CENTRE FOR LAW AND DEMOCRACY

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Analysis: Amendments to the Penal Code by the State Administration Council

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org
fb.com/CentreForLawAndDemocracy
@Law_Democracy

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Introduction[1]

On 1 February 2021, the military read out a statement on the military-owned television station, Myawaddy Television, indicating that a state of emergency had been declared and governing power had been handed over to the Commander-in-Chief of the Armed Forces, Senior General Min Aung Hlaing. The claimed justification for this was serious election fraud, which represented an act or attempt "to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means", contrary to Article 417 of the Constitution of the Republic of the Union of Myanmar.[2] Articles 418 and 419 provide that, once a state of emergency is declared under Article 417, the "legislative, executive and judicial powers of the Union [shall be transferred] to the Commander-in-Chief of the Defence Services". Myanmar's military then created the State Administration Council, purportedly under Article 419 of the Constitution, to govern the country.

There are serious questions about the validity of these moves and about whether any laws issued by the State Administration Council are valid. First, the core argument for triggering Article 417, namely election fraud, rests on very doubtful claims, as other commentators have already indicated.[3] Second, Article 417 only grants the President the power to declare a state of emergency, which did not happen in accordance with the Constitutional rules. This Analysis does not address these legal issues. Given that the military is exercising *de facto* power in the country, the Centre for Law and Democracy (CLD) assumes that orders and laws passed by the State Administrative Council will be enforced in practice. Given that assumption, this Analysis provides a detailed assessment of the amendments of the Penal Code and Criminal Procedure Code from a human rights perspective, so as to highlight their serious human rights failings. This Analysis should not be read as in any way implying that these amendments are legitimate law under the Constitution of Myanmar.

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[2] See Al Jazeera, "Full text of Myanmar army statement on state of emergency", 1 February 2021, https://www.aljazeera.com/news/2021/2/1/full-text-of-myanmar-army-statement-on-state-of-emergency. The Constitution is available in English at: https://www.constituteproject.org/constitution/Myanmar_2008.pdf?lang=en.

[3] See, for example, Carter Center, Carter Center Preliminary Statement on the 2020 Myanmar General Elections, 10 November 2020, https://www.cartercenter.org/news/pr/2020/myanmar-111020.html ("election day itself occurred without major irregularities being reported by mission observers"); and Melissa Crouch, "Myanmar Coup Has No Constitutional Basis", 3 February 2021, East Asia Forum, https://melissacrouch.com/2021/02/04/myanmar-coup-on-the-pretext-of-a-constitutional-fig-leaf.

On 14 February 2021, the State Administration Council passed State Administration Council Law No. (5/2021) and Law No. (6/2021).[4] These laws amend the Penal Code[5] and Criminal Procedure Code,[6] respectively. The key changes instituted by Law No. (5/2021) are to:

- Expand the offence of high treason to include attempts to alter by unconstitutional or any other means the "organs of the Union" (amended section 121).
- Expand the crime of sedition to cover the "Defence Services or Defence Services Personnel" (amended section 124A).
- Add new offences of disrupting the work of the military, law enforcement and government employees (new sections 124C and 124D).
- Expand "statements conducing to public mischief" under section 505 to prohibit statements which undermine the motivation, discipline or health of military personnel or government employees (new section 505(a)).
- Add new offences of causing fear, spreading false news or agitating a criminal offence against a government employee (new section 505A).

For each new offence, Law No. (6/2021) establishes procedural rules governing matters such as bail and arrest warrants.

The first section of this Analysis describes these changes in more detail. The next two sections review relevant international human rights standards on freedoms and in relation to criminal justice, and assess the Penal Code amendments in light of those standards. This is followed by a short summary of the impact of the recent Martial Law declarations on these provisions and the Analysis ends with a set of conclusions and recommendations.

1. Legal Changes to the Penal Code

1.1 High Treason (Amended Section 121)

Myanmar's Penal Code already punished high treason before the amendments were adopted. Previously, this offence was limited to violent action or inciting violent action. Specifically, high treason was defined as waging war against Myanmar or using force of arms or other violent means to overthrow the "organs of the Union". With the amendments, high treason also includes any attempt to overthrow the "organs of the Union" by

[4] State Administration Council Laws No. 5/2021 and 6/2021, 14 February 2021, published in The Global New Light of Myanmar, 15 February 2021, https://cdn.myanmarseo.com/file/client-cdn/gnlm/wp-content/uploads/2021/02/15_Feb_21_gnlm_1.pdf.

[5] Penal Code (2016 version), available at: https://www.mlis.gov.mm/lsScPop.do?lawordSn=9506%20 and on file with CLD.

[6] Criminal Procedure Code, available at: https://www.mlis.gov.mm/lsScPop.do?lawordSn=10442#ATTLIST_28043 and on file with CLD.

"unconstitutional means or any other means". The consequences of doing so are significant, as the penalty remains unchanged, namely death or a term of 20 years' imprisonment (section 122). Encouraging or harbouring a person who commits treason (section 123), or failing to disclose to officials cases where others commit treason (section 124) are also crimes under the Penal Code.

Police require a warrant to arrest individuals for all three crimes relating to high treason (sections 121, 123 and 124). All three are also non-bailable offences (Criminal Procedure Code, Schedule II) meaning that accused persons do not have a right to bail. While bail may be granted on a discretionary basis for most non-bailable offences, this is not available for healthy adult males charged with offences punishable by death, unlimited imprisonment or 20 years' imprisonment (due to exceptions for young people, women and the sick) (Criminal Procedure Code, sections 496-497). Under the Constitution, a conviction for high treason is also grounds for impeachment for a number of positions, such as the President and Vice-President (section 71),[7] ministers (sections 233 and 263) and senior judges (sections 302 and 311).

1.2 Sedition (Amended Section 124A)

The amendments also appear to expand the crime of sedition. Formerly this applied to penalise bringing or attempting to bring the Government into hatred or contempt, or exciting disaffection towards it. The crime now also explicitly includes such actions directed at "the Defence Services or Defence Services Personnel". Explanation 1 clarifies that "disaffection" includes "disloyalty and all feelings of enmity". Explanation 2 indicates that merely expressing disapproval of the government measures with a view to changing them legally and without exciting hatred, contempt or disaffection is not included, while Explanation 3 similarly protects expressions of disapproval of government administration or action, again if done without exciting hatred, contempt or disaffection.

The maximum penalty for sedition is twenty years' imprisonment with a fine, which essentially remains the same. Arrest for sedition requires a warrant but sedition is a non-bailable offence (Criminal Procedure Code, Schedule II), hence not normally available even on a discretionary basis given the maximum penalty of 20 years' imprisonment.

1.3 Disrupting Officials (New Sections 124C and 124D)

The amendments add two new provisions to the Chapter of the Penal Code on "Crimes against the State", which is also where sections 121 and 124 are located, following section 124B. Section 124C prohibits sabotaging or hindering the performance of the military or law

[7] Constitution of Myanmar, section 71, available in English at: https://www.constituteproject.org/constitution/Myanmar_2008.pdf?lang=en.

enforcement organisations which are "engaged in preserving the stability of the State", with a maximum possible penalty of 20 years' imprisonment and/or a fine. Section 124D makes it a crime to disrupt or hinder defence services personnel or government employees from carrying out their duties,[8] with a penalty of up to seven years' imprisonment and/or a fine.

Since the maximum penalty under 124C is much greater than under 124D (20 years' imprisonment instead of seven), the following differences between the two otherwise similar provisions are important:

- Section 124C is limited to the hindering the performance of military or law enforcement organisations which are working to preserve the stability of the State, while section 124D covers hindering *any* government personnel carrying out *any* duties. 124C is therefore more specific, although the concept of preserving State stability is not very clear. It might refer to a limited set of law enforcement and security activities which are of great importance to stability (for example not including ordinary crimes such as theft), although an expansive reading could arguably cover any military or law enforcement actions related to security matters (which could cover any action taken vis-à-vis a demonstration or protest).
- 124C refers to *sabotaging* or hindering the performance of duties, while 124D refers to *disrupting* or hindering them. These terms are not defined, so the distinction may not be very important, although a natural language reading of sabotaging suggests a more harmful or malicious action.
- Police cannot arrest persons on either of these charges without a warrant and both of the offences are non-bailable.[9] However, the higher maximum penalty under 124C means that discretion to grant bail is once again limited.
- Section 124C covers both intending to cause and causing sabotage or hindrance, whereas section 124D appears to be limited to actually causing hindrance or disruption. The language of "intending" is also found in new section 505A and is discussed below in that context.

1.4 Statements Undermining the Motivation of Military or Government Employees (new Section 505(a))

The original section 505 of the Penal Code made it a crime to make statements which cause a range of forms of public mischief, including causing a member of the military to mutiny or fail in his duty, causing fear or alarm in the public such that someone commits an offence

[8] The wording is somewhat unclear, but it seems fairly reasonable to assume this is what is meant. The exact language is: "Whoever causes or hinders the Defence Services personnel and Government employees towards the Government, disrupts or hinders by any means, those who are carrying out their duties, such a person shall be punished…"

[9] State Administration Council Law 6/2021, note 4, sections 3(a) and 3(b).

against the State or public tranquillity, or inciting a class of persons to commit an offence against another class of persons. These crimes have been preserved and renumbered, so that section 505(a) has become section 505(b).[10] The amendments have added an additional offence, namely making or circulating statements with the intent to cause, or which are likely to cause, a hindrance or damage to the "motivation, discipline, health, or conduct" of military personnel or government employees, or to bring their conduct into hatred, disloyalty or disobedience.[11]

Importantly, the Exception to this crime provides it is not an offence that where the person making the statement has reasonable grounds to believe that it is true and does not intend to cause the prohibited result.

Section 505 is punishable with up to two years' imprisonment and/or a fine. It is not bailable as of right (so bail can only be granted on a discretionary basis). This is highly unusual since almost all crimes for which the maximum penalty is three years' imprisonment or less are bailable. A warrant is required for an arrest (Criminal Procedure Code, Schedule II).

1.5 Causing Fear or Committing an Offence against a Government Employee (new Section 505A)

The amendments introduce a new provision which creates following three new offences:

- Causing fear among the public (section 505A(a)).
- Spreading false news, knowing or believing that it is untrue (section 505A(b)).
- Committing or agitating for the commission or a criminal offence against a government employee, whether directly or indirectly (section 505A(c)).

The penalty for all of these crimes is up to three years' imprisonment or a fine, or both. Police do not need a warrant to arrest anyone for any of the offences specified in 505A.[12] The section 505A offences fall into the category of offences under Myanmar law for which the police do not need an arrest warrant where they know or have reason to believe that a person is committing or has committed the offence (Criminal Procedure Code, section 54). These

[10] This is important as some reporting on charges brought under these provisions has confused the old section 505(a) (now 505(b)), the new 505(a) and 505A (discussed below).

[11] This is our interpretation of the provision, although the language is not very clear, at least in the English version, which reads: "Whoever makes, publishes or circulates any statement, rumour or report – (a) whoever with intent to cause, or which is likely to cause, a member of the Defence Services or government employees to deprive affect, hinder, disturb, damage the motivation, discipline, health, conduct upon Government or the Defence Services and the duty of government employees or members of defence services to being into the hatred, disobedience, disloyalty; … shall be punished…".

[12] State Administration Council Law 6/2021, note 4, section 3(c).

offences are also non-bailable.[13] Again, as noted, this is unusual given that the maximum penalty is just three years' imprisonment.

None of the core concepts used in these offences, such as "causing fear" or "false news", are defined. It is not clear whether 505A(c) refers to any crime in the Penal Code, although this seems likely. If so, this increases the penalties for certain other crimes in the Penal Code when they are committed against government employees. For example, defamation under section 500 of the Penal Code is punishable by two years' imprisonment but this could now increase to three years when the defamation is against a government employee.

These offences penalise both causing and "intending to cause" the prohibited action. On its face, this would appear to criminalise mere intent, even if not acted upon, which is tantamount to "thought crime". However, it seems likely that this is an issue of either poor drafting or poor translation. The true meaning may be to cover attempted crimes which are not fully realised (i.e. an intention accompanied by some act designed to realise the intention but which is not successful).

2. Impact on Rights and Freedoms

2.1 International and Constitutional Standards

The amendments to the Penal Code have an impact on a number of fundamental rights and freedoms, especially the rights to freedom of expression, peaceful assembly and association. These rights are protected in the *Universal Declaration of Human Rights* (UDHR),[14] which is widely recognised as the foundational document for human rights standards, as well as international treaties such as the *International Covenant for Civil and Political Rights* (ICCPR).[15] While Myanmar has neither signed nor ratified the ICCPR, it still reflects an important source for interpreting fundamental rights. In addition, these rights are directly and indirectly recognised in treaties which Myanmar has ratified related to the rights of children, persons with disabilities and women.[16] These international standards are therefore relevant to whether Myanmar is respecting the rights of its own people, including rights recognised in Myanmar's Constitution.

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[13] *Ibid*.
[14] UN General Assembly Resolution 217A(III), 10 December 1948.
[15] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
[16] Specifically, the *Convention on the Rights of the Child*, UN General Assembly Resolution 44/25, 20 November 1989, entered into force 2 September 1990, *Convention on the Elimination of Discrimination against Women*, UN General Assembly Resolution 34/180, 18 December 1979, entered into force 2 September 1981, and the *Convention on the Rights of Persons with Disabilities*, UN General Assembly Resolution 61/106, 13 December 2006, entered into force 3 May 2008. Myanmar's ratification status for these and other international human rights treaties can be found at https://indicators.ohchr.org/.

Freedom of expression is protected under Article 19 of the UDHR and Article 19 of the ICCPR, as well as Article 13 of the *Convention on the Rights of the Child* and Article 21 of the *Convention on Persons with Disabilities*. The gives everyone the right to express and exchange information and ideas through all forms of communication and on all kinds of topics. It protects even controversial and offensive speech.

In certain circumstances, however, international law allows States to restrict the exercise of the right. To ensure these restrictions are not enacted or applied in an abusive manner, Article 19(3) of the ICCPR establishes a strict, three-part test for such restrictions, which requires any restriction to:

1) Be provided by law.
2) Have the aim of protecting on of the following (listed) legitimate interests: the rights and reputation of others, national security, public order, public health or public morals.
3) Be necessary to protect that interest.

Under the first part of this test, any criminal law which restricts freedom of expression should be sufficiently precise to provide clear guidance to individuals as to what speech will violate the law.[17] The law must also have the primary aim of protecting one of the interests listed above to pass the second part of the test. Laws which protect other interests, such as protecting the reputation of the government or vague notions such as preventing discontent among people, are not legitimate.

The third part of the test, necessity, requires any restriction to be the least restrictive means of protecting the interest in question.[18] The necessity part also requires restrictions to be proportionate. This also applies to sanctions for breach of restrictions on freedom of expression, including criminal penalties. Because imprisonment is such a serious limitation on a person's freedom, it should only be applied in the context of particularly harmful speech. Other speech, which while causing harm to others does not rise to the level of justifying deprivation of liberty, can be sanctioned in other ways, such as through fines or a requirement to pay damages.[19]

International law also protects the rights to peaceful assembly and to association (UDHR, Article 20(1) and ICCPR, Articles 21 and 22). Freedom of association gives people the right to

[17] UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/G/CG/34, para. 39, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.
[18] General Comment No. 34, note 17, para. 34 (citing General Comment No. 27).
[19] The problem of disproportionate criminal penalties has been extensively considered in the defamation context. See, for example, *Kimel v. Argentina*, 2 May 2008, Series C No. 177 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf; and *Lohé Issa Konaté v. Burkina Faso*, 5 December 2014, Application No. 004/2013 (African Court on Human and Peoples' Rights), http://www.ijrcenter.org/wp-content/uploads/2015/02/Konate-Decision-English.pdf.

associate informally, such as in meetings or casual groups, as well as formally, such as through a legally established organisation. Freedom of assembly includes the right to gather peacefully with others in a public place, including for purposes of protest or demonstration. The right does not include violent acts, but the mere fact that violence occurs at a protest does not render the entire assembly non-peaceful or justify liability for those not involved in the violence.[20]

The international law test for restrictions on the freedoms of assembly and association mirror that for freedom of expression: restrictions must be set out in law and be necessary in a democratic society to protect a legitimate interest. The list of legitimate interests varies only slightly from freedom of expression, including national security, public safety, public order, public health, public morals, and the rights and freedoms of others.[21] According to these standards, it is only legitimate to impose penalties on individuals for participating in demonstrations, gatherings or organisations where this is provided by a law which is specific and strictly necessary to protect one of the listed interests.

The right to freedom of association also protects the right of workers organise and take collective action, including to strike.[22] The right to strike is also explicitly protected in Article 8(1)(d) of the *International Covenant on Social, Economic and Cultural Rights*, and via protections for the right to organise in Article 11 of the International Labour Convention No. 87, both of which Myanmar has ratified.[23] While these treaties allow strikes to be subject to conditions set out in law, those laws must provide adequate protection for the right to strike in the first place.[24]

Article 354 of Myanmar's Constitution protects the right of citizens to express and publish their convictions and opinions freely, to assemble peacefully without arms, to hold processions, and to form associations and organisations. These guarantees are subject to any laws enacted for Union security, law and order, community peace and tranquillity, or public order or morality. Unlike under international law, such laws are not subject to conditions,

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[20] UN Human Rights Committee, General Comment No. 37 on the right of peaceful assembly (article 21), 17 September 2020, CCPR/C/GC/37, para. 17, https://undocs.org/CCPR/C/GC/37.
[21] ICCPR, note 15, Articles 21 and 22(2). One small difference: freedom of association should be "prescribed by law" while for assembly it is "in conformity with the law"
[22] Report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, 14 September 2016, paras. 67-71, http://freeassembly.net/wp-content/uploads/2016/10/A.71.385_E.pdf.
[23] International Labour Organization, Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, adopted 9 July 1948, in force 4 July 1950; and *International Covenant on Social, Economic and Cultural Rights*, UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[24] Article 4 of ILO Convention No. 87, note 23, provides that workers exercising the rights in the Convention should "respect the law of the land" but Article 8 provides that the law of the land shall not impair or be applied to impair the guarantees in the Convention. See also Article 8 of the ICESCR, read in light of Article 4, which only permits limitations of the rights in the Covenant in a matter compatible with the nature of the right and for the sole purpose of promoting the general welfare.

such as the necessity test. In addition, every citizen has the right to conduct scientific, artistic and research work freely (Article 366(c)). These Constitutional provisions should, to the extent possible, be interpreted in light of international human rights standards.

2.2 Assessment of the New Rules

The February 2021 amendments to the Penal Code seriously undermine several of these rights, especially freedom of expression. The very vague and unclear wording of the amendments means they do not past the first part of the three-part test, which requires clarity in legal provisions which restrict freedom of expression. Many of the changes do not appear to be aimed at protecting a legitimate interest (the second part of the test). And none appear to meet the requirements of the necessity part of the test, particularly given the heavy penalties, which are disproportionate. Each provision raises different concerns, as outlined below.

- High Treason (section 121): Previously, this made it an offence to incite war against or violent overthrow of the government. Even laws prohibiting incitement to violence should establish a sufficiently direct and close relationship between the speech and the violence, to avoid abuse, for example by applying to statements which, although strongly worded, do not actually incite to violence.[25] Given the lack of a close link, even the old language raised human rights concerns.[26] However, the new language drops any requirement of a link to violence, so that high treason also covers "incitement" to peaceful efforts to bring about a change in government which are unconstitutional or even constitutional ("other means"). This could cover a wide range of perfectly legitimate criticism of the current military government of Myanmar, a particular concern given the very severe penalty associated with this crime (death or 20 years' imprisonment).
- Sedition (section 124A): This offence, which makes it an offence to disseminate hateful or contemptuous statements about the government, already conflicted with the right to freedom of expression. Indeed, sedition laws fell to the wayside – either legally or as a matter of practice – in democracies a long time ago. Everyone should be free to express disagreement about or criticise government, even in strong or intemperate terms. It is not clear how the addition to this crime of an explicit reference to the

[25] See General Comment No. 34, note 18, para. 25.
[26] Controversial high treason cases have taken place in Myanmar, based on mere general allegations of supporting armed groups. See Ye Mon, "Aye Maung, Wai Hin Aung Handed 20-Year Sentences for High Treason", 19 March 2019, Frontier Myanmar, https://www.frontiermyanmar.net/en/aye-maung-wai-hin-aung-handed-20-year-sentences-for-high-treason/; and Min Aung Khine, "Rakhine Political Leader Faces High Treason, Defamation Charges", 10 September 2018, The Irrawaddy, https://www.irrawaddy.com/news/burma/rakhine-political-leader-faces-high-treason-defamation-charges.html.

military changes the offence but it may be noted that the right to criticise government applies equally to the military, especially where it is running the government.

- Disrupting officials (sections 124C and 124D): These new sections criminalise hindering, sabotaging or disrupting the military, law enforcement or government employees. Because these terms are not clearly defined, they could possibly be applied to statements which, due to their critical nature, are deemed to disrupt the work of these entities, as well as actions which are physically disruptive. It is not legitimate to curtain freedom of expression on the grounds that a statement, of itself, may "disrupt" the work of certain officials. Inciting others to commit crimes is already covered under the Myanmar Penal Code via the rules on abetment. These provisions fail to serve a legitimate aim and are neither necessary nor proportionate as restrictions on free speech. Their heavy penalties of 20 or seven years' imprisonment exacerbate this problem.
- Statements Undermining the Motivation of Military or Government Employees (new section 505(a)): The new section 505(a) is problematic for very similar reasons as sections 124C and 124D. Again, this could be deemed to cover statements which are disparaging or critical of military or government, which may indirectly result in de-motivating staff but which should never be criminalised.
- Causing Fear (section 505A(a)): This makes it a crime to cause fear among a group of citizens or the public. Protecting others against fear is simply not a legitimate ground for restricting freedom of speech (i.e. it is not recognised among the list of interests in section 19(3) of the ICCPR). Something as simple as a report on a harsh weather system or the spread of COVID 19 may create fear, although these would likely represent legitimate reporting in the public interest. Prohibitions on causing fear, which were sometimes found in colonial era legislation, have been struck down by peak courts in a number of countries.[27]
- False News (section 505A(b)): General prohibitions on the dissemination of "false news" do not represent a legitimate restriction on freedom of expression.[28] The very notion of what is false is often highly subjective and does not, as a result, provide a proper basis for restricting freedom of expression. Furthermore, general prohibitions of this nature do not protect a legitimate interest and are not proportionate, taking into account that everyone makes mistakes. Prohibiting false statements in specific

[27] See, for example, *Chavunduka & Choto v. Minister of Home Affairs & Attorney General,* 22 May 2000, Judgement No. S.C. 36/2000, Civil Application No. 156/99 (Supreme Court of Zimbabwe).

[28] See, for example, para. 2(a) of the Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda adopted by the UN, OSCE, OAS and African Commission special mandates on freedom of expression, 3 March 2017, https://www.law-democracy.org/live/wp-content/uploads/2012/08/17.03.03.Joint-Declaration.PR_.pdf.

contexts, such as defamatory statements or perjury, may on the other hand be legitimate.

- Agitating Crimes against Government Employees (section 505A(c)): This offence punishes even indirect agitation to commit a crime. This is highly problematic and also unnecessary. The commission of and direct incitement to commit crimes are already, by definition, penalised (indeed this is what would trigger this offence). As a result, this offence merely creates steeper penalties for some crimes against officials. It is generally inappropriate to provide greater protection to officials than ordinary citizens in this way and, in some contexts, such as defamation, international law specifically required officials to tolerate a higher degree of criticism because of their public role.[29] The vague and broad language used here – in particular both direct and indirect "agitation", fails to create a sufficiently direct link between speech and the commission of a crime that is necessary for crimes of incitement to pass muster under international law.

The freedoms of association and assembly are closely related to freedom of expression such that restrictions on expression may also impact on these rights. Protestors and participants in similar gatherings are meeting precisely to make a point. Limiting the content of what they may say or do at such events may constitute a violation of their rights to assembly and association, as well as their right to expression.

More specifically, new sections 124C, 124D and 505A(a) and (c) raise particular concerns regarding freedom of assembly. These provisions refer in general terms to hindering the work of the military, law enforcement and government employees (sections 124C and 124D), as well as causing fear or directly or indirectly agitating an offence against an official (section 505A(a) and (c)). These provisions are sufficiently vague that they could be used against peaceful protestors, for example because they are deemed to be hindering the work of law enforcement officers who are policing protests. Protestors should not face charges merely for protesting, even if that indirectly complicates the work of law enforcement officers or other officials. Similarly, protestors may make some people feel uncomfortable, or even fearful, but this is no reason to criminalise their actions.

Similarly, those sections, as well as the new section 505(a), which prohibits statements which undermine the motivation of government employees, create a risk that striking civil servants or those who encourage civil servants to go on strike might be subject to criminal prosecutions. As noted above, the right to strike is part of the right to freedom of association and represents a core labour right. Criminal penalties for striking or calling on others to strike are almost always disproportionate under human rights law.

[29] General Comment No. 34, note 18, para. 38.

3. Principles of Criminal Justice

3.1 International and Constitutional Standards

International human rights law also establishes certain rights to protect persons against abuses in the administration of justice and to maintain the rule of law, many of which are rooted in principles of criminal justice. One of the most fundamental principles of criminal law is that there shall be no crime without law (often known by its Latin term, *nullum crimen sine lege*), meaning that no one should face a criminal prosecution for an act that was not prohibited by law that was adopted before the act was done, i.e. laws should not apply retroactively.

This also creates a correlate principle, namely that criminal laws should be clear and precise. Criminal rules that are not clearly defined invite arbitrariness on the part of authorities, given that they can be applied to a range of acts, and they are also unjust, because they fail to give advance notice of what behaviour is prohibited. The importance of clarity is well established in civil law systems as part of the principle of "legality", an extension of the non-retroactivity principle. The British common law tradition also embraces this principle as a component of the rule of law and a protection against arbitrariness by authorities.[30]

Human rights law also embraces these principles. The UCHR, ICCPR and Convention of the Rights of the Child all prohibit the retroactive application of criminal rules.[31] International human rights bodies have interpreted this protection to incorporate a requirement of clarity. The European Court of Human Rights has noted:

> [The prohibition on retroactive punishment] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty … it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable … [32]

Another core rule of law principle is that of proportionality, including in sentencing. Imprisonment is a restriction on the right to personal liberty and freedom of movement, and such restrictions should be proportionate to the interest which the State seeks to protect when

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[30] See *Regina v. Rimmington* and *Regina v. Goldstein*, 2005 UKHL 63, paras. 32-33 (describing the historical basis for the principle of legal certainty in British common law), https://www.bailii.org/uk/cases/UKHL/2005/UKHL_2005_63.html; and A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885, Indianapolis, Liberty Classics), p. 110 (contrasting the rule of law with arbitrariness in the law), http://files.libertyfund.org/files/1714/0125_Bk.pdf.

[31] UDHR, note 14, Article 11(2); ICCPR, note 15, Article 15(1); and Convention on the Rights of the Child, note 16, Article 40(2)(a).

[32] *Case of Veeber v. Estonia (No. 2)*, 21 January 2003, Application No. 45771/99, para. 31, http://hudoc.echr.coe.int/fre?i=001-60891.

incarcerating someone.[33] Heavy prison sentences are a disproportionate penalty for minor crimes and thus violate human rights.

Proportionality of sentence is particularly important whenever the death penalty applies. Because every human being has an inherent right to life, the death sentence "may be imposed only for the most serious crimes".[34] The death penalty should only be carried out following a final judgement by a court and anyone who is sentenced to death should have the right to seek a commutation of the sentence.[35] Internationally, an emerging norm recognises the unacceptability of the death penalty in any circumstance: 88 countries are now party to the Second Optional Protocol to the ICCPR on the abolition of the death penalty.[36]

International human rights law also establishes a right to be free from arbitrary arrest and detention.[37] This means that someone should only be arrested or detained in accordance with the law and that the law should also protect certain rights upon arrest. These include the right to be informed, at the time of arrest, of the reasons for the arrest and to be informed promptly of any charges that are brought or are being considered or investigated.[38] They also include the right to be brought promptly before a judge or judicial officer, even if no formal charges have been laid, normally within 48-hours, and the right either to be tried within a reasonable time or released.[39] The right to be informed promptly of the charges one is facing and the right to be tried without undue delay are also necessary for the realisation of the right to a fair trial and equality before the courts.[40]

A warrant serves as protection against arbitrary arrest, because it can provide notice of the reasons for the arrest and the charges brought against someone. While arrests without a warrant are justified in some defined circumstances, such as if police arrest someone who is in the act of committing a crime or who is likely to destroy evidence if not arrested, this

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[33] UN Human Rights Committee, General Comment No. 27 on Freedom of movement (article 12), 1 November 1999, CCPR/C/21/Rev.1/Add.9, para. 14, https://undocs.org/CCPR/C/21/Rev.1/Add.9; and UN Human Rights Committee, 26 May 2004, CCPR/C/21/Rev.1/Add.13, General Comment No. 31 on the nature of the general legal obligation imposed on State Parties to the Covenant, para. 6, https://undocs.org/CCPR/C/21/Rev.1/Add.13.

[34] ICCPR, note 15, Article 6(2).

[35] ICCPR, note 15, Articles 6(2) and 6(4).

[36] See OHCHR, Status of Ratification Interactive Dashboard, https://indicators.ohchr.org. *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, UN General Assembly Resolution 44/128, 15 December 1989, entered into force 11 July 1991, https://indicators.ohchr.org.

[37] UDHR, note 14, Article 9, ICCPR, note 15, Article 9.

[38] UN Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and security of the person), 16 December 2014, CCPR/C/GC/35, paras. 32-33, https://undocs.org/CCPR/C/GC/35; and UN Human Rights Committee, General Comment No. 32 on Article 14, 23 August 2007, CCPR/C/GC/32, para. 31, https://undocs.org/CCPR/C/GC/32.

[39] ICCPR, note 15, Articles 9(1)-(3).

[40] UDHR, note 14, Article 10; ICCPR, note 15, Article 14.

decision should be made on an individualised basis and subject to general justifications such as those listed.[41] Laws which grant police broad discretion to arrest persons without a warrant simply because they are believed to have committed certain crimes are therefore suspect under human rights law.

Another right of criminal defendants, and a core principle of fair criminal justice, is the right not to be refused bail and subjected to pre-trial detention without justification. Pre-trial detention increases the harm suffered by a person ultimately found to be innocent and increases the risk of arbitrary detention. It is also associated with heightened risk of torture, which States have a duty to prevent.[42] For this reason, the ICCPR prohibits the adoption of a general rule requiring people awaiting trial to be detained.[43] Rather, the UN Human Rights Committee has indicated that "bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party."[44] The mere fact that someone is accused of a more serious crime should not alone be a basis for denying bail.[45]

Myanmar's Constitution recognises a number of these core criminal justice rights. It acknowledges the rights to liberty and to due process of law, and prohibits the retroactive application of laws (Articles 43, 373 and 381). It also prohibits holding a citizen in custody beyond 24 hours before that person is brought before a court (Article 21(b)), which represents good practice.

On the other hand, the Constitution also recognises limitations to these protections. The right to due process, for example, may be suspended in certain circumstances, including during emergencies (Article 381). And the prohibition on holding individuals beyond 24 hours without court approval is conditioned in cases of "precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law" (Article 376). The latter means that any law may provide for detention beyond 24 hours without court oversight.

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[41] For a discussion of the jurisprudence of the UN Working Group on Arbitrary Detention on this question, see Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (2020, Cambridge University Press, United Kingdom), pp. 234-244, https://www.perseus-strategies.com/wp-content/uploads/2020/04/Jared-Genser-The-UN-Working-Group-on-Arbitrary-Detention-Cambridge-University-Press-2019.pdf.

[42] UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), UN General Assembly Resolution 45/110, 14 December 1990, para. 6.1, https://www.ohchr.org/documents/professionalinterest/tokyorules.pdf; and General Comment No. 35, note 38, para. 34.

[43] ICCPR, note 15, Article 9(3).

[44] *Hill v. Spain*, Communication No. 526/1993, 2 April 1997, para. 12.3, https://undocs.org/CCPR/C/59/D/526/1993.

[45] *Grishin v. Russia*, 24 October 2012, Application No. 14807/08, para. 142 (European Court of Human Rights), http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-112442&filename=001-112442.pdf.

3.2 Assessment of the New Rules

The amendments to the Penal Code fail in important ways to respect both Constitutional and international human rights criminal justice standards. First, as already noted above, many of the new provisions suffer from a lack of precision so that it remains quite unclear either what acts or what intent is required to constitute the crimes. This conflicts with the principle of non-retroactivity as outlined above.

Second, in many cases the sentences imposed fail to meet the standard of proportionality. Some of the amendments significantly expand the scope of pre-existing crimes. For example, high treason now includes non-violent as well as violent action. However, the penalties have not been correspondingly reduced, so that very heavy penalties could be imposed for relatively minor conduct. Beyond that, the ambiguous language in the new rules could cover an enormous range of behaviour, including some which should not be punished by criminal sanctions in the first place.

The potential imposition of the death penalty for high treason is particularly troublesome. There are some procedural protections in Myanmar law against the use of the death penalty. Section 31(2) of the Criminal Procedure Code provides that while lower courts may impose a death sentence, this must be confirmed by the Supreme Court. The President has the power to commute death sentences to a lesser sentence[46] and has, in practice, exercised this power regularly such that there have been no reported executions in recent years.[47] However, this is entirely discretionary and, with the military now exercising executive authority, it is unclear whether the practice of commutation will remain in place.

Third, these changes will increase the risk of arbitrary detention and improperly long pre-trial detention. This is particularly so for the offences under section 505A – which include causing fear, spreading false news or agitating a crime against government employees – because, unlike the other new offences, no warrant is required to arrest people under these provisions.

Myanmar law requires that people arrested without a warrant to be brought before a magistrate within 24 hours. As noted above, this right is protected by the Constitution, albeit with important qualifications. It also used to be provided for in the Law Protecting the Privacy and Security of the Citizens, but the military has issued a law suspending this provision.[48] However, section 61 of the Criminal Procedure Code still limits the period of

[46] Penal Code, note 5, section 54 and Criminal Procedure Code, note 6, section 402.
[47] Ei Ei Toe Lwin, "The Ultimate Penalty: Debating the Death Sentence", 12 January 2021, Frontier Myanmar, https://www.frontiermyanmar.net/en/the-ultimate-penalty-debating-the-death-sentence.
[48] State Administration Council Law No 4/2021, 13 February 2021, https://www.gnlm.com.mm/amendment-of-law-protecting-the-privacy-and-security-of-the-citizens, https://www.gnlm.com.mm/amendment-of-law-protecting-the-privacy-and-security-of-the-citizens/; and Law Protecting the Privacy and Security of Citizens, 8

detention of an individual who was arrested without a warrant to 24 hours, while section 167 requires an order from a magistrate where further detention is sought.

A further concern is the fact that all of the offences discussed in this Analysis are non-bailable, meaning that bail may be denied and is not available at all for healthy adult males accused of high treason, sedition and sabotaging or hindering military or law enforcement officers (section 124C). This creates a serious risk of unnecessary pre-trial detention which also increases the risk of other problems, such as torture or ill treatment. While one would hope that judges would deny bail only in justified cases, such as where there is a genuine risk of the accused destroying evidence or fleeing, this is not even an option in some cases and cannot be guaranteed in others. As noted in the international standards section, the mandatory denial of bail for persons accused of certain serious crimes is not consistent with human rights standards because it does not allow for individualised decision-making and does not respect the principle of the presumption of innocence.

4. Declaration of Martial Law

Myanmar's military issued Martial Law Orders on 14 March 2021 (one) and again on 15 March 2021 (two) imposing martial law in six townships in Yangon.[49] According to news reports, the State-run television network also announced that martial law was imposed on an additional five districts in Mandalay, but we have not seen an actual order to this effect.[50] According to Martial Law Order 3/2021, administrative and judicial powers are transferred to the military in the six named townships in Yangon. This enables military tribunals to try designated criminal cases. Specifically, the Order lists 23 categories of violations which shall be tried by military tribunals and, in case of conviction, shall result in either death, unlimited years' imprisonment with hard labour or the highest punishment designated for that crime.

The amended and new crimes discussed in this Analysis are all included in the list of 23 categories.[51] This means that in areas under martial law, such crimes will be tried by military tribunals and may result in death or long periods of hard labour.

March 2017, as amended 28 August 2020, section 7, English translation available at: https://www.myanmar-responsiblebusiness.org/pdf/Law-Protecting-Privacy-and-Security-of-Citizens_en_unofficial.pdf.

[49] Martial Law Order 1/2021, 14 March 2021, https://www.gnlm.com.mm/martial-law-order-1-2021/; and Martial Law Orders 2 and 3/2021, 15 March 2021, https://cdn.myanmarseo.com/file/client-cdn/gnlm/wp-content/uploads/2021/03/16_Mar_21_gnlm.pdf. See also the corrigendum, addressing an error in the English translation, Global New Light of Myanmar, 17 March 2021, p. 3, https://cdn.myanmarseo.com/file/client-cdn/gnlm/wp-content/uploads/2021/03/17_Mar_21_gnlm_1.pdf.

[50] Al Jazeera, "More Protesters Killed in Myanmar as Military Tightens Grip", 16 March 2021, https://www.aljazeera.com/gallery/2021/3/16/in-pictures-more-protesters-killed-in-myanmar-as-military-tightens-grip.

[51] We note that, for high treason, the wrong citation is given, listing the Criminal Procedure Code instead of the Penal Code.

This obviously has very serious consequences in terms of human rights and criminal justice procedures. It imposes extraordinarily heavy penalties even for offences which potentially involve comparatively minor conduct, such as the 505A offences which are otherwise subject to three years' imprisonment or a fine. Removing cases from the normal criminal justice process may also deprive accused persons of certain protections for their rights that are built into those processes.

A full discussion of the legal issues associated with martial law is beyond the scope of this Analysis. However, even under emergency regimes, restrictions on fundamental rights should be proportionate and limited to what is strictly required by the circumstances. The right to life and procedural protections surrounding the death penalty should never be derogated from, even in an emergency.[52] The new martial law rules do not meet these requirements.

Conclusions and Recommendations

There is little doubt, given the nature and wording of the February 2021 amendments to the Penal Code, that they were adopted with a view to giving the military government of Myanmar additional tools to silence any expression of dissent or criticism of its actions, whether through the media, social media or via protest and demonstration. Many of the provisions explicitly single out the military for special protection, even where they would already appear to have been covered. And the specific nature of the prohibitions, whether they relate to hindering the work of the military, spreading false news or causing fear, all seem to be tailored to capture criticism of the military regime.

Overall, the amended and new crimes in the Penal Code raise very serious concerns from a human rights perspective. Some of the more serious concerns include the following:

- The often very seriously excessive penalties for crimes involving "mere" speech (i.e. not linked to specific actions), which has been very seriously exacerbated by the declaration of martial law.
- The illegitimate nature of some of the rules which criminalise statements, including criticism of the military and debate about matters of public concern, which are protected under international law.
- The very vague and hence flexible nature of many of the rules, which renders them illegitimate both as restrictions on freedom of expression and due to their failure to reflect the principle of "no crime without law", which requires criminal laws to be sufficiently precise to allow individuals to understand what is prohibited.
- The fact that many of these rules are also offensive to freedom of assembly and association.

[52] ICCPR, note 15, Article 4.

- A failure to respect basic due process rules, as reflected in human rights standards, including because of the broad powers to arrest suspects without warrants and of the serious limitations they impose on obtaining bail, so that there is a serious risk that individuals facing charges will face prolonged and unnecessary pre-trial detention.

The very vague and discretionary nature of these new rules means that it will be important to track how they are applied, in terms both of how the military government understands and applies them and of how the courts interpret them. This applies to all of the problematical features outlined above, including the sorts of speech which is deemed to fall foul of these rules, whether and under what conditions bail is refused, how often arrests are made without warrants, and what sorts of penalties are ultimately applied to those who are convicted. Understanding this better may help journalists, civil society and ordinary citizens to avoid prosecution under these new provisions.

To the extent possible, all actors involved in the administration of criminal justice, including the police, prosecutors and judges, should be urged to interpret and apply these new rules in a rights-respecting manner. They should, as far as possible, be interpreted narrowly to exclude speech which is protected under international law and any discretion, for example regarding bail or making arrests without warrants, should be exercised so as to protect rather than undermine rights.

It is also important that both national and international actors, including journalists, who are reporting on these new rules do so in an informed and accurate manner, which this Analysis will hopefully facilitate. It is important to avoid both implying that the military has abolished more legal protections than it actually has and downplaying legitimate legal risks. In an environment where access to information is limited, it is important to avoid contributing to further confusion.

The situation in Myanmar is evolving rapidly, including in terms of the law. Given the military's usurpation of power, including legislative power, there are limited options for challenging these legal developments on the grounds that they are unconstitutional or conflict with human rights standards. However, we believe it is important to highlight breaches of constitutional and international human rights standards to expose the illegitimacy of these measures, to provide a clear record for future assessments and to provide some solidarity with those who are suffering abuse due to these new rules. And these are the reasons we have produced this Analysis.