever could be for the resistance fighters the policy is meant to undermine. This is a disheartening observation which at least provides one constructive note—the fact that forced displacement is generally considered an element of a larger SPDC policy means that (3) (4) the Defendants would be expected to have knowledge of it and play a key role in its implementation. Thus, as long as the ICC Prosecutor is able to confirm that the forcibly displaced victims were lawfully present in Burma at the time of their transfer, and that the SPDC was aware they were forcing

217. CRIMES IN BURMA, *supra* note 16, at 46–47; Special Rapporteur of the Comm’n on Human Rights on the Situation of Human Rights in Myanmar, *Interim Rep. of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar, transmitted by Note of the Secretary–General*, ¶ 17, U.N. Doc. A/57/290 (Aug. 9, 2002) (by Paulo Sergio Pinheiro) [hereinafter *Pinheiro Comment August 9*].

218. CRIMES IN BURMA, *supra* note 16, at 47; *Pinheiro Comment August 9, supra* note 217, ¶ 17.

219. CRIMES IN BURMA, *supra* note 16, at 44; The Special Rapporteur on the Situation of Human Rights in Myanmar, *Human Rights Situations that Require the Council’s Attention: Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, delivered to the General Assembly, Human Rights Council*, ¶ 69, U.N. Doc. A/HRC/7/18 (Mar. 7, 2008).

220. CRIMES IN BURMA, *supra* note 16, at 49; See The Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, delivered to the General Assembly*, ¶ 47, U.N. Doc. A/61/369 (Sept. 21, 2006).

221. Sabyashci Basu Ray Chaudhury, *Burma: Escape to Ordeal*, in INTERNAL DISPLACEMENT IN SOUTH ASIA 213, 219 (Paula Banerjee et al. eds., 2005) (“The Four Cuts policy . . . aims to cut the supplies of food, funds, recruits and information to resistance groups by systematically terrorizing, controlling, and impoverishing the civilian population in resistance areas so that they have neither the opportunity nor the means to provide any form of support to the opposition.” One pillar of the Four Cuts policy is “forced relocation to sites and villages directly under the control of the SPDC military troops.”).

the relocation of legally present individuals, then the Generals on trial will be in clear violation of forced displacement under the Rome Statute's crimes against humanity.

Defending against charges of forced displacement may be one area where the SPDC Generals have a slight advantage over the Prosecutor. This advantage stems from the Prosecutor's potential difficulty in proving all required elements of forced displacement. Unlike the humanity crimes of sexual violence and torture—where relevant medical records may have been gathered by international groups to corroborate victim accusations—validating a forcibly displaced person's legal presence in Burma may be harder to accomplish.²²² This is because a person's legal presence in a country is highly predicated on the country itself—in this situation Burma. With most of these displaced persons originating in rural Burmese communities near the national borders, it may be common for them not to have documentation proving their legal status—even if they were born within the territory of the State. The Prosecutor's best option would be to emphasize the potential disconnect between rural and city communities, showing that birth certificates, marriage licenses, and other documentation are not commonly possessed by people in rural Burma. If the Prosecutor can validate this argument and show that their lack of legal documentation is caused by deficiencies in the Regime's governance, then it may be unnecessary to prove a person's legal presence in Burma past the testimony of third-party witnesses.²²³ The testimony of third-party witnesses may also suffice if the Prosecutor emphasizes to the Court that these displaced persons were separated from legal status documentation through the displacement itself. Regardless, a Trial Chamber that chooses to strictly interpret the elements of forced displacement might not accept these lines of reasoning, so the Prosecutor's safest angle would be to locate as many displaced persons with legal status paperwork as possible to establish the practice as a widespread or systematic policy of the Regime.

While the Generals may attempt to assert the affirmative defenses of military necessity and self-defense once more, these defenses would again

222. See *supra* note 219 (noting that internal displacement figures are generally estimates). The sheer numbers of those displaced may lead to difficulties in gathering statistics.

223. See Rome Statute, *supra* note 9, art. 69(3) (“The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”). See also SCHABAS, *supra* note 2, at 125–26 (noting that “[t]o be admissible, evidence must be relevant and necessary”). This does not mean, however, that evidence must be wholly validated in order to be submitted to the Court's record. Generally, the Rome Statute implies that evidence need only be *prima facie* reliable—a nod to civil law traditions—which technically means that even indirect evidence or hearsay evidence could be submitted when deemed necessary by the judges. This point is eternally significant to this Article, as the findings of the UN Rapporteurs for Myanmar (Burma) may at times fall into this category of evidence, and without these findings being admissible it would be slightly more difficult to convict the SPDC Generals for crimes under the Rome Statute.

falter when viewed in proper context. While the Defendants would argue that their forced displacement of populations throughout Burma is done to prevent aid and support from reaching armed resistance groups, this still does not change the fact that these groups are only being hindered *indirectly*—the brunt of this punishment is still being placed on innocent civilians. These noncombatants are being used as pawns in the SPDC’s internal struggle against opposition fighters, and forced displacement is just another strategy—like the murders, torture, imprisonments, and sexual violence noted *supra*—for retaining dominion over Burma.

C. War Crimes

1. Rome Statute Definition

It is undeniable that the Rome Statute’s war crimes provisions are challenging to decipher. In fact, the extensive provisions make it difficult for a casual reader of the law to walk away with a real understanding of their application. While some might argue that the Statute’s vast detail is positive—signifying the contemporary regard for war crimes prosecution, others argue that this comprehensive set of elements only makes it harder to prove the guilt of defendants beyond a reasonable doubt.²²⁴

Generally, “[t]he Court shall have jurisdiction . . . [over] war crimes . . . committed as part of a plan or policy or as part of a large-scale commission of such crimes.”²²⁵ Building on this requirement, the war crimes elements of Article 8 may be divided into two divisions: those applying to international armed conflicts and non-international armed conflicts respectively. Should an armed conflict be deemed international in nature, war crimes will equal “[g]rave breaches of the Geneva Conventions of 12 August 1949” that are committed “against [the] persons or property” protected by these Conventions—these generalized breaches are noted under Article 8(2)(a).²²⁶

224. See SCHABAS, *supra* note 2, at 43 (“The greater the detail in the provisions, the more loopholes exist for able defence arguments.”).

225. Rome Statute, *supra* note 9, art. 8(1).

226. Violations of the Rome Statute’s Article 8(2)(a) are namely:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected

Article 8(2)(b) also spells out a second category of war crimes applying to international armed conflicts. This list, which is more specific in its criminal requirements, is largely an extension of traditional laws known as “Hague Law” to the Rome Statute—an installment of older, accepted laws of war into the contemporary system of the ICC.²²⁷

However, should an armed conflict be deemed non-international, war crimes will equal:

[S]erious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of Executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.²²⁸

Article 8(2)(e) spells out another category of war crimes applying to non-international armed conflicts. This list, which is more specific in its criminal requirements than Article 8(2)(c), largely consists of Protocol Additional II—an expansion on common Article 3 of the Geneva Conventions that was adopted by UN members in the 1970s.²²⁹ Like with “Hague Law” under Article 8(2)(b), the drafters of the Rome Statute

person of the rights of fair and regular trial;

- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

See also SCHABAS, *supra* note 2, at 46 (explaining that while “[n]othing in [Article 8(2)(a)] insists that these [breaches] apply only to international armed conflict . . . the context suggests that this must necessarily be the case.”). For an explanation of this “context,” see SCHABAS, *supra* note 2, at 46, n. 82.

227. Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 279 [hereinafter Hague IV]. *See* SCHABAS, *supra* note 2, at 47.

228. Rome Statute, *supra* note 9, art. 8(2)(c)(i–iv).

229. *See* SCHABAS, *supra* note 2, at 51; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol Additional II].

seemed to defer to their earlier laws of war by incorporating Protocol Additional II directly into the modern Court's extensive structure. However, it is important to note that "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence" do not qualify as war crimes for purposes of non-international armed conflicts²³⁰—an indicator to States that the Court will not interfere with infrequent occasions of violence out of customary deference to national sovereignty.²³¹

2. *Application to Burma*

As was observed *supra* in Part IV(B), the heinous actions that the SPDC Generals have been accused of are internal in nature—and often have taken place as a result of the SPDC's armed conflicts with resistance groups. In light of the non-international character of these actions, Articles 8(2)(c)–(f) and the *Elements of Crimes of the International Criminal Court*²³² will be the sole basis for war crime elements in this Article. From these sources of ICC law, general war crime elements may be deciphered: (1) an "armed conflict" must exist,²³³ (2) the "internal" armed conflict cannot simply be a "riot" or "disturbance" or "isolated and sporadic,"²³⁴ and (3) the alleged war crimes must have been "committed as part of a plan or policy or as part of a large-scale commission of such crimes."²³⁵ Every war crime that the Prosecutor charges the Defendants with will require that these elements be met for conviction—as well as individual elements specific to each charge.

3. *Murder*

Explicitly detailed in Part IV(B)(2), murders have been conducted against civilians by SPDC soldiers in order to make them fearful of supporting armed resistance groups.²³⁶ This demonstrates that (1) an armed conflict exists between the SPDC and various opposition groups in Burma. Evidence also demonstrates that (3) these murders are committed according to a large-scale Regime policy; this may be deduced from the fact that numerous Rapporteurs have expressed concerns to the Generals over the innocent civilian murders being committed by their forces, and to no avail.²³⁷ This further proves that (2) the murders taking place in Burma are neither sporadic nor isolated. With the three general war crime elements met

230. See Rome Statute, *supra* note 9, arts. 8(2)(d), 8(2)(f).

231. See *id.* art. 8(3).

232. See generally *Elements of ICC Crimes*, *supra* note 161.

233. See Rome Statute, *supra* note 9, art. 8(2)(c)–(f).

234. *Id.* arts. 8(2)(d), 8(2)(f).

235. *Id.* art. 8(1).

236. See *supra* notes 166–67.

237. CRIMES IN BURMA, *supra* note 16, at 65.

for murder, we must assess which war crimes may be charged to the defendant Generals through command responsibility.

A war crime pertaining to murder is Article 8(2)(c)(i), “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.” This war crime requires that an innocent civilian be killed by a perpetrator in the context of a non-international armed conflict. Moreover, the civilian killed must not have taken part in the hostilities, and the perpetrator must have been aware of this fact.²³⁸ Each element appears sufficiently met by the facts of the preceding paragraph, as long as witness testimony is able to corroborate the victim’s innocence. With the Regime’s Generals having command responsibility over the actions of their soldiers—especially with these murders being brought to their immediate attention by reputable investigators like UN Rapporteurs—General Than Shwe and his fellow Defendants on trial may be held criminally responsible for potentially hundreds of murder-based war crimes, as each individual killing may constitute an offense before the Court if properly evidenced.

4. Torture

Broadly noted *supra* in Part IV(B)(3), torture has been another technique enacted against Burma’s civilian population in order to make them hesitant about assisting local groups opposing the despotic Regime. This again demonstrates that (1) an armed conflict exists between SPDC forces and rebel groups opposed to their rule in Burma. Torture’s widespread, systematic use also shows that (3) it is a large-scale practice by SPDC soldiers²³⁹—a policy that would be incredibly hard for the Defendants to deny knowledge of and responsibility for. As torture appears to be Regime policy,²⁴⁰ (2) it would be exceedingly difficult for the Generals to claim it is a sporadic or isolated action. With the general war crime elements for torture met, we must determine which war crimes may be charged to the SPDC Generals through command responsibility.

One war crime concerning torture is Article 8(2)(c)(i), “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.” This war crime requires that an innocent person have “severe physical or mental pain or suffering” inflicted upon them by a perpetrator in the context of a non-international armed conflict. Additionally, the civilian being tortured must not have taken part in the hostilities, and the perpetrator must have been aware of this fact. Overall, the torture must have been conducted for the purposes of “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on

238. See Elements of ICC Crimes, *supra* note 161, art. 8(2)(c)(i)–1(1–5).

239. See CRIMES IN BURMA, *supra* note 16, at 65; See *Pinheiro Comment August 5*, *supra* note 176, ¶ 56.

240. See generally *infra* Part IV.B.3.

discrimination.”²⁴¹ Each element appears to be suitably met by the facts of the prior paragraph, as long as the victim’s and/or any witness testimony is able to properly substantiate the innocence of the victim. With the Defendants holding command responsibility over the actions of their soldiers—and torture apparently being a standard method for instilling preemptive fear in citizens to preempt support for armed resistance fighters—the SPDC Generals on trial may be held criminally responsible for possibly hundreds of torture-based war crimes, as each instance may constitute an offense before the Court if appropriately confirmed.

5. *Sexual Violence*

Duly noted in Part IV(B)(5), atrocious instances of sexual violence have taken place against rural civilians near resistance group strongholds; the attackers of these civilians have notoriously been SPDC soldiers aiming to prevent local assistance of armed resistance fighters through fear, punishment, and anxiety.²⁴² This brutality—triggering paranoia of the Regime’s military forces demonstrates that (1) a formidable armed conflict exists between the SPDC and militarized opposition groups within Burma. Moreover, the pervasive nature of rape and other aggravated sexual crimes in the State show that (2) the sexual violence in Burma is not isolated or sporadic. In fact, with rape and other sexual aberrations seeming to coincide with most Regime attacks on rural populations, the condition certainly has the makings of (3) a large-scale SPDC policy. With the three standard war crime elements met for sexual violence, we must consider which war crimes may be charged to Generals Than Shwe, Maung Aye, and Thura Shwe Mann by way of command responsibility.

One war crime connected to sexual violence—and rape more specifically—is Article 8(2)(e)(vi), “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.” This war crime specifies that the general *actus reus* elements of rape under crimes against humanity shall also be the standard for rape as a war crime.²⁴³ With the SPDC noticeably aware of the connection between their sexual crimes and the non-international turmoil they face from armed militias,²⁴⁴ each element appears sufficiently met by the facts of the preceding paragraph. Additionally, it is important to note that the elements for proving rape as a war crime do not include provisions requiring non-

241. See Elements of ICC Crimes, *supra* note 161, art. 8(2)(c)(i)–4(1–6).

242. See *supra* notes 204–05.

243. See Elements of ICC Crimes, *supra* note 161, art. 8(2)(e)(vi)–1(1–2). Compare with *Id.* art. 7(1)(g)–1(1–2).

244. *Id.*, art. 8(2)(e)(vi)–1(3–4).

active participation by the victim in any armed conflict against the crime's perpetrator.²⁴⁵ This point is significant, as it dictates that rape and other heinous sexual attacks are *never* permitted under the pretexts of combat. With the Regime's Generals having command responsibility over the actions of their soldiers, General Than Shwe and his fellow Defendants may be held criminally responsible for countless instances of rape, as each sexual attack may constitute an offense before the Court if properly substantiated by evidence and testimony.

6. *Forced Displacement*

Part IV(B)(6) observed in detail the forced displacement of rural civilian populations in Burma—a technique employed by the SPDC to obstruct possible aid for armed resistance movements.²⁴⁶ Again, the rudimentary facts demonstrate that (1) an armed conflict exists between Regime forces and resistance groups opposed to SPDC control over Burma. Additionally, the widespread, systematic use also shows that (3) involuntary displacement is a large-scale practice by SPDC soldiers²⁴⁷—a policy for which it would be exceedingly difficult for the Defendant to deny all responsibility and knowledge. This is especially true with the practice being considered a component of the SPDC's "Four Cuts" policy.²⁴⁸ Thus, it would be nearly impossible for the Generals to claim that forced displacement was (2) a sporadic or isolated action. With the basic war crime elements for involuntary displacement met, we must then determine which war crimes may be charged to the Defendants through command responsibility.

One war crime concerning forced displacement is Article 8(2)(e)(viii), "[o]rdering the displacement of [a] civilian population for reasons related to [a] conflict, unless the security of the civilians involved or imperative military reasons so demand." This war crime's elements state that a perpetrator in a position of influential authority must have ordered a civilian population's displacement in light of an armed conflict known to the perpetrator. In addition, the displacement must not have been justified by "military necessity" or the security of the civilians.²⁴⁹ Each element appears to be appropriately met by the facts of the prior paragraph, as long as the victims and other witnesses are able to demonstrate the viciousness of the displacements. No forced displacements on the basis of civilian security would feasibly include violence against the citizens themselves—the presence of cruelty in the SPDC's rural population displacements seemingly defeats this justification. With the Defendants holding command

245. See *id.*, art. 8(2)(e)(vi)–1(1–4).

246. See *supra* notes 215–19.

247. See *supra* note 220.

248. See Chaudhury, *supra* note 221.

249. See Elements of ICC Crimes, *supra* note 161, art. 8(2)(e)(viii)(1–4).

responsibility over the actions of their soldiers—and forced displacement being a standard facet of greater Regime strategy—the SPDC Generals may be held criminally responsible for the displacement of hundreds of thousands of civilians, as the practice will probably constitute a war crime.

7. *The Use of Child Soldiers*

While the previously discussed war crimes of torture, forced displacement, rape, and murder required less factual study in light of their detailed analysis under crimes against humanity,²⁵⁰ the war crime of child soldier use has been untouched so far in this Article. Nevertheless, this does not mean that the issue is of any less concern to the international community. In fact, in October 2002 it was estimated “that 70,000 or more of the [SPDC’s] estimated 350,000 soldiers may be children.”²⁵¹ In 2006 the Human Rights Education Institute of Burma would build on this statistic by asserting that SPDC “child recruitment rates remain essentially unchanged” from the figures noted by Human Rights Watch in October 2002.²⁵² The Regime once claimed that its military, the Tatmadaw, was solely comprised of volunteers who are eighteen years of age or older.²⁵³ However, in what may be construed as a partial admission of guilt, the SPDC leadership eventually “agreed to cooperate [with the UN] in the establishment of a monitoring and reporting mechanism on child rights violations. . . . The [SPDC] also agreed to provide the details of actions taken against army recruiters who recruited children.”²⁵⁴ While these pledges were an important step forward in protecting Burmese children from the horrors of armed conflict, their enactment has been more rhetorical than truly action-based.²⁵⁵

250. See generally Part IV.B.

251. See HUMAN RIGHTS WATCH, “MY GUN WAS AS TALL AS ME” – CHILD SOLDIERS IN BURMA 3 (Oct. 2002), available at <http://www.hrw.org/legacy/reports/2002/burma> [hereinafter MY GUN WAS AS TALL AS ME].

252. See *Burma: Use of Child Soldiers Continues Unabated*, HUMAN RIGHTS WATCH (Sept. 12, 2006), <http://www.hrw.org/en/news/2006/09/11/burma-use-child-soldiers-continues-unabated> [hereinafter *Use of Child Soldiers Continues*].

253. HUMAN RIGHTS WATCH, SOLD TO BE SOLDIERS – THE RECRUITMENT AND USE OF CHILD SOLDIERS IN BURMA 6 (Oct. 2007) [hereinafter SOLD TO BE SOLDIERS], available at <http://www.hrw.org/sites/default/files/reports/burma1007webwcover.pdf>.

254. The Secretary General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 64, U.N. A/62/609-S/2007/757 (Dec. 21, 2007), available at http://www.ceipaz.org/images/contenido/Children%20and%20armed%20conflict_ENG.pdf.

255. See *Burma Army Frees Boy after Mother Pleads through Media*, BBC NEWS (Feb. 1, 2010), <http://news.bbc.co.uk/2/hi/asia-pacific/8491376.stm> (noting the forced conscription of a fourteen year old male; the immediate release of the child from SPDC military service following international media attention underscores that child soldier use is still a problem in Burma as recently as 2010—as the child’s mother was paraphrased as stating, “the boy’s release was probably an attempt by the [SPDC] to limit the damage from the case, which had attracted a lot of public attention and threatened to damage the army’s

Jo Becker, an advocate for children's rights at Human Rights Watch, has contended that "[m]ilitary recruiters are literally buying and selling children to fill the ranks of the Burmese armed forces."²⁵⁶ The receipt of money and other types of compensation for child soldier recruitment—along with high military desertion rates and the Regime's desire to expand militarily—have all contributed to the SPDC's use of child soldiers in the Tatmadaw.²⁵⁷ Even the Regime's military recruiters have an incentive to conscript child soldiers, as military recruits are typically worth rewards for the recruiter.²⁵⁸ Children are often threatened into military service through physical beatings, or intimidated with the threat of arrest for loitering or not possessing an identity card.²⁵⁹ On occasion, threats are substituted with misleading enticements such as free education, a job, or clothing.²⁶⁰ Regardless of the method, Becker believes that "[the SPDC's] continued recruitment of child soldiers separates children from their families, subjects them to abusive military training, and exposes them to horrific violence."²⁶¹ Some of the children recruited for military training have been as young as nine years old, while some as young as eleven have been placed in active military battalions.²⁶² It is hard to imagine a child of this age range having the mental stability or physical capability to endure such an intense burden.

Like with the other war crime actions detailed in this Article, the aforementioned facts on child soldier use in Burma indicate that (1) an armed conflict exists between Regime forces and resistance groups opposed to their control over Burma. One of the SPDC's key reasons for conscripting child soldiers undoubtedly stems from their underlying fear of armed paramilitary threats. Tragically, using child soldiers is a quick fix for their lack of military volunteers.²⁶³ Moreover, the vast quantity of child military enlistments—once estimated at roughly 70,000 or more of the SPDC's military forces—shows definitively that (3) the recruiting of child soldiers is a large-scale practice by SPDC forces.²⁶⁴ Thus, it would be virtually impossible for the Defendants to assert that child soldier use is (2) a sporadic or isolated action. With the basic war crime elements for child soldier use met, we must then determine which war crimes may be charged to the SPDC Generals through command responsibility.

reputation." Furthermore, "[t]he Coalition to Stop Child Soldiers says Burma has thousands of children in its armed forces, some as young as 11 years old.").

256. Nora Boustany, *Report: Brokers Supply Child Soldiers to Burma*, WASH. POST (Oct. 31, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/30/AR2007103002072.html>.

257. *Id.*

258. SOLD TO BE SOLDIERS, *supra* note 253, at 37.

259. *Id.* at 7.

260. *Id.*

261. *Use of Child Soldiers Continues*, *supra* note 252.

262. SOLD TO BE SOLDIERS, *supra* note 253, at 43.

263. *See* Boustany, *supra* note 256.

264. *See supra* notes 251–52.

One war crime concerning child soldier use is Article 8(2)(e)(vii), “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”²⁶⁵ This war crime’s elements state that a perpetrator cannot conscript or enlist individuals into armed forces or use them “actively in hostilities” if they are under the age of fifteen and the perpetrator should have known or knew their age to be disqualifying for military service. As well, the perpetrator must have been aware of an armed conflict connected to the enlistment/conscription need.²⁶⁶ Each element appears to be properly met by the facts established in Part IV(C)(7), as long as witnesses and military service documents are able to help substantiate the inappropriate age of these child soldiers, along with the blatant disregard by SPDC officials for military age requirements.²⁶⁷

Still, a major difficulty with war crime prosecutions for child soldier use is the basic fact that children are involved. While some children may be old enough to testify as victims of the Regime, others may still be too young to be asked to testify in such a tough situation. In other circumstances, the victims may not be allowed justice because they became child soldiers at, for example, the age of sixteen. Since the Rome Statute specifies that war crimes for child soldier use may only be charged if the children are under the age of fifteen when conscripted or enlisted, this may lead to the elimination of countless war crime counts the international community unwittingly thought were applicable against the Defendants—as commonly the global norm for childhood is when an individual is under the age of eighteen. Despite children in trial proceedings being a sensitive subject to address on many fronts, enough victims and witnesses will probably be able to come forward in order to hold the Generals accountable. With 70,000 child soldiers as a rough estimate for the Tatmadaw’s condition,²⁶⁸ this means that *conservatively* hundreds of war crime counts could be attributed to the Defendants. With the Generals Than Shwe, Maung Aye, and Thura Shwe Mann undoubtedly aware of the child soldier problem in their armed forces—especially since the issue has been brought to their attention without suitable correction,²⁶⁹ it will be appropriate to place command responsibility on them for their inaction in fixing the problem. Consequently, the use of child soldiers in the Regime’s Tatmadaw will probably constitute *many* war crime charges for these Defendants.

265. Rome Statute, *supra* note 9, art. 8(2)(e)(vii).

266. See Elements of ICC Crimes, *supra* note 161, art. 8(2)(e)(vii)(1–5).

267. See SOLD TO BE SOLDIERS, *supra* note 253, at 48. According to one former Tatmadaw child soldier, Than Myint Oo, “[SPDC soldiers] asked my age so I said, ‘I’m 14 and I was forced, I don’t want to be here.’ They said, ‘That’s impossible’ and left. After they left we were made to lay down and were kicked and beaten.” *Id.*

268. MY GUN WAS AS TALL AS ME, *supra* note 251, at 3.

269. See *supra* notes 254–55.

8. War Crime Defenses

While defenses of the SPDC Generals were not covered as extensively for war crimes as they were for crimes against humanity, there certainly is a reason behind this omission. The crimes against humanity allegedly committed by the Defendants raised no strong defenses that could conclusively eliminate the liability facing the Generals. Since the war crimes allegations are generally based on the same heinous actions as the crimes against humanity allegations, it logically appears as if the same affirmative defenses would fail under both broad criminal topics. Self-defense and military necessity were noted as the major attempts for defense that would be put forward by the Generals, and in no way will war crimes like murder, torture, and rape be justified by either. Self-defense, or even third-party defense, could theoretically legitimize certain uses of forced displacement, but these uses would need to be based on appropriate security needs for the SPDC or civilians respectively. Here, the Regime has been shown to use involuntary displacement as an *attack* on citizens who have not been proven to support any armed resistance group. The SPDC has displaced citizens on the basis of hypothetical threats and speculation, and this is never an adequate use of displacement. Finally, there is no proper defense for the use of child soldiers, as self-defense and military necessity could never provide an argument for their purpose in conflict. Simply put, if you have a shortage of volunteer, age-appropriate military recruits, then maybe you need to change conditions, rights, or policies being enacted in your State. Something must be leading citizens to forego their desire to defend State ideologies through military service, and Burma is one such State where this is evident. True discontent has persisted for years over the harsh rule of SPDC leadership.

V. AFTERMATH OF THE TRIAL

A. Probable Trial Chamber Decision

With three judges presiding over a Trial Chamber's case, any decision of guilt or innocence on the charges facing a defendant must hold a simple majority.²⁷⁰ Likewise, the decisions of innocence or guilt on each charged crime must be determined by the judges beyond a reasonable doubt.²⁷¹ When considering the trial of Generals Than Shwe, Maung Aye, and Thura Shwe Mann, potentially thousands of allegations may be leveled at these Defendants, which are certainly not limited to the crimes discussed in this Article. However, the specific charges against these SPDC Generals will depend on the Prosecutor's preferences—which may rest on the credibility

270. Rome Statute, *supra* note 9, art. 74(3).

271. *Id.* art. 66(3).

of evidence, availability of victim and witness testimony, the ability of the Defendants to defend against a certain charge, and other additional factors. Expectantly, these SPDC Generals will still face hundreds of charges, of which it is likely they will be found guilty of most beyond a reasonable doubt. The extensive documentation of heinous crimes committed by the Regime is astounding. From Rapporteurs assigned by the United Nations—to independent investigations by concerned third party organizations—to stories being conveyed by witnesses and victims alike through media outlets—the evidence overwhelming favors a guilty verdict for each General by way of command responsibility.²⁷² These guilty charges will encompass numerous crimes: under crimes against humanity the defendants will assuredly be found guilty on charges of torture, rape, murder, forced displacement, and unsubstantiated imprisonments; under war crimes the defendants will unquestionably be found guilty on charges of murder, rape, forced displacement, torture, and the use of child soldiers. Other charges may yet exist, but it will require in depth investigation by the ICC Prosecutor and OTP to bring their details to greater light.

B. Sentencing and Appeal

Once the SPDC Generals have been convicted of war crimes and crimes against humanity, the judges presiding over the case in the Trial Chamber will be required to establish an appropriate sentence corresponding to their guilt.²⁷³ It is important to note that “[t]here is a strong presumption in favour of a distinct sentencing hearing following conviction. Though not mandatory, it must be held upon the request of either the Prosecutor or the accused, and, failing application from either party, the Court may decide to hold such a hearing.”²⁷⁴ This technical separation of sentencing from the trial itself is important to both the Prosecution and Defense for one major reason: time. This added time will allow the Prosecutor and Defense a chance to submit aggravating and mitigating evidence that is relevant to the sentencing phase. In essence, both sides will be able to offer evidence that may not have been permitted at trial but may be relevant for submission once guilt or innocence has been determined.²⁷⁵ Examples of Prosecution submissions might include “proof of bad character” for a defendant or their “prior convictions,” while Defense Counsel offerings may include “testimony by the convicted person” or their “psychological reports.”²⁷⁶

In order to avoid undue speculation, fine points on added evidence in the case at hand will be avoided in this Article. Thus, with hundreds of charges

272. See Rome Statute, *supra* note 9, art. 28(a).

273. Rome Statute, *supra* note 9, art. 76.

274. SCHABAS, *supra* note 2, at 131–32.

275. *Id.* at 132.

276. *Id.* at 132–33.

facing the SPDC Generals—which would probably lead to a multitude of criminal convictions—the Trial Chamber would surely impose a sentence of life imprisonment each for SPDC Chairman, Senior General Than Shwe, Regime Vice–Chairman, General Maung Aye, and a former Joint Chief of Staff Thura Shwe Mann. The Generals may also be required to financially compensate victims in some situations.²⁷⁷ Their collective knowledge of their soldier’s actions is abhorrent, especially when viewed in the context of the grisly acts committed by these military against the citizenry of Burma. With alarms about these deeds being sounded the world over, it would be impossible for the Generals to deny their awareness of the crimes. In fact, their lack of real attempts to stop the crimes noted in this Article would suggest that the crimes are not sporadic, but Regime policy. With leaders like this, Burma and its people will never thrive as a nation. Their actions have been a cancer on humanity, and the permanent removal of these Generals from our global society would be a benefit for all. With no death penalty available under the Rome Statute, the next best option is unequivocally imprisonment for the remainder of their natural lives.²⁷⁸

It is likely, with their convictions and subsequent penalties of life imprisonment, that the Generals will appeal to the ICC Appeals Chamber for mitigation of their sentences or an overturning of their convictions on the basis of “procedural error,” “error of fact,” “error of law,” or “[a]ny other ground that affects the fairness or reliability of the proceedings or decision.”²⁷⁹ There are countless areas of a case which the Defendants may appeal from; this includes the ICC’s basic jurisdiction and admissibility and basic elements of the trial itself. In fact:

Where the Appeals Chamber grants the appeal on a point of law or fact that materially influenced the decision, or because of unfairness at the trial proceedings affecting the reliability of the decision or sentence, it may reverse or amend the decision or sentence, or order a new trial before a different Trial Chamber.²⁸⁰

However, absent knowledge of specifics that would entice the Defense Counsel to appeal the Defendants’ convictions—like new evidence being discovered or credible reports that evidence used at trial was falsified²⁸¹—

277. See Rome Statute, *supra* note 9, art. 77(2)(a).

278. See *id.* art. 77(1)(b) (life imprisonment is applicable “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”). The author of this Article believes that life imprisonment may be a harsher punishment for the SPDC Generals, and rightly so, as death is a constant worry when operating a military regime and the Generals may be numb to its possibility. Instead, divesting them of their riches and power and shaming them through life imprisonment may actually be a fate worse than death.

279. *Id.* art. 81(1)(b)(i–iv).

280. SCHABAS, *supra* note 2, at 134.

281. *Id.* at 135.

the decision of guilt and the life sentence convictions of the Trial Chamber will be upheld by the Appeals Chamber. In addition, with the Rome Statute not addressing appeals past the Appeals Chamber, it may be properly argued that a decision by the ICC Appeals Chamber is a final decision.²⁸²

C. Incarceration

The process of imprisonment for the guilty SPDC Generals presents an interesting state of affairs, as the ICC does not have the authority to operate a permanent prison. Instead, the Court depends on Rome Statute's State parties to volunteer their prison systems for these incarcerations.²⁸³ If no State party steps forward to offer their services, then the burden of incarceration will fall upon the ICC's host nation—The Netherlands—with the costs and imprisonment being “borne by the Court.”²⁸⁴ Regardless of their final confinement location, it will be comforting for the people of Burma to know that these Generals will be unable to preside over future crimes in their homeland and that justice has been served through their fitting sentence. Hopefully their punishment will prevent future heinous crimes from taking place within Burma's borders. Maybe the removal of these Generals will allow Burma a real opportunity to alter their governance structure for the better—in a way where human rights and basic civilized dignities are lauded and truly venerated.

CONCLUSION

While mankind has always sought to hold select behavioral norms sacred, the methods for upholding these societal values have traditionally been inconsistent, culture-specific, or enforced at the predisposed hands of a conflict's victors. Even feeble inaction has plagued the maintenance of humanity-based justice—as nations have often watched in horror as the ruling authorities in other States have been free as “sovereigns” to harm their own citizens. In light of these problems, the birth of the International Criminal Court may be considered one of the greatest achievements in human history. The involvement of a myriad of States in its creation signaled a desire to solidify what clearly offends the global conscience.

While far from perfect, the Court is *predominantly* a signal of hope for people who have endured unspeakable atrocities at the whims of cruel dictators, military juntas, and other oppressive regimes. While customary rules of autonomy had often prohibited or deterred States in the past from interfering in the internal crimes of other States, the ICC categorically opened an avenue for bringing justice to these oft-forgotten victims. No

282. *Id.*

283. *See* Rome Statute, *supra* note 9, art. 103.

284. *Id.* art. 103(4).

longer would the international community allow blatant human rights abuses to be deceitfully ignored by national governments and judiciaries—or so it was assumed would be the case.

Tragically, Burma remains to this day a nation of forgotten victims. It is true that aspects of the Burmese struggle have been globally publicized—like the Saffron Revolution of Burma’s Buddhist monks in 2007,²⁸⁵ the horrors brought about by Cyclone Nargis’ landfall in 2008,²⁸⁶ and the nation’s efforts for democracy under the support of Nobel Peace Prize Laureate Aung San Suu Kyi.²⁸⁷ Yet sadly the people’s struggles against war crimes and crimes against humanity remain a misfortune being addressed by the international community with arguably less fervor. Ignorance cannot be used as an excuse, as the United Nations, global advocates, media outlets, and world leaders alike have all noted the brutality of the SPDC. In its simplest form, the problem is not a lack of information on the heinous events taking place under Regime policy—it is a fundamental lack of action by a global community claiming to take human rights seriously. And actions truly do speak louder than words.

With this Article, I urge the United Nations Security Council to allow for referral of the events in Burma to the International Criminal Court. The world cannot continue to be indifferent to the cruelties the Burmese people face at the hands of the Regime and its leadership. Until the case is able to reach the ICC for trial, I urge concerned advocates to continue publicizing the plight of these people. Like with the Court’s creation, a movement is more powerful when its purpose and voice are globally unified. But while the work is far from over, it must be done quickly. After years of anguish, the victims in Burma deserve nothing less.

Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure. A most insidious form of fear is that which masquerades as common sense or even wisdom, condemning as foolish, reckless, insignificant or futile the small, daily acts of courage which help to preserve man’s self-respect and inherent human dignity . . . Yet even under the most crushing state machinery courage rises up again and again, for fear is not the natural state of civilized man.

-Daw Aung San Suu Kyi²⁸⁸

285. See generally *Burmese Riot Police Attack Monks*, *supra* note 196.

286. See generally *Burma ‘Guilty of Inhuman Action,’* BBC NEWS (May 17, 2008), http://news.bbc.co.uk/2/hi/uk_news/politics/7406023.stm.

287. See generally *supra* notes 189–93.

288. FREEDOM FROM FEAR, *supra* note 1, at 184 (quote selected from Aung San Suu Kyi’s essay, *Freedom from Fear*).

IN ADDENDUM

APRIL 2011

Our world has changed significantly in the few short months since the completion of *Justice in Burma*. In this timeframe, we have all witnessed the upheaval taking place in the Middle East; it is a remarkable unrest that has reverberated through states like Tunisia, Egypt, and Libya.²⁸⁹ The dissatisfaction with oppressive governance is apparent, and it appears the citizens of these nations are finally ready to rise up against the crushing state machinery that ensnares them. Their demand for basic human rights and dignities has been heard by all, and their differing means for achieving this end are being observed closely by repressed populations globally.

The Middle East's demand for change is obviously being absorbed by the oppressed citizens of Burma,²⁹⁰ yet it is fair of them to question the strength of their own future resistance actions without real pressure and support from the United Nations and other global actors. Recently, the UN Security Council voted 10–0 to impose a no-fly zone over Libya in order to help protect civilians from violence being committed by the Gaddafi Regime.²⁹¹ This response to the uprising in Libya was conducted rather quickly—yet when the people of Burma peacefully demonstrated for change against the SPDC in 2007's Saffron Revolution, the UN Security Council failed to issue more than effortless statements condemning the brutal retaliation the people subsequently received at the hands of the angered Regime.²⁹²

There has also been talk of the ICC investigating the Gaddafi Regime for crimes against humanity.²⁹³ While the author considers this investigation to be appropriate given the Gaddafi Regime's recent treatment of the Libyan people, its swiftness does raise questions of hypocrisy regarding Burma. Gaddafi's current exploits have been heinous, but what about the horrors the Burmese people have suffered for years at the hands of the SPDC?

289. See generally Fouas Ajami, *How the Arabs Turned Shame Into Liberty*, N.Y. TIMES (Feb 26, 2011), <http://www.nytimes.com/2011/02/27/opinion/27ajami.html>.

290. See Molly McHugh, *Burma Joins the Facebook Revolutions*, DIGITAL TRENDS (Mar. 3, 2011), <http://www.digitaltrends.com/social-media/burma-joins-the-facebook-revolutions>.

291. *Libya: UN Backs Action Against Colonel Gaddafi*, BBC NEWS (Mar. 18, 2011), <http://www.bbc.co.uk/news/world-africa-12781009> (UN Resolution 1973 had five Security Council Members abstain from voting, including China and Russia. The Resolution included a “ban on all flights in Libyan airspace” except for aid planes” and authorization for “all necessary measures” to be taken in order to “protect civilians and civilian populated areas under threat of attack.”). See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

292. See *UN Security Council Resolutions and Statements on Burma – ALTSEAN Burma*, <http://www.altsean.org/Research/UN%20Dossier/UNSC.htm> (noting that zero UN Security Council Resolutions imposed sanctions on—or authorized force against—the SPDC from January 2007–August 2009).

293. Htet Aung, *ICC for Libya . . . Why Not Burma?*, THE IRRAWADDY (Mar. 3, 2011) http://www.irrawaddy.org/opinion_story.php?art_id=20865.

One would generally believe that the global community would be more likely to seek some level of justice when crimes take place in the public eye, but this theory fails when you consider the failed Saffron Revolution—a Burmese event that mirrors today’s Middle East situation and was made known to the world in similar fashion. Simple condemnation is one thing, but what is preventing global institutions and states from holding the SPDC’s leadership accountable for their actions? Sadly, this is a question we continue to ask of the global community, despite the clear presence of the International Criminal Court. Hopefully the Middle East’s contemporary unrest will bring about more answers than questions for the Burmese people and those of us who hear their call for help.

[The State Peace and Development Council was officially dissolved as the ruling Regime in Burma on March 30, 2011.²⁹⁴ Now, the Union Solidarity and Development Party (“USDP”) controls the State by holding a majority of Burma’s parliamentary seats, which were gained in what most experts are referring to as a sham election.²⁹⁵ It appears the SPDC leadership intends this governmental shift to mask its past indiscretions while allowing high-ranking SPDC leaders to maintain control over the State in various USDP roles. Already, newly-elected President (and former SPDC Prime Minister) U Thein Sein²⁹⁶ has established the eleven member National Defense and Security Council,²⁹⁷ which is eerily similar to the old Regime’s hierarchy of generals. In other words, this is a hollow change that the world must not be fooled by. Moreover, this “change” does nothing to erase any of the criminal liability the former SPDC leadership holds for its vicious treatment of the Burmese population; if anything it shows that (now “retired”) top SPDC officials like Than Shwe, Maung Aye, and Thura Shwe Mann²⁹⁸ are worried that the world is starting to wake up and recognize the crimes they have committed. Thus, a United Nations Security Council referral to the International Criminal Court *must* still be the desired goal.]

294. See also Kocha Olarn, *Myanmar Swears in New President*, CNN.COM (Mar. 30, 2011), <http://edition.cnn.com/2011/WORLD/asiapcf/03/30/myanmar.new.government>.

295. See Zin Linn, *Is Burma’s New Government in Military’s Sheepskin?*, ASIAN TRIBUNE (Mar. 31, 2011), <http://www.asiantribune.com/news/2011/03/30/burma%E2%80%99s-new-government-military%E2%80%99s-sheepskin>.

296. *Id.*

297. *Myanmar Forms National Defense, Security Council*, XINHUA (Mar. 31, 2011), http://news.xinhuanet.com/english2010/world/2011-03/31/c_13807811.htm.

298. See Larry Jagan, *The Look of Burma’s New Government*, ASIA SENTINEL (Apr. 1, 2011), http://www.asiasentinel.com/index.php?option=com_content&task=view&id=3102&Itemid=164 (noting the alleged retirement of Than Shwe and Maung Aye from Burmese leadership, but also noting a “military auxiliary law” that would technically “allow Than Shwe to return to lead the army and country if he feels he needs too.”). See also *Burma’s Generals*, *supra* note 144 (noting that [on or before August 31, 2010] “number three leader [] Thura Shwe Mann [was] said to have stepped down” from his SPDC leadership position).

