



**Universal Periodic Review Submission: Myanmar
23rd Session, November 2015 (Report submitted March 23, 2015)**

Introduction to the International Human Rights Clinic

1. The International Human Rights Clinic at Harvard Law School works to protect the human rights of clients and communities around the world. For the past ten years, one focus of the Clinic’s work has been Myanmar, including an in-depth investigation into grave human rights and international humanitarian law violations that took place during a major offensive by the Myanmar armed forces in Kayin State between 2005 and 2008 (“the Offensive”). The findings implicated commanders who oversaw the offensive, including Major General Ko Ko, who is now a Lieutenant General, the head of the Myanmar Universal Periodic Review (“UPR”), and Myanmar’s Minister of Home Affairs.

Background and Human Rights Framework

2. Myanmar has ratified or acceded to various international human rights instruments. *See infra* note 1. Myanmar is also subject to the binding norms of customary international law, including prohibitions against crimes against humanity and war crimes, which are particularly relevant to this submission.

Promotion and Protection of Human Rights

I. Summary

3. In a November 2014 *Legal Memorandum: War Crimes and Crimes Against Humanity in Eastern Myanmar*, the Clinic detailed the findings of its four-year investigation documenting grave human rights and international humanitarian law violations during the first year of the 2005-2008 military offensive in Kayin State. The Clinic spoke to more than 150 individuals, amassed over 1,000 pages of draft affidavits, and concluded that the military perpetrated crimes against humanity and war crimes during the Offensive. In the *Legal Memorandum*, the Clinic also assessed whether there was sufficient evidence to find individual criminal responsibility for those directing operations. The Clinic named specific commanders, including the current Home Affairs Minister, Lieutenant General Ko Ko, who headed Southern Command, the regional military unit that oversaw major operations during the Offensive. The Clinic found there was sufficient evidence to satisfy the arrest warrant standard of the International Criminal Court for Lieutenant General Ko Ko and two other commanders’ involvement in the Offensive.

4. No matter the form—whether as reparations, restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, or some other mechanism—Myanmar has failed to meet its ongoing obligation to provide full and effective remedies to those who suffered grave violations during the Offensive as well as other military operations. Myanmar also failed to identify and hold individuals to account, including by failing to investigate perpetrators such as Lieutenant General Ko Ko. Indeed, not only was he promoted after the Offensive, Lieutenant General Ko Ko was also selected to head the UPR process for Myanmar, raising serious concerns about ongoing impunity and Myanmar’s commitment to human rights.

II. Myanmar has ongoing obligations to provide remedies and to investigate war crimes and crimes against humanity in Kayin State

5. Myanmar's various international legal obligations¹ include guarantees to those who have suffered gross violations of human rights and international humanitarian law to the right to a full and effective remedy for the harms they have experienced.² The State must provide various forms of remedies and reparations, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.³ The State must also provide "equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law."⁴ International law also includes an obligation to investigate such "violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."⁵ Various international bodies have identified the obligation of states to investigate, prosecute, and punish perpetrators for acts defined as human rights violations and crimes under international law.⁶

6. Myanmar has failed to investigate war crimes and crimes against humanity that took place during the Offensive and failed to take any other apparent steps to safeguard the right to a remedy.

¹ Myanmar has ratified or acceded to numerous international instruments, including the Convention concerning Forced or Compulsory Labour (4 Mar. 1955), the Convention on the Prevention and Punishment of the Crime of Genocide (14 Mar. 1956), the Convention on the Elimination of All Forms of Discrimination against Women (22 July 1997), and the Convention on the Rights of the Child (15 July 1991).

² See, e.g., United Nations Office of the High Commissioner for Human Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>, art. II, ¶ 3(d) (states must "provide effective remedies to victims") (hereinafter "Basic Principles"); Universal Declaration of Human Rights (10 Dec. 1948), art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, entered into force 26 June 1987, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.").

³ Basic Principles, art. IX.

⁴ *Id.*, art. VIII, ¶ 12.

⁵ *Id.*, art. II, ¶ 3(b).

⁶ Naomi Roht-Ariazza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990) available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1840&context=californialawreview>, at 462. For example, the legal requirement to investigate is a core part of the state obligation to respect and ensure the right to life and fundamental to the prohibition against extrajudicial killings. See, e.g., *Ergi v. Turkey*, App. No. 66/1997/850/1057, Judgment, Eur. Ct. H.R., ¶ 82 (July 28, 1998) ("[T]he mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation . . . to carry out an effective investigation into the circumstances surrounding the death.").

A. *There is evidence that war crimes and crimes against humanity took place during the Offensive*

7. In November 2005, Myanmar Army soldiers from Southern Command attacked Hee Daw Kaw village in Thandaung Township, destroying approximately thirty homes, laying landmines, and firing mortars at civilians.⁷ This marked the beginning of a three-year military offensive targeting the Karen National Union (“KNU”) and the Karen National Liberation Army (“KNLA”). Thandaung Township⁸ was just one of many townships affected by the Offensive. Nearly every village was affected in Thandaung, and during the Offensive, tens of thousands of civilians were displaced.

8. During the Offensive, the Myanmar military repeatedly engaged in unlawful conduct against civilian populations. Evidence collected by the Clinic details a disturbing pattern of unlawful engagement. In Thandaung Township, Myanmar Army soldiers involved in the Offensive violently cleared civilian areas and indiscriminately attacked villagers, including by firing mortars at villages; opening fire on fleeing villagers; destroying homes, crops, and food stores; laying landmines in civilian locations; forcing civilians to work and porter; and capturing and executing civilians. Tens of thousands of individuals were displaced during the campaign, and many were killed. Nearly every village in Thandaung Township was affected by the Offensive, and, in large swathes of territory, almost all villagers were forced to flee.

9. Under the Rome Statute, a war crime is one of a number of prohibited acts which “took place in the context of and was associated with” an armed conflict.⁹ In the context of the Offensive, such a conflict existed between the Myanmar military and the KNLA.¹⁰ War crimes that are committed as part of a “plan or policy” or part of a “large-scale commission” of prohibited acts receive particular attention in the Rome Statute.¹¹ The Clinic gathered evidence of the following war crimes: attacking civilians,¹² displacing civilians, destroying or seizing the enemy’s

⁷ See International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes Against Humanity in Eastern Myanmar* (Nov. 2014) available at: <http://hrp.law.harvard.edu/wp-content/uploads/2014/11/2014.11.05-IHRC-Legal-Memorandum.pdf>. Unless otherwise indicated, the facts included here are drawn from this Legal Memorandum.

⁸ To effectively build a comprehensive criminal case against specific perpetrators, the Clinic narrowed the scope of its investigation, focusing on military conduct that occurred in Thandaung Township from 2005 to 2006. The scope of the Clinic’s investigation was limited to a single township over a two-year period, but abuses were not as limited in scope.

⁹ International Criminal Court, Elements of Crimes, U.N. Doc ICC-ASP/1/3 (9 Sept. 2002), art. 8(2)(a)(i).

¹⁰ *Legal Memorandum*, Section VI.A.1.

¹¹ See Rome Statute, of the International Criminal Court, U.N. Doc. A/Conf.183/9, 17 July 1998, entered into force 1 July 2002, art. 8.

¹² One interviewee’s account is illustrative of the tactics used by the military to attack civilians in Thandaung Township during the Offensive: The interviewee and his family fled under gunfire after soldiers entered his village and began to shoot at villagers. He later returned to find his village destroyed. While surveying his property, he accidentally set off a landmine that the military had placed in his kitchen. He is now blind because of injuries from the landmine. See *Legal Memorandum* (citing Clinic Database, Interview No. 27).

property,¹³ pillage, murder,¹⁴ execution without due process, torture, and outrages upon personal dignity.

10. The military's actions also satisfy the elements for establishing crimes against humanity. The crimes were committed repeatedly during a widespread and systematic attack directed at a civilian population. In addition, the military's actions furthered an institutional policy specifically aimed at targeting civilians.¹⁵ The Clinic gathered evidence of the following crimes: forcible transfer of a population,¹⁶ murder, enslavement, torture,¹⁷ and other inhumane acts.

B. There is evidence sufficient to hold individual commanders responsible.

11. The Clinic found that officers from two units could—pending investigation—be held legally responsible for the above crimes under two theories of liability. Under Article 25 of the Rome Statute,¹⁸ an individual is criminally responsible if they are directly involved in the crime's commission. Under Article 28, a military commander can be held responsible for the crimes of his subordinates if: 1) the commander exercised effective command and control; 2) the commander knew or should have known that crimes were being committed; and 3) the commander failed to take measures to prevent, repress, or report the crimes.¹⁹ Evidence collected by the Clinic satisfies the arrest warrant standard under Article 58 of the Rome Statute²⁰ and

¹³ Villagers usually described the destruction that they found after the military had left the area and the villagers had returned to their homes. One villager who returned to his village after it had been cleared, recounted that “the church had been burned, and the houses had been burned, and the rice stores of the villagers had been burned The Burmese army burnt every house . . . and the village school [was] burnt down completely.” See *Legal Memorandum* (citing Clinic Database, Interview No. 135).

¹⁴ One well-documented case involved a civilian being shot while trying to flee from the military outside of Shah Si Boh. This killing was reported by nine interviewees, including two eyewitnesses to the shooting. One of the eyewitnesses detailed that “he was shot through the eye, and the shot came out the back of the head. It was only one shot.” See *Legal Memorandum* (citing Clinic Database, Interview No. 151).

¹⁵ See Rome Statute, art. 7; see also *Legal Memorandum* (citing Clinic Expert Declaration, Expert 3, para. 57 (The Clinic's Expert Declarant No. 3 stated that Articles 7(1) and 7(2)(a) “cumulatively require that an ‘attack’ must (1) involve the multiple commission of prohibited acts, (2) be directed against a civilian population, (3) be widespread or systematic, and (4) be undertaken pursuant to State or organizational policy,” in addition to the requirement of a nexus between the prohibited act and the attack and knowledge of the attack by the perpetrator)).

¹⁶ In one incident in March 2006, the military sent a written message to a village chief. The message conveyed the military's intent to clear the village and kill villagers that remained. A chili was included in the envelope—a warning that the “military is hot, [and] if you don't leave you will get the chili.” Another village was shelled in conjunction with a relocation order and others were burned after villagers relocated. *Legal Memorandum* (citing Clinic Database, Interview No. 143).

¹⁷ In one such incident, a villager was beaten unconscious and tied to a post by his neck, hands, and feet. The villager awoke to a soldier forcing a six-inch long knife into his mouth and twisting it with the intention of cutting off his tongue. The villager was left bleeding and could not eat for days. *Legal Memorandum* (citing Clinic Database, Interview No. 133).

¹⁸ Rome Statute, art. 25(3).

¹⁹ *Id.*, art. 28(a).

²⁰ *Id.*, art. 58(1).

supports the issuance of arrest warrants for Major General Ko Ko, Brigadier General Khin Zaw Oo, and Brigadier General Maung Maung Aye (ranks at time of the Offensive).

1. Major General Ko Ko

12. Major General Ko Ko, now a Lieutenant General, commanded Southern Command during the Offensive. During this time, soldiers under his command committed multiple war crimes and crimes against humanity.

13. Southern Command and Light Infantry Division (“LID 66”) committed egregious war crimes and crimes against humanity.²¹ Ko Ko had effective command and control over Southern Command, along with other combat divisions, including LID 66, during this time. His effective command and control is indicated by the following factors: (i) the highly organized structure of the Myanmar military, (ii) reliable military reporting and communications systems, (iii) an alleged wire intercept of his orders during the Offensive, (iv) his presence in eastern Myanmar during the Offensive, and (v) the coordination of units under his command in offensive deployments, tactical maneuvers, and supply logistics.²²

14. Moreover, Ko Ko knew or should have known that his subordinates committed or were about to commit crimes, as indicated by the following factors: (i) stringent reporting requirements and a reliable communications system, (ii) Ko Ko’s presence in eastern Myanmar during the Offensive, (iii) his past experience with the modus operandi of civilian targeting in counterinsurgency tactics, (iv) alleged wire intercept of his orders during the Offensive, (v) high profile statements by the UN condemning the military’s actions, (vi) the widespread nature of crimes throughout three regional spheres of operation, and (vii) the three-year period during which crimes were committed.²³

15. The Clinic found no evidence that Major General Ko Ko attempted to prevent the crimes that were committed or to report them to the proper authorities.

2. Brigadier Generals Khin Zaw Oo and Maung Maung Aye

16. The Clinic has amassed evidence that LID 66 is also responsible for crimes committed during the Offensive. The Clinic has collected sufficient evidence of Brigadier General Khin Zaw Oo’s and Brigadier General Maung Maung Aye’s individual responsibility to meet the standard for the issuance of arrest warrants under the Rome Statute.

17. The effective command and control of Brigadier Generals Khin Zaw Oo and Maung Maung Aye is indicated by factors including the following: (i) a highly organized military structure, (ii) reliable reporting systems, (iii) tightly controlled operations of battalions by orders transmitted through Tactical Operation Commands, (iv) close coordination of LID 66 battalions, and (v)

²¹ See *Legal Memorandum*, Section VI.

²² *Id.*

²³ *Id.*

routine placement in advance locations in close proximity to the frontlines due to their positions as division commanders.²⁴

18. Secondly, Brigadier Generals Khin Zaw Oo and Maung Maung Aye knew or should have known that their subordinates in LID 66 committed or were about to commit the crimes, as indicated by the following factors: (i) stringent reporting requirements and a reliable communications system, (ii) their presence in advance locations near the frontlines during the Offensive, (iii) past experience with the modus operandi of civilian targeting in counterinsurgency tactics and LID 66's consistent implementation of unlawful policies, (iv) high profile statements by the UN condemning the military's actions, (v) the widespread nature of crimes throughout the regions where LID 66 operated, and (vi) the time period during which crimes were committed.²⁵

19. The Clinic found no evidence that the commanders of LID 66 attempted to prevent the crimes that were committed or to report them to the proper authorities.

C. The promotions of Major General Ko Ko, Brigadier General Khin Zaw Oo, and Brigadier General Maung Maung Aye perpetuate Myanmar's failure to investigate and provide a remedy to those who suffered harm

20. Instead of investigating the crimes committed under his control, the military promoted Major General Ko Ko. He received several promotions after commanding the Offensive and is currently a Lieutenant General and holds the position of Myanmar's Home Affairs Minister. Recently, he was also appointed head of the UPR process in Myanmar. Major General Ko Ko's subsequent promotions highlight the lack of accountability within Myanmar and underscore the importance of publicizing and addressing the human rights violations that happened during the Offensive.

21. In addition, both commanders of LID 66 during the Offensive were later promoted after they left eastern Myanmar. Brigadier General Khin Zaw Oo was the commander of LID 66 at the time of its deployment to eastern Myanmar. In 2006, Brigadier General Khin Zaw Oo was promoted to the rank of Major General and assumed command of the Coastal Regional Command. He was then appointed to be the Adjutant General of the Myanmar Armed Forces. Brigadier General Maung Maung Aye replaced Khin Zaw Oo (after his promotion in 2006) and was subsequently promoted; his current rank and position are unknown.

22. The subsequent promotions of all three Generals combined with the lack of investigation in the wake of reports of abuses and crimes taking place during the Offensive point to a lack of accountability in Myanmar. The promotions and inaction to date raise serious questions about the commitment of authorities to meet their international legal obligations to provide remedies for those who suffered harm.

²⁴ *Id.*

²⁵ *Id.*

III. To guarantee non-repetition of human rights abuses, Myanmar should make changes to its military policies and structures

23. Myanmar has not taken adequate measures regarding its military policy and practices to prevent the recurrence of violations and attacks against civilians.²⁶ A pattern of indiscriminate attacks and willful killings of civilians by the Myanmar military that took place during the Offensive has unfolded over many decades and appears to continue under the Thein Sein government.²⁷ The Myanmar military appears to continue to prioritize military objectives over civilian protection, including by failing to denounce policies and practices that sanction the direct targeting of civilians. Such policies and practices include targeting civilians through “shoot-on-sight” incidents, extrajudicial executions, indiscriminate shelling, and the purposeful use of landmines to inflict civilian casualties. Additional policies and practices indicate officers and enlisted soldiers alike have been primed to pursue military goals and satisfy superiors’ expectations without regard for civilian impact.

24. In areas of ongoing conflict, such as Kachin State and northern Shan State, communities continue to report attacks that are consistent with these historical patterns of civilian targeting. These events suggest that improvements in civilian security in ceasefire regions are the result of a reduction in hostilities rather than the reform of problematic policies and practices. Moreover, individuals living in ceasefire areas are skeptical about the durability of peace and fear a return to active conflict and large-scale civilian targeting.

25. The lack of accountability for and the pattern of promotions of human rights abusers, like Ko Ko, Khin Zaw Oo, and Maung Maung Aye, demonstrate the structural problems that allow the policies and practices to continue. They indicate that Myanmar has not taken sufficient steps to ensure non-repetition of abuses. These promotions also indicate the presence of an incentive structure that encourages the continuation of military policies and tactics resulting in abuses. Without a thorough investigation and change of such policies and practices, individuals such as Lieutenant General Ko Ko will remain in influential positions, which does not promote the protection of human rights.

IV. Recommendations to the Government of Myanmar

26. The Clinic believes that there are likely thousands of individuals who possess information about the military’s actions during the Offensive. The Clinic’s investigation yielded considerable evidence indicative of the criminal responsibility of Ko Ko, Khin Zaw Oo, Maung Maung Aye,

²⁶ See Basic Principles, art. IX, ¶ 23(f)-(h) (stating that guarantees of non-repetition should include, among other things, “[p]romoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement . . . and military personnel,” “[r]eviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law,” and “promoting mechanisms for preventing and monitoring social conflicts and their resolution”).

²⁷ See International Human Rights Clinic, *Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military* (Mar. 2014) available at http://hrp.law.harvard.edu/wp-content/uploads/2014/03/2014.03.24-IHRC-Military-Policy-Memorandum-FINAL.web_.pdf. The information in the next two paragraphs is drawn from this *Policy Memorandum*.

and other lower-level perpetrators. However, further investigation should be conducted to document the violations with a higher degree of specificity and support efforts to hold them accountable.

27. Southern Command and LID 66 were not the only units involved in the Offensive. By focusing on additional witnesses, former soldiers, and internal military documents, information can be gathered regarding other units that likely committed prohibited acts in other districts as part of clearing operations during the Offensive. The actions of other units should be investigated and remedies should be provided to the individuals and their families who suffered harm.

28. The Clinic's research implicates two particular military units—LID 66 and the “Baw Bi Doh” (a military unit known as the “short pants”)—that could be investigated more thoroughly given reports of abuses beyond the Offensive. The Clinic recommends further investigation of both units.

29. The Clinic's investigation was limited in its geographic and temporal scope, addressing the conduct of two specific military units in one township during a two-year period. The Clinic recommends investigating and providing appropriate remedies for any similar abuses in other locations and time periods, including those reported in present conflict areas such as Kachin State and northern Shan State. Remedial action should include changing Myanmar military policies and practices to guarantee non-repetition of human rights violations in present conflict areas.

30. The Clinic recommends Myanmar thorough review and reform of any laws, policies, and practices that allow gross violations of human rights to continue in conflict areas. Review should include any policies and practices related to indiscriminate attacks that reportedly continue. Myanmar should promote the observance of international codes of conduct and ethical norms. Finally, Myanmar should review and change any policies and practices that have resulted in the promotion of alleged perpetrators, which incentivizes unlawful behavior.²⁸

²⁸ This version has minor style corrections from the version that was submitted on March 23, 2015. It also clarifies the current rank of the commanders who oversaw the Offensive, which in some cases has changed since the operations ended in 2008.