

# LEGAL MEMORANDUM:

## War Crimes and Crimes against Humanity in Eastern Myanmar

November 2014

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INTERNATIONAL HUMAN RIGHTS CLINIC  
HUMAN RIGHTS PROGRAM AT HARVARD LAW SCHOOL



**The International Human Rights Clinic at Harvard Law School** (“the Clinic”) works to protect the human rights of clients and communities around the world. The Clinic undertakes projects focusing on fact-finding, litigation, legal and policy analysis, report drafting for international oversight bodies, and the development of advocacy strategies. Through supervised practice, students learn the responsibilities and skills of human rights lawyering.

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## PREFACE

The International Human Rights Clinic at Harvard Law School has worked on issues relating to Myanmar<sup>1</sup> for almost ten years. In 2009, we published *Crimes in Burma*, a report that reviewed United Nations (“UN”) reports relating to armed conflict in eastern Myanmar and concluded that there was a *prima facie* case for violations of international criminal law that took place in the area.<sup>2</sup> In the report, we recommended the formation of a UN Commission of Inquiry to investigate abuses in Myanmar.

In the year following the release of *Crimes in Burma*, policymakers often asked us whether international crimes had occurred and whether a criminal case could be built against individual perpetrators. Although abuses occurred on both sides of the conflict, we were asked most often about the viability of cases against specific individuals in the Myanmar military.

With this in mind, we initiated our own investigation into human rights abuses associated with a Myanmar military offensive in eastern Myanmar, which began in late 2005 and continued until 2008 (“the Offensive”). From the decades of conflict in the country, we chose this particular offensive because it was one of the largest in recent memory and was widely condemned by the international community. To facilitate the assessment of the viability of a case against specific perpetrators, we narrowed the scope of our investigation by focusing on military conduct that occurred in one specific township in 2005 and 2006.

Over a period of three years, we conducted eleven missions to Myanmar and along the Thailand-Myanmar border to collect evidence relating to the Offensive and to consult with local partners. To our knowledge, our investigation is the most in-depth examination to date of international crimes committed during a military campaign in Myanmar.

We applied a framework of international criminal law and employed a research methodology appropriate for satisfying the higher evidentiary standards associated with criminal prosecution. We hoped that by demonstrating the feasibility of building a criminal case against specific perpetrators, we would help deter future abuses and promote a culture of accountability in the Myanmar military.

The political landscape in Myanmar shifted significantly during the course of our investigation. More than 1,000 political prisoners were freed, many media restrictions

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<sup>1</sup> The ruling military regime changed the name of the country from “Burma” to “Myanmar” in July 1989.

<sup>2</sup> International Human Rights Clinic, Harvard Law School, “Crimes in Burma,” May 2009, <http://hrp.law.harvard.edu/wp-content/uploads/2013/02/Crimes-in-Burma.pdf>.

were lifted, Aung San Suu Kyi was elected as a Member of Parliament, and public officials engaged in debate about the reform and repeal of controversial laws. Additionally, the Government signed preliminary ceasefire agreements with many non-state armed groups.

In the context of these developments, we sought to utilize the findings of our investigation in a way that was responsive to new opportunities for dialogue, while still addressing persistent human rights concerns. To this end, in March 2014, we published a document titled *Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military*.<sup>3</sup> That document identified Myanmar military policies and practices that lead to unlawful attacks and killings, and recommended a practical program of reform. This present document, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar*, sets forth the findings of our criminal investigation. It concludes that war crimes and crimes against humanity were committed by Myanmar military personnel in the context of the Offensive and identifies senior military officers who could be held accountable for those crimes.

Countries in transition face profound and difficult questions about how to address past abuses. This memorandum brings into focus those questions facing Myanmar at this time of transition. While this memorandum concludes that international crimes have been committed, international criminal law is not the only means of addressing Myanmar's legacy of abuse. The people of Myanmar should have the opportunity to discuss these difficult questions and craft a meaningful response that allows them to address their past and to move the country forward.

As the investigation progressed over the past several years, we consulted with many relevant stakeholders. We discussed how identifying senior military officers as perpetrators of international crimes could affect democratic reforms, the peace process, and the security situation in Myanmar. The following themes featured consistently in our discussions:

First, discussions focused on deterring Myanmar military personnel from committing abuses in the future. The unlawful forms of military conduct that we have documented continue to be employed with impunity in places like Kachin State and northern Shan State. This memorandum informs senior military officers and enlisted soldiers that they could be held accountable for unlawful actions. It also demonstrates that local activists and the international human rights community are able to document abuses to an extraordinary level of detail and are committed to ensuring that perpetrators are held to account.

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<sup>3</sup> International Human Rights Clinic, Harvard Law School, "Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military," Mar. 2014, [http://hrp.law.harvard.edu/wp-content/uploads/2014/03/2014.03.24-IHRC-Military-Policy-Memorandum-FINAL.web\\_.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2014/03/2014.03.24-IHRC-Military-Policy-Memorandum-FINAL.web_.pdf).

Second, many questioned the limited space given to human rights issues in current conversations about reform and transition in Myanmar. To date, dialogue has often focused on political developments in Yangon and Naypyidaw without addressing the continued threat that the military's conduct and role in governance pose to the country's citizens, peace process, and long-term stability. This memorandum highlights the problems that can arise absent human rights protections and suggests that such issues cannot be swept aside during conversations about the country's future.

Finally, stakeholders emphasized the need to encourage discussions in Myanmar about how to address the country's past. Despite recent reforms, there have been few public discussions about Myanmar's legacy of violence and oppression. Military abuses such as those described in this memorandum have affected millions of people in ethnic nationality areas and elsewhere. However, their perspectives have too rarely been heard in conversations about Myanmar's transition, and their accounts are too important to be forgotten or ignored.

At the conclusion of interviews with villagers affected by the Offensive, we asked the question, "Is there anything else you would like to tell us?" Many simply said, "Please tell the world our story." This memorandum represents part of their story—one that should help shape conversations about the past, present, and future of Myanmar.

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## EXECUTIVE SUMMARY

In January 2011, the Harvard Law School International Human Rights Clinic (“the Clinic”) began to investigate the actions of the Myanmar Army during a military offensive in eastern Myanmar (“the Offensive”) that began in late 2005 and lasted approximately three years. The Clinic sought to determine whether violations of international criminal law occurred during the Offensive, and whether there exist reasonable grounds to assert that individual military officers could be held responsible for those crimes. The Clinic’s investigation focused specifically on the conduct of two military units—Southern Regional Military Command (“Southern Command”) and Light Infantry Division 66 (“LID 66”)—in Thandaung Township, Kayin State.

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.

Based on evidence gathered during its investigation, the Clinic has concluded that Myanmar Army personnel from Southern Command and LID 66 committed crimes against humanity and war crimes, as defined by Articles 7 and 8, respectively, of the Rome Statute of the International Criminal Court. Moreover, the Clinic has found that officers from Southern Command and LID 66 could—pending further investigation—be held legally responsible for these crimes under two theories of liability: individual criminal responsibility under Article 25 and command responsibility under Article 28. In relation to three specific military commanders, the Clinic has collected evidence sufficient to satisfy the standard required for the issuance of an arrest warrant by the International Criminal Court as set forth in Article 58 of the Rome Statute. These three commanders are:

- **Major General Ko Ko**, the commander of Southern Command during the Offensive, and currently Myanmar’s Home Affairs Minister;
- **Brigadier General Khin Zaw Oo**, the commander of LID 66 during the Offensive until May 2006, and currently commander of Myanmar Army Bureau of Special Operations (“BSO”) 4; and

- **Brigadier General Maung Maung Aye**, the commander of LID 66 during the Offensive after May 2006, who was subsequently promoted to be the Naypyidaw Regional Commander. There are unconfirmed reports that he has since retired.

In light of these findings, the Clinic believes that dealing with Myanmar's history of abuse is necessary to help ensure a successful transition. Addressing the past should include further investigation into the actions of the commanders named in this memorandum, their units, and other military personnel involved in the Offensive. Scrutiny into other military operations, particularly those that are ongoing, is also warranted. Such investigations would help contribute to accountability for human rights abuses and create an historical record. Finally and just as importantly, to break the prevailing cycles of violence in Myanmar, there is a need for concerted effort to reform military policies and practices that have fueled indiscriminate attacks against innocent civilians.

## MAJOR FINDINGS

### **A. The conduct of Myanmar military personnel during the Offensive resulted in egregious human rights violations.**

The Offensive investigated by the Clinic targeted the Karen National Union (“KNU”), the Karen National Liberation Army (“KNLA”), and the largely Karen civilian population that resides in eastern Myanmar. It began in November 2005, when soldiers from Southern Command—the military authority permanently assigned to oversee the region where the Offensive occurred—attacked Hee Daw Kaw village in Thandaung Township, northern Kayin State. Southern Command battalions fired mortars at the village and shot at villagers as they fled. As part of the attack, soldiers allegedly captured and executed a villager, burned approximately 30 homes, and laid landmines in the village. In the wake of these clearing operations, the villagers were forced to flee and were unable to return.

The attack on Hee Daw Kaw village would foreshadow a pattern of military conduct repeated during attacks on hundreds of villages in eastern Myanmar in the three years that followed.

In January and February 2006, at least seven combat divisions arrived in northern Kayin State and eastern Bago Division (now “Bago Region”),<sup>4</sup> to participate in the Offensive. One of these divisions was LID 66. After joining the Offensive, LID 66 came under the de facto control of Southern Command, which was responsible for military operations in its assigned territory.

The Myanmar military’s chief tactical objective during the Offensive was to drive the civilian population from KNLA-controlled areas to government-controlled areas or across the border into Thailand, where they could less easily provide material support to the armed group. To accomplish this objective, the military engaged in various forms of unlawful conduct, including the shelling of villages, agricultural fields, and internally displaced persons (“IDP”) hiding sites; the use of machine gun and assault rifle fire against civilians; the destruction of homes and means of livelihood; the laying of landmines in villages and rice paddies; and the forcible relocation of villages. Civilians were also subjected to forced labor, executions, and torture. The Myanmar military employed these forms of conduct on a large scale affecting a high percentage of the population in the region.

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<sup>4</sup> Names and descriptions used in this memorandum are those designated by the Government of Myanmar. In 2010, divisions were renamed as “regions,” the label designated by the 2008 Constitution and used today. The KNU and Karen population use alternate names for geographic regions and recognize different geographic boundaries between administrative territories. Many village names have been subject to various different spellings. To ensure accuracy, the Clinic confirmed the location of villages and events described in this memorandum by referencing geographic features and proximity to other locations.

Adding to massive pre-existing displacement from decades of armed conflict, the impact of this offensive on local communities was profound. The Clinic documented events affecting nearly every village in the region that was the focus of its investigation. Local and international organizations extensively documented grave abuses committed by Myanmar military personnel during the Offensive. UN Special Rapporteurs, U.S. lawmakers, the International Committee of the Red Cross (“ICRC”), and others condemned Myanmar’s military government for these abuses. Reports estimate that as many as 42,000 residents were displaced by military operations undertaken to “clear” civilian populations from large swathes of territory.

**B. There are numerous witnesses and ample evidence that could support a criminal case against Myanmar Army officers for their conduct during the Offensive.**

Although the Offensive in eastern Myanmar affected parts of Mon, Kayin, and Kayah States as well as Bago Division, the Clinic specifically investigated military activities in Thandaung Township, northern Kayin State.<sup>5</sup> The Offensive spanned almost three years from late 2005 to 2008, but the Clinic focused its research on events that occurred between January 2005 and December 2006. This time period captures approximately the year preceding the Offensive and the first year of its execution. The Clinic investigated the actions of Southern Command and LID 66, two of the most active military units in the area in 2005 and 2006. Given the limited geographic and temporal scope of its investigation, the Clinic believes that the abuses that it documented are only a small fraction of those that were perpetrated during the Offensive.

During eleven field missions to Myanmar and the Thailand-Myanmar border, the Clinic spoke with more than 300 individuals—and conducted extensive interviews with more than 150 from that group—about the Myanmar military and the Offensive in eastern Myanmar. Interviewees included survivors of abuses perpetrated by the military, eyewitnesses to military actions, individuals who were forced to carry supplies for the military, Karen village leaders who had frequent personal contact with military officers, and men who had formerly served in the Myanmar Army. The Clinic collected detailed accounts from individuals during interviews that sometimes lasted several days and prepared draft affidavits, which interviewees reviewed for accuracy. The Clinic also reviewed dozens of human rights reports and documents pertaining to military actions during the Offensive, compiled photographic evidence, and solicited expert declarations from four professionals with knowledge relevant to the Offensive.

Altogether, the Clinic has compiled more than 1,500 pages of documentation relating to the Offensive in eastern Myanmar, including more than 1,000 pages of draft affidavits

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<sup>5</sup> This document often names “Thandaung Township” as the geographic focus of the Clinic’s investigation. This should be understood to include areas along the border between Thandaung Township and Bago Division. Villages such as Shah Si Boh, Yay Shah, Zee Pyu Gone, and Taw Gone lie almost directly on this border.

(several of which exceed 50 pages in length), 180 pages of expert declarations, and third-party reports relating to the Offensive. The Clinic's evidence relates to events affecting more than 90 different villages and thousands of civilians. Many events were described with great consistency by multiple witnesses. See Section III for further information about the investigation.

**C. Myanmar military counterinsurgency policies institutionalized the targeting of civilians and resulted in the commission of crimes.**

Evidence collected by the Clinic reveals a pattern of widespread and systematic abuses by the Myanmar Army—including by soldiers from Southern Command and LID 66—in eastern Myanmar in 2005 and 2006. These abuses were the result of the implementation of longstanding military policies and practices that sanctioned or facilitated the direct targeting of civilians and were designed to effect large-scale displacement.

The basic parameters of the Myanmar military's counterinsurgency strategy date to the late 1960s when the military's Four Cuts doctrine was promulgated. The Four Cuts doctrine was designed to deny non-state armed groups access to food, finances, intelligence, and recruits by driving civilian populations from areas where they could offer support. While the terminology used to describe these tactics may have evolved, modern military policies and practices have continued in the tradition of Four Cuts by facilitating civilian targeting as a means of separating non-state armed groups from their civilian support bases.

A chief objective in contemporary Myanmar military counterinsurgency operations has been the "clearing" of contested territory. Official military documents have prescribed the use of armed attacks, the destruction of property, and the laying of landmines to drive residents from their homes and discourage their return. Other coordinated actions have also been undertaken to displace civilian populations and facilitate their movement to government-controlled areas.

In practice, clearing operations have been facilitated by a color-classification system under which the military has labeled areas based on the extent of government control. This system resulted in differential rules of engagement, including those that have sanctioned the targeting of civilians in some areas. "Black areas" have been territories over which the Myanmar Government has exercised little or no control; "brown areas" have been areas in which government control has been contested; and "white areas" have been those in which government control has been strong. Critically, soldiers have regularly been instructed that all individuals—including civilians—present in black areas were to be considered "the enemy" and therefore legitimate targets of attack. As staging areas for more frontline operations, military conduct in brown areas has more often been characterized by the use of civilian forced labor.

During the Offensive, these policies and practices were implemented through coordinated assaults on civilian populations. In black areas in particular, assaults involved mortar attacks on villages, the destruction of civilian property, “shoot-on-sight” incidents, and the placing of landmines in locations that indicate a clear intent to cause civilian casualties, among other abusive forms of conduct. These policies and practices—and their impact during the Offensive—were described in great depth by former soldiers, civilians, and the Clinic’s expert declarants. See Section III.B for further discussion of military counterinsurgency policies.

**D. There is sufficient evidence to establish the commission of war crimes and crimes against humanity as defined by the Rome Statute.**

The evidence collected by the Clinic indicates that actions by Myanmar military personnel in 2005 and 2006 constitute war crimes under Article 8 of the Rome Statute and crimes against humanity under Article 7.<sup>6</sup>

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.<sup>7</sup> In the context of the Offensive, such a conflict existed between the Myanmar military and the KNLA.<sup>8</sup> 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.<sup>9</sup> The Rome Statute further specifies that a prohibited act constitutes a crime against humanity if (1) there was an “attack” involving the multiple commission of prohibited acts; (2) the attack was “widespread or systematic;” (3) the attack was “directed against any civilian population;” and (4) the attack was carried out “pursuant to or in furtherance of State or organizational policy.”<sup>10</sup>

The Clinic documented numerous prohibited acts that constitute both war crimes and crimes against humanity. The Myanmar military committed these acts as part of operations to violently clear civilians from KNLA-controlled areas while employing military counterinsurgency policies and practices. Of particular relevance to war crimes, these acts were an integral part of the armed conflict. With regards to crimes against

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<sup>6</sup> Myanmar is not a party to the Rome Statute. However, the Rome Statute provides a recognized framework for analyzing violations of international criminal law.

<sup>7</sup> International Criminal Court, *Elements of Crimes (Elements)*, U.N. Doc ICC-ASP/1/3, adopted 9 Sept. 2002, art. 8(2)(a)(i).

<sup>8</sup> See Section VI.A.1.

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

<sup>10</sup> 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. Clinic Expert Declaration, Expert 3, para. 57.

humanity, the clearing operations were attacks “directed against” the civilian population. The Clinic has not only documented a large number of incidents, but these operations involved “scorched earth” campaigns that were planned at the highest levels of military authority. Thus, there is strong evidence that the unlawful conduct was part of a “plan or policy” and was “systematic” in nature, establishing respectively the commission of war crimes and crimes against humanity.

Evidence collected by the Clinic is sufficient to establish that the following war crimes and crimes against humanity were committed by military personnel from Southern Command and LID 66 during the Offensive:

*War Crimes*

Attacking civilians  
Displacing civilians  
Destroying or seizing the enemy’s property  
Pillage  
Murder  
Execution without due process  
Torture  
Outrages upon personal dignity

*Crimes against Humanity*

Forcible transfer of a population  
Murder  
Enslavement  
Torture  
Other inhumane acts

Additionally, the Clinic has collected some evidence relevant to the following war crimes and crimes against humanity that were committed by military personnel from Southern Command and LID-66 during the Offensive:

*War Crimes*

Rape

*Crimes against Humanity*

Rape  
Persecution

Further investigation is merited to determine whether it might be possible to build a case relating to these latter crimes in the context of the Offensive. *See* Section V for additional discussion of crimes.

**E. Officers from Southern Command and LID 66 could be held responsible under the Rome Statute based on two theories of liability: individual criminal responsibility and command responsibility.**

Article 25 and Article 28 of the Rome Statute establish the two mechanisms by which individuals can be held liable for crimes within the jurisdiction of the International Criminal Court. Under Article 25, an individual shall be criminally responsible if that person is directly involved in the crime’s commission.<sup>11</sup> Under Article 28, a military commander can be held responsible for the crimes of his subordinates if that commander exercised effective command and control, knew or should have known that

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<sup>11</sup> *See* Rome Statute, art. 25.

crimes were being committed, and failed to take measures to prevent, repress, or report the crimes.<sup>12</sup>

The Clinic collected significant evidence identifying military personnel from Southern Command and LID 66 as the direct perpetrators of crimes. Because Southern Command had a permanent presence in the region and because its soldiers tended to operate in brown areas, where contact between soldiers and civilians was more frequent, many interviewees were able to identify the officers and units involved in abuses by name and battalion number. Interviewees had a harder time identifying specific officers and battalions from LID 66 because it was a combat division that primarily engaged in offensive operations in black areas, where villagers would often flee in front of advancing military columns. Nevertheless, several key interviews as well as photographic evidence place LID 66 in the vicinity of abuses that they are alleged to have committed.

The Clinic also collected evidence indicative of the criminal responsibility of the commanders of Southern Command and LID 66 for crimes committed by their subordinates under a theory of command responsibility. For example, former soldiers and the Clinic's expert declarants described a rigid military system in which superior officers were aware of and closely controlled the actions of lower-ranking personnel and units. Additionally, the Clinic documented longstanding military policies and practices—implemented by military officers throughout the chain of command—that sanctioned or facilitated attacks on civilians. Not only is there no indication that efforts were made to prevent or report these crimes, but these military commanders appear to have taken affirmative steps to initiate operations to target civilians and clear them from KNLA-controlled areas.

In relation to three commanders, evidence collected by the Clinic is sufficient to meet the standard set by Article 58 of the Rome Statute for the issuance of an arrest warrant by the International Criminal Court, which requires that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”<sup>13</sup> These commanders are:

- **Major General Ko Ko**, the commander of Southern Command during the Offensive, and currently Myanmar's Home Affairs Minister;
- **Brigadier General Khin Zaw Oo**, the commander of LID 66 during the Offensive until May 2006, and currently the commander of BSO 4; and
- **Brigadier General Maung Maung Aye**, the commander of LID 66 during the Offensive after May 2006, who was subsequently promoted to be the Naypyidaw Regional Commander. There are unconfirmed reports that he has since retired.

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<sup>12</sup> See Rome Statute, art. 28.

<sup>13</sup> Rome Statute, art. 58(1)(a).

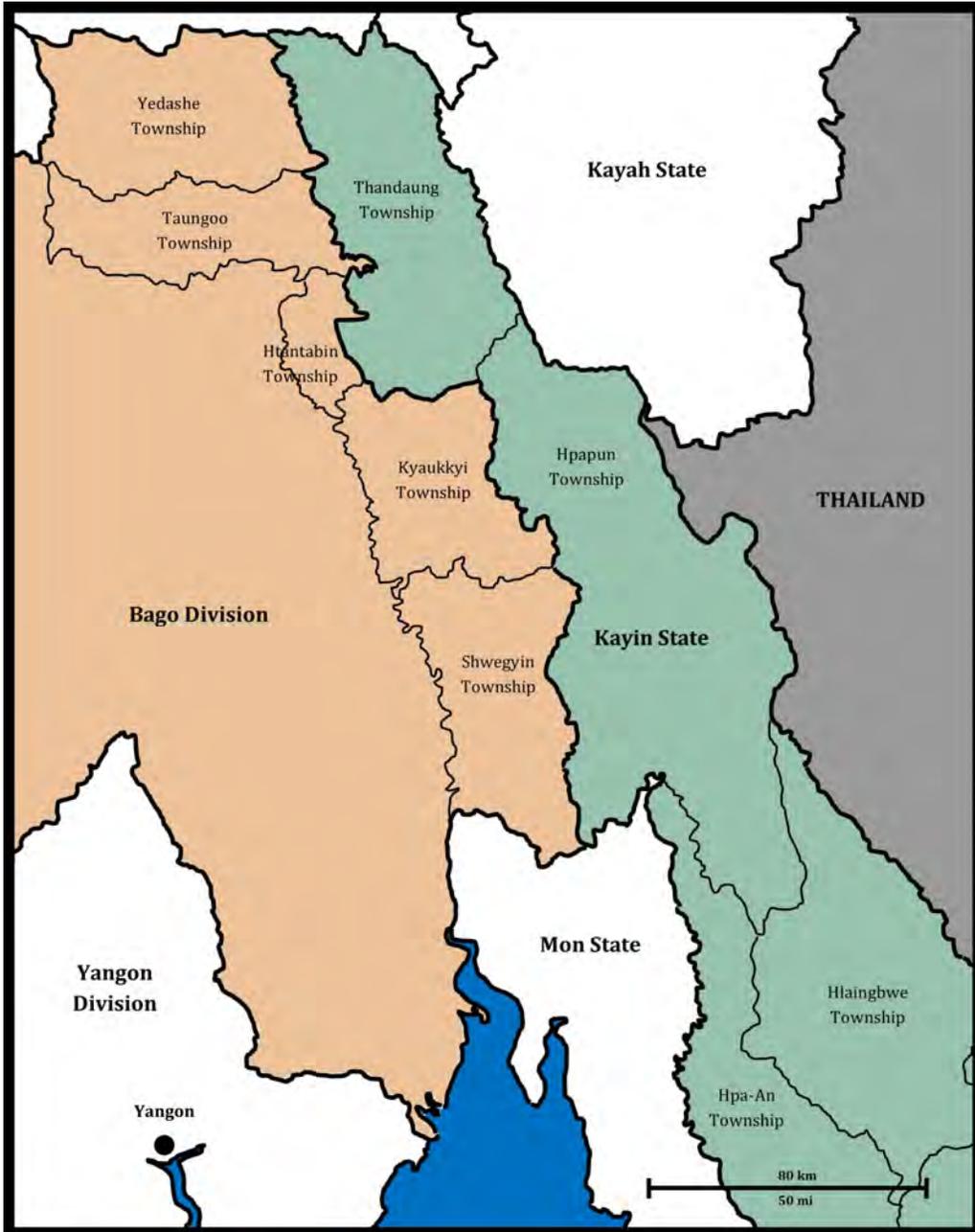
With additional time and effort, evidence could be collected which satisfies the higher standards of proof required for confirmation of charges and conviction in relation to Major General Ko Ko, Brigadier General Khin Zaw Oo, and Brigadier General Maung Maung Aye, as well as other officers. See Section VI for further discussion of the identity, actions, and criminal responsibility of specific military units and officers.

## ACRONYMS

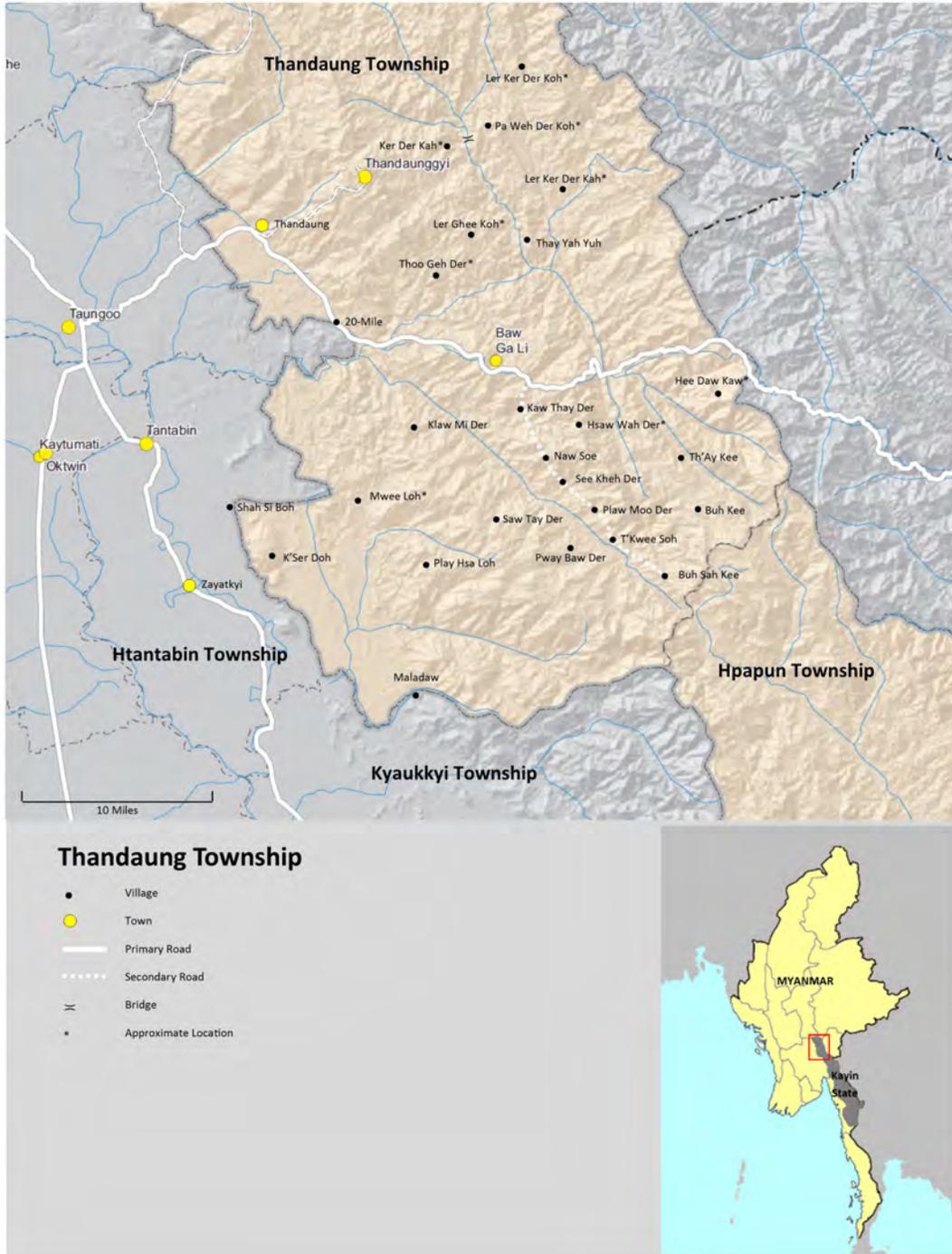
BSO	Bureau of Special Operations
FBR	Free Burma Rangers
IB	Infantry Battalion
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
KHRG	Karen Human Rights Group
KNLA	Karen National Liberation Army
KNU	Karen National Union
LIB	Light Infantry Battalion
LID	Light Infantry Division
MOC	Military Operation Command
RMC	Regional Military Command
SOC	Special Operation Command
TOC	Tactical Operation Command
UN	United Nations

## MAPS

### Eastern Myanmar



## Thandaung Township



## I. BACKGROUND

Armed conflict has plagued Myanmar since it gained independence from the United Kingdom in 1948. The Government of Myanmar has fought numerous non-state armed groups affiliated with ethnic minority populations and ideological movements. Although ceasefire agreements have at times led to periods of relative peace in some parts of the country, nationwide peace has never been achieved. Throughout Myanmar's history, military personnel have been accused of committing grave abuses—including attacks on civilians, extrajudicial executions, forced relocations, forced labor, and torture—against civilian populations during counterinsurgency operations.<sup>14</sup>

The Myanmar military has periodically undertaken major counterinsurgency offensives against non-state armed groups throughout the country.<sup>15</sup> Commentators view a cyclical pattern to conflict in which the Government maintains ceasefire agreements with certain armed groups while concentrating military force on others.<sup>16</sup> Many of these offensives have targeted civilian populations deemed to support non-state armed groups. During offensives, reports of abuses have traditionally increased substantially.<sup>17</sup>

The Government of Myanmar has been at war with the KNU and its armed wing, the KNLA, since 1949. Although the KNU has demanded independence from Myanmar in the past, today the KNU seeks increased autonomy in a federal democratic system. Throughout the history of the conflict, the KNU/KNLA has controlled significant territory in eastern Myanmar. In recent decades, the Government has likewise maintained a heavy military presence in this region. Periodic offensives in eastern

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<sup>14</sup> See, e.g., Amnesty International, "Evidence of Unlawful Killing and Torture of Ethnic Minorities in Burma Says Amnesty International," ASA 16/06/88, 11 May 1988, <http://www.burmalibrary.org/KN/16-06-88-ocr50.pdf>; Amnesty International, "Allegations of Extrajudicial Executions, Torture and Illtreatment in the Socialist Republic of the Union of Myanmar," ASA 16/03/87, Sept. 1987, <http://www.ibiblio.org/obl/docs3/16-03-87-ocr.pdf>.

<sup>15</sup> See, e.g., Tom Kramer, Transnational Institute, "Neither War Nor Peace: The Future of the Cease-fire Agreements in Burma," July 2009, <http://www.tni.org/files/download/ceasefire.pdf>.

<sup>16</sup> See, e.g., Tom Kramer, Transnational Institute, "Burma's Cease-fires at Risk: Consequences of the Kokang Crisis for Peace and Democracy," Sep. 2009, <http://www.tni.org/sites/www.tni.org/files/download/psb1.pdf>.

<sup>17</sup> See, e.g., Project Maje, "A Swamp Full of Lilies: Human Rights Violations Committed by Units/Personnel of Burma's Army, 1992-1993," Feb. 1994, <http://www.projectmaje.org/pdf/lilies.pdf>; Amnesty International, "Burma: Atrocities in the Shan State," AI Index: ASA 16/05/98, 16 Apr. 1998, <http://www.hrsolidarity.net/mainfile.php/1998vol08no07/1571/>; Amnesty International, "Myanmar: Exodus from Shan State," AI Index: 16/11/00, July 2000, p. 1, <http://www.amnesty.org/en/library/asset/ASA16/011/2000/en/dbcff799-deb1-11dd-8e92-1571ae6babe0/asa160112000en.pdf>.

Myanmar have escalated conflict with the KNLA and featured attacks on civilians and large scale displacement of the Karen population living in the area.<sup>18</sup>

In early 2006, more than seven Army combat divisions arrived in eastern Myanmar to assist military units already headquartered there in a massive offensive against the KNLA that lasted almost three years. This campaign affected a large geographic area, including parts of Kayin, Kayah, and Mon States, and Bago Division. However, the Offensive was centered on the KNLA's stronghold in northern Kayin State and eastern Bago Division. Thandaung Township, the northernmost township in Kayin State, experienced particularly intense military conflict in 2006, 2007, and 2008.

The chief tactical objective of the Offensive appears to have been to clear the Karen civilian population from areas where they could support the KNLA.<sup>19</sup> To accomplish this goal, the Myanmar Army shelled villages and IDP hide sites, opened fire on villagers, destroyed homes, agricultural fields, and food supplies, and laid landmines in villages. Torture, killings, theft, and other forms of abuse also proliferated during the Offensive. In certain areas, nearly every village was affected by the violence being directed at the civilian population. A humanitarian organization that provides assistance to the population in eastern Myanmar estimated that 42,000 civilians were displaced by the Offensive.<sup>20</sup>

In January 2012, the Government of Myanmar and the KNU signed a preliminary ceasefire agreement, initiating a series of high-level peace talks between the two parties. Conflict between the KNLA and government forces has subsided since the signing of the agreement, leading to increases in security for the Karen civilian population. However, there continue to be periodic reports of abuses by military personnel.

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<sup>18</sup> See, e.g., Human Rights Watch (HRW), "Burma/Thailand: No Safety in Burma, No Sanctuary in Thailand," July 1997, <http://www.hrw.org/legacy/reports/1997/burma/>.

<sup>19</sup> Clinic Expert Declaration, Expert 1, para. 12.

<sup>20</sup> Thailand-Burma Border Consortium (TBBC), "Internal Displacement in Eastern Burma: 2007 Survey," Oct. 2007, p.36, <http://www.tbtc.org/idps/report-2007-idp-english.pdf>.

## II. METHODOLOGY AND SOURCES OF EVIDENCE

The Clinic's investigation focused on the Offensive in eastern Myanmar, which began in late 2005 and continued into 2008. The Offensive affected a large geographic area, which touched several states and divisions and was home to a large civilian population. To successfully develop a comprehensive criminal case against specific perpetrators, the Clinic sought to narrow the scope of its inquiry.

After an initial mission to the Thailand-Myanmar border in March 2011, the Clinic decided to closely examine the military's operations in Thandaung Township in northern Kayin State and bordering areas in Bago Division. The scope of the Clinic's investigation was further focused on the actions of soldiers and commanders from two of the military units that appear to be most responsible for human rights violations in Thandaung Township: Southern Command and LID 66. The Clinic chose to concentrate on the time period from January 2005 to December 2006, a window which captures events associated with the buildup to the Offensive as well as LID 66's deployment to the region at the outset of the Offensive.

Between March 2011 and March 2014, the Clinic conducted eleven field missions to Myanmar and the Thailand-Myanmar border to consult with local partners and collect evidence of alleged crimes committed by military personnel during the Offensive. These investigations yielded over 1,000 pages of draft affidavits related to the actions of the Myanmar military during the Offensive. Additional photographic and documentary evidence was also collected.

The Clinic's ability to collect evidence about the Offensive has been limited by security concerns and lack of access to certain locations and populations. For example, the Clinic has received secondhand reports of meetings held in Thandaung Township during the Offensive in which military personnel warned villagers about impending "clearing" operations in civilian areas.<sup>21</sup> The Clinic has not been able to speak with villagers who attended these meetings in part because it has not been able to gain access to the towns and villages where they occurred. Gaining access to areas and populations in Thandaung Township would allow evidentiary gaps to be closed more quickly. Similarly, security concerns have hampered the Clinic's efforts to speak with former soldiers who served in the Myanmar Army and other individuals who possess additional firsthand knowledge of the military's actions during this time period. Access to these types of persons would facilitate the development of a criminal case against the perpetrators of crimes committed during the Offensive. Recommendations for further investigation are described in more detail in Section VII.

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<sup>21</sup> Clinic Database, Interview Nos. 51 and 119.

## **A. Interviews**

After screening more than 300 individuals, the Clinic conducted more than 150 in-depth interviews with individuals who had knowledge relevant to the Offensive in eastern Myanmar. Interviewees included survivors of human rights violations committed by military personnel, eyewitnesses to the military's actions during the Offensive, village chiefs and other local leaders who had extensive interaction with military commanders, and individuals who formerly served in the Myanmar Army.

The Clinic used an interview methodology appropriate for an international criminal investigation, ensuring that interviewees were not prejudiced by the manner of questioning or any information provided by the research team. Interviews were conducted through Karen and Burmese translators and ranged in length from less than an hour to five days. After concluding an interview, the research team would compile notes into a draft affidavit and read it back to the interviewee to ensure accuracy. Information from interviews and from other sources was assembled into a project database, allowing evidence to be easily searched and sorted.

The Clinic has distinguished between direct and hearsay evidence and believes that, with further investigation, many unconfirmed secondhand accounts of abuses can be corroborated, and the identity of those individuals directly responsible, or in command of those responsible, can be confirmed.

### **1. Villagers**

The majority of the individuals interviewed by the Clinic were civilians from villages in Thandaung Township. Most were survivors of military attacks, eyewitnesses to abuses perpetrated by the military, or both. Almost all villagers told stories of military abuse occurring during different periods in their lives, revealing a pattern that stretched back decades. Regarding the Offensive, villagers shared their personal knowledge of military attacks on villages, killings, forced labor, forced displacement, torture, and other abuses. Some villagers were able to identify particular military units or officers that were involved in these acts.

Many villagers also provided accounts of events of which they had no direct knowledge. In many cases, they heard about these incidents from other villagers or KNLA soldiers. In some cases, these descriptions have been corroborated through the statements of eyewitnesses. In others, no further information is yet available about the events that they describe.

## **2. Village Leaders**

The Clinic interviewed ten individuals who had served as village leaders in Thandaung Township.<sup>22</sup> Some of these individuals are key witnesses who would be essential to a criminal case against senior military officers because of their extensive knowledge of abuses, the conduct of the military, and the actions of individual commanders. Village leaders often had close, sustained contact with military personnel, including military officers operating in a command capacity, and were sometimes able to provide the names and ranks of officers with whom they interacted. Village leaders explained that they often received orders from military officials, which they then passed on to their villagers. Many of these orders were received personally from military commanders in face-to-face meetings.<sup>23</sup> Some village leaders also spoke of regular, scheduled meetings, revealing a context in which military commanders were aware of events on the ground and were directing policies that resulted in systematic abuses.<sup>24</sup> This communication structure was also confirmed by numerous ordinary villagers, who indicated that village leaders would act as the go-betweens for military leaders and local populations.<sup>25</sup>

Some of the orders received by village leaders directly implicate officers in the commission of crimes. For example, village leaders explained that military commanders would systematically demand that villagers perform unpaid labor for the army.<sup>26</sup> Other examples include the pronouncement of shoot-on-sight orders sanctioning the killing of civilians in certain areas,<sup>27</sup> relocation orders and restrictions on movement,<sup>28</sup> and forced provision of goods to the military.<sup>29</sup>

## **3. Porters**

The Clinic interviewed 24 individuals who described having to carry supplies (or “porter”) for military units in 2005 or 2006.<sup>30</sup> Many of these individuals carried supplies

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<sup>22</sup> Clinic Database, Interview Nos. 18, 51, 52, 74 (section leader, not village leader), 75, 100, 102, 121, 123, 142, and 163. Some of these individuals were village leaders at times other than during the Offensive.

<sup>23</sup> Clinic Database, Interview Nos. 52, 74, 100, 121, 142, and 163.

<sup>24</sup> Clinic Database, Interview Nos. 52, 100, 121, 142, and 163.

<sup>25</sup> Clinic Database, Interview Nos. 33, 38, 42, 71, 80, 97, 103, 105, 107, 116, 119, 120, 125 (an army defector who reports transmitting orders through village head), 127, 134, 138, 143, 147, and 151.

<sup>26</sup> Clinic Database, Interview Nos. 74, 100, 142, and 163.

<sup>27</sup> Clinic Database, Interview Nos. 142 and 163.

<sup>28</sup> Clinic Database, Interview Nos. 100 and 163.

<sup>29</sup> Clinic Database, Interview Nos. 100 and 121.

<sup>30</sup> Clinic Database, Interview Nos. 8, 9, 12, 13, 18, 22, 31, 39, 46, 73, 86, 97, 100, 105, 106, 116, 120, 121, 127, 138, 142, 143, 146, and 147. This total includes only those individuals who portered themselves, not those who described a family member or another individual having to porter. A total of 56 interviewees described having participated in or witnessed forced portering at some point in their lives.

a short distance only and spent less than a day with the military. However, ten individuals spent two or more consecutive days carrying supplies for military units.<sup>31</sup>

Civilian porters, regardless of the duration of their service for the military, generally had intimate contact with military personnel. Interviewees who were porters could frequently identify the units, and occasionally the officers, for whom they served. They sometimes also spoke with soldiers, were privy to orders given by officers, or witnessed the actions of military personnel.

Individuals who spent multiple days in service to the military often provided the Clinic with rich descriptions of the actions of units involved in the Offensive. Some of these individuals traveled to frontline areas, where the military was engaged in combat with the KNLA and undertook actions directed at the local civilian population.<sup>32</sup> Long-term porters described witnessing the killing of porters,<sup>33</sup> the destruction of civilian property,<sup>34</sup> the use of civilians as minesweepers,<sup>35</sup> the beating or torture of civilians,<sup>36</sup> and the theft of food and property.<sup>37</sup> Many long-term porters suffered mistreatment by the military during their terms of service.<sup>38</sup>

For more information regarding the use of forced labor by the military, including the use of civilian and prisoner porters, see Section V. Crimes.

#### **4. Former Soldiers**

The Clinic spoke with seven individuals who were formerly soldiers in the Myanmar Army.<sup>39</sup> Several of these individuals had served in Kayin State or Bago Division, although none were operational in Thandaung Township during the Offensive. These individuals provided information on the Army command structure, reporting protocols, training programs, and operational procedures, among other matters. Of particular value

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<sup>31</sup> Clinic Database, Interview Nos. 8 (one month), 9, 13 (one week), 18 (three consecutive days of trips originating from home village), 22 (three days), 102 (one night with military), 105 (three occasions, up to 2-3 days), 120 (two occasions, 2 days each time), 142 (slept at home every night, but had to go with army every day for a period of over one month), and 146.

<sup>32</sup> Clinic Database, Interview Nos. 8 (not entirely clear where interviewee went during portering, but description matches front-line portering), 22, and 146.

<sup>33</sup> Clinic Database, Interview Nos. 8 (a fellow porter killed), 105 (killings of multiple prisoner porters), and 142 (killing of two prisoner porters).

<sup>34</sup> Clinic Database, Interview No. 146.

<sup>35</sup> Clinic Database, Interview No. 105.

<sup>36</sup> Clinic Database, Interview Nos. 8, 142, and 146.

<sup>37</sup> Clinic Database, Interview No. 146.

<sup>38</sup> Clinic Database, Interview Nos. 8 (beaten), 9 (beaten, severely tortured), 13 (severely tortured prior to being forced to porter), 18 (beaten, along with others), 22 (beaten with stick), 105 (witnessed other porters beaten with guns), and 142 (beaten after a soldier stepped on a landmine).

<sup>39</sup> Clinic Database, Interview Nos. 68, 90, 98, 125, 152, 156, 157, 160, and 161.

to the Clinic, former soldiers were able to describe orders and policies regarding the targeting of civilians and the “clearing” of civilian areas. These policies are outlined in greater depth in the pages that follow. The testimony of these soldiers belies claims that low-level soldiers committed human rights abuses outside of the purview, notice, or authority of their superiors.

## **B. Expert Declarations**

The Clinic solicited expert declarations from four professionals with extensive knowledge of the Myanmar military and the conflict in Kayin State and eastern Bago Division. These declarations provide additional details regarding the military’s command structure and counterinsurgency policies, its actions in eastern Myanmar during the Offensive, and the legal ramifications of such actions. For security reasons, the identities of the experts have been withheld from this document. The experts include:

- i. An academic who has studied the Myanmar Defense Services and associated human rights violations. This declaration explores the military command structure responsible for the Offensive, including the officers and units involved in actions described in this memorandum. The declaration also describes the military’s counterinsurgency policies and other relevant issues.
- ii. A former U.S. Army officer with a deep understanding of ethnic armed conflict in Myanmar and firsthand knowledge of the 2005-2008 Offensive in eastern Myanmar. This declaration provides information relating to the KNLA, the Myanmar Army’s counterinsurgency tactics, and the impact of military conduct on the civilian population, particularly Karen communities. The declaration also describes events in northern Kayin State in 2005 and 2006.
- iii. An expert on international criminal law who has served as a prosecutor at two international criminal tribunals and has independently investigated the 2005–2008 offensive in eastern Myanmar. This declaration provides a detailed legal analysis of the Offensive under a framework of international criminal law.
- iv. A key staff member of a local human rights organization that has documented abuses in Kayin State for the past 20 years. This declaration describes recurring patterns of military behavior that the organization has documented in eastern Myanmar.

## **C. Third Party Reports**

The Clinic has obtained additional documents that support its research. These include:

- i. A confidential case file from Aegis Trust—a London-based human rights NGO—describing the Offensive in eastern Myanmar based on existing documentation

by local organizations. The case file incorporates independent research on the command structure and counterinsurgency policies of the Myanmar military. It concludes that there is evidence strongly suggesting that international crimes have been committed in the context of the Offensive.

- ii. Reports from local and international human rights organizations such as the Karen Human Rights Group (“KHRG”) and the Free Burma Rangers (“FBR”). These groups contemporaneously produced reports on abuses in northern Kayin State and eastern Bago Division while the Offensive was ongoing. Additionally, these organizations, as well as international organizations like Amnesty International, produced larger comprehensive reports describing the Offensive.

### III. THE MYANMAR MILITARY: COMMAND STRUCTURE AND COUNTERINSURGENCY POLICIES

The Clinic’s investigation focused on the conduct of two military units—Southern Command and LID 66—that were responsible for grave abuses in Thandaung Township in 2005 and 2006. This section begins by discussing the structure of the Myanmar military, with a particular emphasis on the position of Southern Command and LID 66 within the military chain of command. The section then discusses the Myanmar military’s counterinsurgency policies that were employed by Southern Command, LID 66, and other units during the Offensive.

#### A. Myanmar Military Structure

The Myanmar Defense Services, known as the *Tatmadaw* in Burmese, is comprised of the Myanmar Army, Navy, and Air Force.<sup>40</sup> The Army is the ground force of the Myanmar military, and has been the primary service that has carried out domestic counterinsurgency operations.<sup>41</sup> The structure of the Defense Services—and the Army in particular—remained largely constant throughout the Offensive and up to the present day.<sup>42</sup>

The Commander-in-Chief of the Myanmar Defense Services is the highest ranking military official in the country.<sup>43</sup> The Myanmar Army retains its own Commander-in-Chief, who exercises control over Army forces through the Army’s General Staff Office.<sup>44</sup> Bureaus of Special Operations (“BSOs”) are the highest-level field units in the Army. Each BSO in turn controls one to three Regional Military Commands (“RMCs”).<sup>45</sup>

#### 1. Regional Military Commands

RMCs, such as Southern Command, are responsible for military operations in precisely defined geographic areas. Within their assigned territories, RMCs maintain permanent

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<sup>40</sup> Aegis Trust, “Case File: Myanmar Army Offensive in Northern Kayin State and Eastern Bago Division and Surrounding Areas” (confidential), July 2011, p. 12.

<sup>41</sup> Andrew Selth, “Burma’s Security Forces: Performing, Reforming or Transforming?,” Griffith Asia Institute, Regional Outlook Paper No. 45, 2013, p. 8, [http://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0011/559127/Regional-Outlook-Paper-45-Selth.pdf](http://www.griffith.edu.au/__data/assets/pdf_file/0011/559127/Regional-Outlook-Paper-45-Selth.pdf).

<sup>42</sup> Maung Aung Myoe, *Building the Tatmadaw: Myanmar Armed Forces Since 1948* (Singapore: Institute of Southeast Asian Studies, 2009), pp. 76–87.

<sup>43</sup> Constitution of the Union of Myanmar, 2008, art. 20(c).

<sup>44</sup> Maung Aung Myoe, *Building the Tatmadaw*, p. 97.

<sup>45</sup> Aegis Trust, “Case File,” pp. 12–13; Global Security, “Myanmar – Army Regional Military Commands,” undated, <http://www.globalsecurity.org/military/world/myanmar/army-orbat-1.htm>.

bases staffed by battalions under their direct control, often referred to as “garrison battalions.”<sup>46</sup> Within an RMC, garrison battalions are split into several Special Operation Commands (“SOCs”) that are generally identified by the location of the SOC’s headquarters base.<sup>47</sup>

Battalions are identified as either Infantry Battalions (“IBs”) or Light Infantry Battalions (“LIBs”). Although there may have been historical differences in the structure and function of IBs and LIBs, during the Offensive they were functionally identical and remain so today.<sup>48</sup> IBs and LIBs are officially to have 826 soldiers, but at the time of the Offensive were severely understaffed, with many having fewer than 200 soldiers.<sup>49</sup>

Southern Command is the RMC that was responsible for Bago Division and parts of Kayin State north of Hpapun Town during the Offensive.<sup>50</sup> During that time, Southern Command maintained Tactical Operations Commands (“TOCs”) headquartered in Baw Ga Li (“Kler Lah” in the Karen language), Kyaukkyi, Shwegyin, and Thandaung (or Thandaunggyi).<sup>51</sup> Southern Command’s garrison battalions during the Offensive included IB 20, IB 30, IB 39, IB 48, IB 53, IB 57, IB 73, IB 75, IB 124, LIB 349, LIB 351, LIB 439, LIB 440, LIB 589, LIB 590, and LIB 599.<sup>52</sup>

## 2. Combat Divisions

Combat divisions operate alongside—but are distinct from—the nationwide network of RMCs and garrison battalions. Combat divisions take the form of Light Infantry

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<sup>46</sup> Maung Aung Myoe, *Building the Tatmadaw*, p. 78.

<sup>47</sup> Aegis Trust, “Case File,” p. 13.

<sup>48</sup> Clinic Expert Declaration, Expert 1, para. 36.

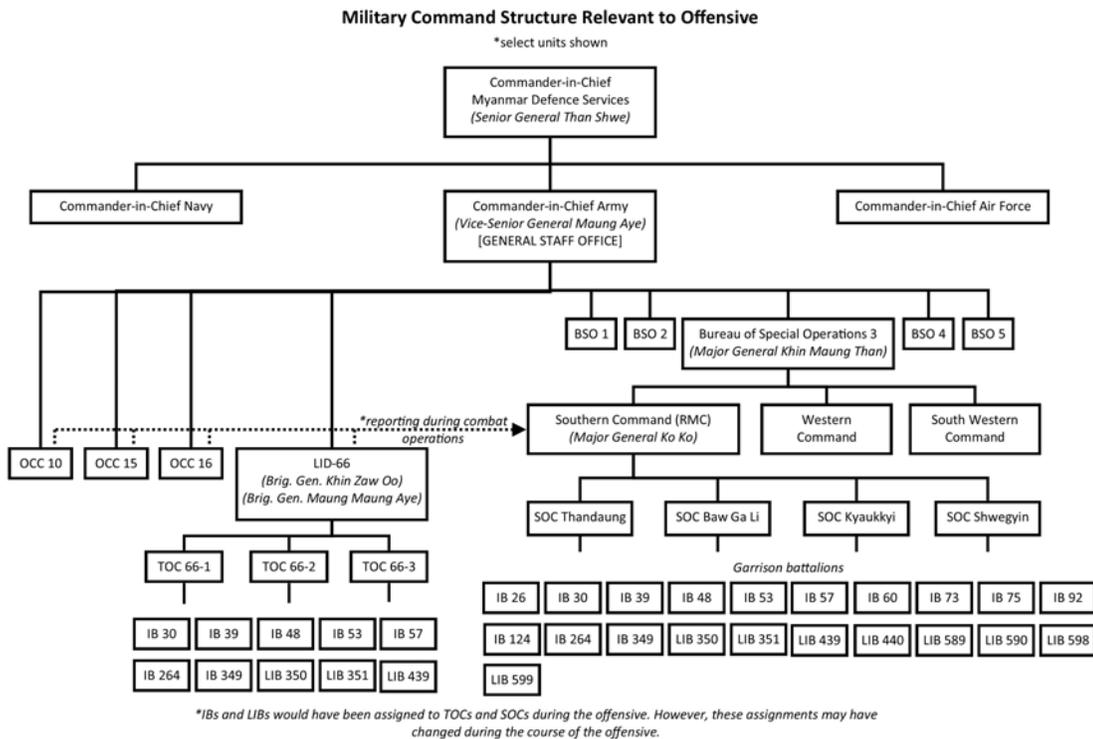
<sup>49</sup> Aegis Trust, “Case File,” p. 15; HRW, “Burma: Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma,” Oct. 2007, p. 30, <http://www.hrw.org/sites/default/files/reports/burma1007webwcover.pdf> (citing Jane’s Defence Weekly, “Army conditions leave Myanmar under strength,” 5 Apr. 2006).

<sup>50</sup> Clinic Expert Declaration, Expert 1, para. 29.

<sup>51</sup> Clinic Expert Declaration, Expert 1, para. 30. Two locations in Thandaung Township are often colloquially referred to as “Thandaung.” On official maps, the two locations are usually listed as Thandaung (or New Thandaung) and Thandaunggyi, with Thandaung located along the Toungoo–Baw Ga Li road (19°01’12” N, 96°35’11”) and Thandaunggyi located in the mountains to the northeast (19°04’18” N, 96°40’42”). This similarity in names results from the fact that government administrative outposts were relocated from Thandaunggyi to Thandaung at some point after Myanmar gained independence. Based on descriptions provided by interviewees, the Clinic believes that many Karen civilians refer to Thandaunggyi as “Thandaung,” and that most of the events Karen civilians described as occurring in “Thandaung” occurred in Thandaunggyi. Nevertheless, it is possible that some events described in this memorandum as occurring in Thandaunggyi in fact occurred in Thandaung. See Myanmar Travel Information, “Thandaung – Kayin State,” undated, <http://myanmartravelinformation.com/kayin-state/thandaung.html>.

<sup>52</sup> Aegis Trust, “Case File,” p. 138–140.

Divisions (“LIDs”) and Military Operations Commands (“MOCs”).<sup>53</sup> LIDs and MOCs are headquartered at locations throughout the country, but rather than being responsible for proximate territories, they are deployed to areas of active conflict.<sup>54</sup> LIDs and MOCs have been sent most often to join in counterinsurgency operations against insurgent groups, although they have, at times, been deployed to help suppress political unrest in urban areas.<sup>55</sup> Like LIBs and IBs, there is no functional difference between LIDs and MOCs.<sup>56</sup>



Within the Army chain of command, LIDs and MOCs report directly to the General Staff Office.<sup>57</sup> During combat operations in the field, they generally come under the

<sup>53</sup> The Burmese has also been interpreted as Operation Control Command (OCC). Clinic Expert Declaration, Expert 1, para. 17; Aegis Trust, “Case File,” p. 14.

<sup>54</sup> Clinic Expert Declaration, Expert 1, para. 18.

<sup>55</sup> In September 2007, LID 66 was deployed to Yangon to assist with the crackdown on monk-led protests. HRW, “Crackdown: Repression of the 2007 Popular Protests in Burma,” Dec. 2007, p. 100, <http://www.hrw.org/sites/default/files/reports/burma1207web.pdf>.

<sup>56</sup> Maung Aung Myoe, *Building the Tatmadaw*, p. 80.

<sup>57</sup> Aegis Trust, “Case File,” p. 14, Clinic Expert Declaration, Expert 1, para. 33.

control of the RMC that is responsible for the area.<sup>58</sup> However, at times, orders are also issued directly from central command to field units, bypassing the formal chain of command.<sup>59</sup>

Each LID or MOC is normally comprised of ten battalions that may be IBs, LIBs, or both.<sup>60</sup> Within an LID or MOC, battalions are divided into three TOCs, each having three or four battalions.<sup>61</sup> Unlike SOCs, which are labeled by the location of their headquarters, TOCs are identified by numbers—1, 2, or 3.

LID 66 was one of at least seven combat divisions deployed to eastern Myanmar at the outset of the Offensive.<sup>62</sup> During the Offensive, LID 66 was headquartered in Pyay, Bago Division and was comprised of IB 1, IB 11, IB 14, IB 35, IB 80, LIB 4, LIB 5, LIB 6, LIB 10, and LIB 108.<sup>63</sup> These battalions were divided into three TOCs, referred to as TOC 66-1, TOC 66-2, and TOC 66-3.

## **B. Counterinsurgency Policies and Practices**

For much of its history, the Myanmar Government has targeted civilian populations in order to undermine insurgent movements. In the recent past, the military publicly embraced the well-known Four Cuts doctrine, which sought to divide non-state armed groups from their civilian support bases. The current official status of that doctrine is unclear. However, modern policies and practices have embodied the ethos of the Four Cuts doctrine. A chief tactical objective in contemporary military operations is the “clearing” of territory through direct civilian targeting. In practice, this is implemented through a color-classification system that differentiates areas based on the extent of government control and employs variable rules of engagement, including those which sanction the targeting of civilians in some areas.<sup>64</sup>

During the Offensive in eastern Myanmar, the military actively sought to clear civilians from large tracts of territory and strictly applied the color-classification scheme, leading to grave abuses that constitute crimes under international law. Ordinary villagers and village leaders from Thandaung Township, as well as former soldiers who were stationed in eastern Myanmar and elsewhere, described clearing actions, color designations, and

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<sup>58</sup> *Id.*

<sup>59</sup> Clarifying email from Clinic Expert Declarant, Expert 1 citing to interviews with former Myanmar military officers.

<sup>60</sup> Maung Aung Myoe, *Building the Tatmadaw*, p. 80.

<sup>61</sup> Aegis Trust, “Case File,” p. 14; Clinic Expert Declaration, Expert 1, para. 34.

<sup>62</sup> Aegis Trust, “Case File,” p. 14.

<sup>63</sup> Clinic Expert Declaration, Expert 1, para. 38.

<sup>64</sup> In March 2014, the Clinic published *Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military*. This document describes the Myanmar military policies and practices which give rise to attacks on civilians and proposes a practical program of reform. *Supra* note 2.

differential forms of military conduct.<sup>65</sup> Expert declarations and reports from other organizations also provide substantial confirmation of these practices.

### **1. Four Cuts and Clearing Operations**

The Four Cuts doctrine aimed to deny ethnic armed groups access to food, financial support, intelligence, and recruits by driving the civilian population from areas where they could support these groups. The doctrine was developed by senior military officials in the late 1960s, when it was used against the Burma Communist Party.<sup>66</sup> In the decades that followed, it was publicly embraced by the Government. Although the Government no longer explicitly references Four Cuts in public statements, the doctrine was listed in confidential Ministry of Defence documents as recently as 2008.<sup>67</sup>

In practice, the Four Cuts doctrine has been implemented through “clearing” operations and scorched earth (*myae lan mi sho chin*, literally “to overturn and burn the earth”) campaigns.<sup>68</sup> Internal military documents describe “carpet assaults” and “carpet clearing in the designated areas,” and specify that these actions are designed to cut off insurgents’ access to civilian support.<sup>69</sup> Carpet assaults are conducted in four phases and are intended to force civilians out of an area and discourage them from returning. The four phases are: (1) an “assault” that drives out insurgents and inhabitants; (2) “clearing,” which involves the destruction of homes, fields, and property; (3) “gleaning” of information, including by capturing villages; and (4) “mining,” whereby landmines are placed to make areas uninhabitable.<sup>70</sup> Former Army officers also described “pincer assaults” in which military columns would move in tandem along parallel courses to drive civilian populations from a given area.<sup>71</sup>

### **2. Color-Code Classification System**

In recent decades, including during the Offensive, Four Cuts and clearing actions have been facilitated by a color-code classification system that dictates how soldiers interact with civilians in particular areas.

Historically, territory throughout Myanmar has been labeled by the military with one of three color designations—black, brown, or white—based on the extent of government

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<sup>65</sup> Clinic Database, Interview Nos. 51, 52, 61, 62, 68, 69, 81, 98, 100, 103, 106, 111, 112, 115, 118, 119, 120, 121, 125, 128, 129, 139, 145, and 146.

<sup>66</sup> Maung Aung Myoe, *Building the Tatmadaw*, pp. 25–26; Maung Aung Myoe, “The Counter-Insurgency in Myanmar: The Government’s Response to the Burma Communist Party,” PhD Dissertation, Australian National University, 1999, pp. 134–138.

<sup>67</sup> Clinic Expert Declaration, Expert 1, para. 81.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at para. 90.

<sup>71</sup> *Id.* at para. 89 (citing interviews with former Myanmar Army officers).

control.<sup>72</sup> Black areas have been those areas in which government control is weak or non-existent.<sup>73</sup> Brown areas have been places where government control is challenged.<sup>74</sup> White areas have been places where government control is strong.<sup>75</sup> The boundaries between the different territories have been precisely defined, often running along geographic features or landmarks.<sup>76</sup> Former soldiers, including one interviewed by the Clinic and others interviewed by the Clinic's expert declarants, recall seeing maps with "black" or "enemy controlled" areas clearly identified.<sup>77</sup>

Individuals interviewed by the Clinic often possessed very specific knowledge about the location of black areas in Thandaung Township during the Offensive, and were able to specify whether a particular village was in a black or brown area as well as what landmarks or geographic features marked the boundary between the two. Many civilians indicated that they learned about the color-classification system directly from military officers.<sup>78</sup> In general, all of Thandaung Township would have been considered a black area at the time of the Offensive, except for the plains areas in the southwest (near Shah Si Boh), the area around Thandaungyi to the west of the Day Loh River, and government-controlled villages such as Baw Ga Li, Kaw Thay Der, and Klaw Mi Der, which would have been considered brown areas. To the Clinic's knowledge, there were no white areas in Thandaung Township during the Offensive.

### ***3. Differential Rules of Engagement***

Geographic color designations have historically corresponded with different rules of engagement for military personnel operating in those areas. In black areas, Myanmar military personnel have been under fewer constraints, particularly with regard to the use of force.<sup>79</sup> The central feature of military conduct in black areas has been the categorical rejection of the principle of distinction, a key tenet of international humanitarian law that requires soldiers to distinguish between civilian and military targets and refrain from attacking the former. In black areas, soldiers have been instructed that individuals present within those areas who are not Myanmar military personnel are "the enemy" and can therefore be targeted regardless of other factors such as age, gender, proximity to

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<sup>72</sup> Clinic Expert Declaration, Expert 1, para. 83; Clinic Expert Declaration, Expert 2, paras. 94-98; Clinic Expert Declaration, Expert 3, para. 43; Clinic Expert Declaration, Expert 4, para. 31; Aegis Trust, "Case File," pp. 23-26.

<sup>73</sup> Clinic Expert Declaration, Expert 1, para. 84; Aegis Trust, "Case File," p. 23.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Clinic Database, Interview No. 68; Clinic Expert Declaration, Expert 1, para. 84.

<sup>78</sup> Clinic Database, Interview Nos. 52, 68, 69, 98, 115, 125, and 146.

<sup>79</sup> Clinic Expert Declaration, Expert 1, para. 96; Clinic Expert Declaration, Expert 2, para 97; Clinic Expert Declaration, Expert 3, para. 51; Clinic Expert Declaration, Expert 4, paras. 31-36.

opposition forces, and whether they are carrying weapons.<sup>80</sup> Former soldiers interviewed by the Clinic who were operational in Kayin State or eastern Bago Division described receiving these kinds of orders.<sup>81</sup> One former soldier recalled being told to “do whatever you want” to civilians in black areas.<sup>82</sup>

During the Offensive, the effect of these practices was most clearly exhibited in numerous “shoot-on-sight” incidents in which soldiers opened fire with small arms upon initial contact with civilians.<sup>83</sup> These incidents often occurred during military attacks on villages, when soldiers opened fire on civilians as they fled. Shoot-on-sight incidents also occurred in agricultural fields, on plantations, and while civilians were traveling on roads or footpaths. In addition, the rejection of the principle of distinction in black areas during the Offensive manifested itself in mortar attacks on villages, the widespread destruction of civilian property, and the purposeful use of landmines against civilian targets.<sup>84</sup> These actions were pursued with the apparent objective of driving the civilian population from KNLA-controlled areas to either relocation sites in government-controlled areas or across the border into Thailand.

Karen villagers in Thandaung Township knew where the boundaries between black and brown areas lay, and clearly understood the potential consequences of passing from a brown area into a black area.<sup>85</sup> Given the fear generated among the Karen population by the Myanmar military’s practices, civilians rarely had extended contact with the military in black areas. Rather, villagers most often fled their villages after hearing gunfire or being warned about military advances by other villagers or the KNLA.<sup>86</sup> In many cases, civilians never returned to their villages after an attack, but rather lived in small groups near agricultural fields or in the jungle, sometimes remaining in such conditions for years.<sup>87</sup> Because contact between the military and civilians in black areas was infrequent,

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<sup>80</sup> Clinic Database, Interview Nos. 68, 98, 125, 156 (shoot-on-sight policy in place at night only), and 157; Clinic Expert Declaration, Expert 1, para. 89, 96–97; Clinic Expert Declaration, Expert 2, para. 97; Clinic Expert Declaration, Expert 4, para. 31.

<sup>81</sup> Clinic Database, Interview Nos. 68, 98, and 125.

<sup>82</sup> Clinic Database, Interview No. 98 (confirms that “do whatever” includes the rape of women in black areas); *see also* Clinic Database, Interview Nos. 62 (civilian interviewee says that soldiers were free to “do as they like” in black areas), 69 (civilian porter overheard soldier saying “we can do anything we want” in black areas), and 115 (civilian interviewee says that soldiers can “do whatever they want” in black areas).

<sup>83</sup> Clinic Database, Interview Nos. 16, 27, 58, 118, and 139.

<sup>84</sup> Clinic Database, Interview Nos. 2, 5, 11, 13, 16, 27, 30, 37, 39, 44, 49, 59, 87, 89, 92, 93, 114, 115, 122, 124, 128, 136, 141, and 146; Clinic Expert Declaration, Expert 1, para. 90; Clinic Expert Declaration, Expert 4, para. 32.

<sup>85</sup> Clinic Database, Interview Nos. 51, 52, 62, 69, 100, 103, 106, 112, 115, 118, 120, 125, 129, 139, 145, and 146.

<sup>86</sup> *See, e.g.*, Clinic Database, Interview Nos. 13, 16, 27, 37, 39, 59, 63, 65, 67, 87, 89, 115, 122, 136, 146 (civilian porter who saw abandoned villages), and 154.

<sup>87</sup> Clinic Database, Interview Nos. 1, 3, 6, 7, 14, 17, 19, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 40, 41, 43, 45, 48, 50, 51, 53, 58, 62, 69, 83, 87, 88, 91, 92, 93, 94, 96, 101, 102, 118, 119, 124,

forced labor was rare, although villagers were captured on occasion and forced to porter for military units.<sup>88</sup>

In brown areas, soldiers have been governed by rules of engagement that generally do not allow for the same degree of violence and destruction, but nevertheless facilitate regular forms of abuse. In general, military personnel in brown areas have not been permitted to use deadly force indiscriminately as frequently or to destroy civilian property as completely, but have been allowed to engage routinely in other abusive forms of conduct, especially those intended to assert control over local populations.<sup>89</sup>

During the Offensive, contact between military units and civilians was frequent in brown areas, where Army bases were often located in close proximity to villages.<sup>90</sup> Forced labor was extremely prevalent in those areas, with villagers being made to porter goods,<sup>91</sup> build or maintain Army camps,<sup>92</sup> and act as watchmen.<sup>93</sup> The military often employed forced labor systematically by requiring, for example, each household to provide labor on a monthly or weekly basis.<sup>94</sup> The military also closely managed the location and movements of the civilian population in brown areas, often ordering villagers to relocate<sup>95</sup> and imposing severe restrictions on movement, including through the implementation of travel bans,<sup>96</sup> curfews,<sup>97</sup> and pass systems.<sup>98</sup> Shoot-on-sight orders were sometimes given to soldiers in brown areas in relation to temporary time periods

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135, 136, 140, 141, 149, 154, 155, and 158. Some individuals interviewed by the Clinic described being displaced by attacks decades ago and remaining in hiding since then, moving from location to location based on military movements and attacks.

<sup>88</sup> Clinic Database, Interview Nos. 8, 13, 39, and 56 (forced to construct military camp).

<sup>89</sup> Clinic Expert Declaration, Expert 1, para. 95; Clinic Expert Declaration, Expert 2, para. 96.

<sup>90</sup> See, e.g., Clinic interviews with villagers from Shah Si Boh (Clinic Database, Interview Nos. 12, 17, 22, 26, 31, 32, 33, 42, 46, 47, 52, 71, 73, 76, 77, 79, 86, 93, 96, 97, 99, 100, 106, 109, 116, 130, 131, 132, 133, 147, and 151) and Klaw Mi Der (Clinic Database, Interview Nos. 67, 80, 138, 143, and 146).

<sup>91</sup> Clinic Database, Interview Nos. 12, 18, 22, 31, 33, 42, 46, 52, 73, 74, 86, 97, 100, 102, 105, 106, 107, 115, 116, 120, 121, 127, 134 (Play Hsa Loh, unclear if classified as brown or black area), 138, 142, 143, 146, and 147.

<sup>92</sup> Clinic Database, Interview Nos. 33, 52, 71, 80, 86, 97, 100, 103, 107, 116, 120, 121, 123, 130, 142, 147, and 151.

<sup>93</sup> Clinic Database, Interview Nos. 12, 51, 52, 100, 116, 134, and 151.

<sup>94</sup> Clinic Database, Interview Nos. 12, 18, 22, 31, 33, 39, 46, 52, 71, 73, 74, 76, 86, 103, 105, 107, 109, 117, 131, 146, 147, and 162.

<sup>95</sup> Clinic Database, Interview Nos. 12, 35, 38, 46, 54 (ordering villagers from mountains to leave Shah Si Boh), 67, 86, 103, 106, 133, 134, 138, 143, and 146.

<sup>96</sup> Clinic Database, Interview Nos. 22, 26, 31, 33, 46, 52, 73, 74, 75, 77, 80, 86, 88, 95, 96, 97, 100, 103, 106, 107, 111, 142, 146, 149, and 151.

<sup>97</sup> Clinic Database, Interview Nos. 109, 116, 117, 146, 147, 151, and 162.

<sup>98</sup> Clinic Database, Interview Nos. 42, 47, 52, 69, 71, 74, 76, 77, 80, 86, 96, 97, 100, 103, 106, 107, 109, 111, 121, 138, 146, 147, 150, 151, and 162.

and particular territories.<sup>99</sup> Civilians were also executed in brown areas for alleged ties to the KNU or for other reasons.<sup>100</sup>

To the Clinic's knowledge, there were few, if any, white areas in Thandaung Township during the Offensive. Therefore, the Clinic did not document military conduct in white areas.

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<sup>99</sup> Clinic Database, Interview Nos. 26, 33, 46, 47, 71, 81, 106, 146, 147, and 162.

<sup>100</sup> Clinic Database, Interview Nos. 12, 52, 57, 61, 109, 133, 142, 146, and 151.

## IV. THE OFFENSIVE

The Clinic's investigation focused on the events of 2005 and 2006, a time period that roughly captures the year preceding and the year following the start of the Offensive in eastern Myanmar. However, the Offensive spanned a broader time period. Reports on the Offensive in eastern Myanmar usually mark its beginning as either the military's attack on Hee Daw Kaw Village in November 2005<sup>101</sup> or the influx of combat divisions into the region in January or February 2006.<sup>102</sup> Most commentators consider the Offensive to have continued into 2008.<sup>103</sup>

The Offensive was the largest Myanmar military operation to target the KNLA since 1997.<sup>104</sup> Experts have put forward a number of possible strategic goals that the Myanmar military may have been pursuing during the Offensive. For example, it has been suggested that the Offensive was undertaken to secure areas in close proximity to the new capital in Naypyidaw,<sup>105</sup> to extend transportation networks in northern Kayin State and thereby disrupt the KNLA's control of the area,<sup>106</sup> or to repair or build military bases and infrastructure.<sup>107</sup>

### A. 2003–2005: Pre-Offensive Military Operations

Over the course of several decades of conflict, the Myanmar military has built military and transportation infrastructure in eastern Myanmar, including camps, roads, and civilian relocation sites, that facilitated the military's ongoing operations in the region. The Clinic, although not focusing on the events of prior time periods, collected significant information about some of these efforts.<sup>108</sup> The Clinic documented the

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<sup>101</sup> Amnesty International, "Myanmar: Crimes against humanity in eastern Myanmar," AI Index: ASA 16/011/2008, 5 June 2008, pp. 2, 4, <http://www.amnesty.org/en/library/info/ASA16/011/2008>; Karen Human Rights Group (KHRG), "Without Respite: Renewed Attacks on Villages and Internal Displacement in Toungoo District," 13 June 2006, pp. 12, 16; KHRG, "One Year On: Continuing abuses in Toungoo District," 17 Nov. 2006, p. 5.

<sup>102</sup> Clinic Expert Declaration, Expert 2, paras. 55–56; Free Burma Rangers (FBR), "A Campaign of Brutality: Report and Analysis of Burma Army Offensive and Ongoing Attacks Against the People of Northern Karen State, Eastern Burma," Apr. 2008, p.8, <http://www.freeburmarangers.org/download/older/Displaced%20Childhoods%202010%20WV2.pdf>.

<sup>103</sup> Aegis Trust, "Case File," p. 39; Clinic Expert Declaration, Expert 1, para. 11; Clinic Expert Declaration, Expert 2, para. 60; Clinic Expert Declaration, Expert 4, para. 22.

<sup>104</sup> TBBC, "Internal Displacement in Eastern Burma: 2006 Survey," Nov. 2006, p. 37, <http://www.tbtc.org/idps/report-2006-idp-english.pdf>; FBR, "Campaign of Brutality," p. 28.

<sup>105</sup> Aegis Trust, "Case File," p. 40.

<sup>106</sup> FBR, "Campaign of Brutality," p. 32.

<sup>107</sup> KHRG, "One Year On," pp. 8–9.

<sup>108</sup> For example, many interviewees discussed attacks in southeast Thandaung Township that facilitated the construction of the Baw Ga Li – Buh Sah Kee Road (and camps along the road) in

construction of new camps and roads, the relocation of Karen civilian populations, and the deployment of special military units in the years leading up to the Offensive. Most or all of these actions were taken by units under Southern Command, the military authority permanently assigned to the region.

Between 2003 and 2005, the military built or repaired many camps that would subsequently be used to shelter troops, support logistics, and launch attacks during the Offensive.<sup>109</sup> Several interviewees described the construction of two camps in Shah Si Boh: one in 2003 on top of a nearby hill and another in early 2006 beside the village.<sup>110</sup> Shah Si Boh later served as a central hub for units from Southern Command and LID 66 during the Offensive. Additionally, roads were constructed or repaired near Shah Si Boh and Baw Ga Li and between Baw Ga Li and Buh Sah Kee in advance of the influx of troops in early 2006.<sup>111</sup> One of the Clinic's expert declarants stated that the construction or repair of roads is a routine feature of military preparations for any offensive in Myanmar.<sup>112</sup>

Many interviewees also reported the relocation of villages between 2003 and 2006.<sup>113</sup> A village leader in the area recalled attending meetings with other village leaders and senior military officers in 2003 and 2005 in which the officers ordered many of the villagers in western Thandaung Township to relocate to military-controlled locations.<sup>114</sup> Interviewees also described increased restrictions on movement,<sup>115</sup> new bans on certain types of goods like batteries and medicines,<sup>116</sup> and being forced to build fences around their own villages<sup>117</sup> during this time period.

The Clinic received credible accounts of increased troop levels and the use of violence by military units in the years leading up to the Offensive.<sup>118</sup> For example, the Clinic spoke

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1995. Clinic Database, Interview Nos. 35, 36, 40, 41, 43, 45, 51, 53, 55, 56, 66, 70, 76, 77, 86, 88, 93, 94, 96, 97, 101, 113, 129, 149, 153, 155, 158, and 162.

<sup>109</sup> Clinic Database, Interview Nos. 12 (Khaw See Doh, 2005), 72 (Par Der Kah, 2004), 103 (Kaw Thay Der, 2005 or 2006), 106 (Mwee Loh, 2005), 162 (K'Ser Doh, 2003), and 127 (Ku They Der, prior to 2006).

<sup>110</sup> Clinic Database, Interview Nos. 77, 86, 100, 116, and 146.

<sup>111</sup> Clinic Database, Interview Nos. 54 (east of Shah Si Boh, late-2005/early-2006), 55 (Baw Ga Li-Bu Tho, 2005-2006), and 137 (Baw Ga Li-Buh Sah Kee, 2005).

<sup>112</sup> Clinic Expert Declaration, Expert 2, para. 49.

<sup>113</sup> Clinic Database, Interview Nos. 100 (2004), 103 (sections within Kaw They Der, 2005), 106 (Mwee Loh, 2005), 107 (Ker Der Kah, 2003), and 133 (Shah Si Boh temporarily relocated 2004 and 2005).

<sup>114</sup> Clinic Database, Interview No. 163.

<sup>115</sup> Clinic Database, Interview Nos. 77 (Shah Si Boh, 2003), 97 (Shah Si Boh, 2005), 100 (2005), 107 (Ker Der Kah, 2004), and 116 (Shah Si Boh, 2005).

<sup>116</sup> Clinic Database, Interview No. 100.

<sup>117</sup> Clinic Database, Interview Nos. 100 and 151 (Shah Si Boh).

<sup>118</sup> Clinic Database, Interview Nos. 21 (more units and shooting, Kaw Ter Der, 2004-2005), 36 (more troops, Buh Kee), 50 (military "very active" around Plaw Moo Der, 2005-2006), 89 (fled

with several villagers from Buh Kee, a village near the southern terminus of the Baw Ga Li-Buh Sah Kee Road, and they described attacks on their village in 2004 and 2005.<sup>119</sup>

Interviewees also described the operations of special Baw Bi Doh (“Short Pants”) units, known for their ruthlessness, in western Thandaung Township in the years before the Offensive.<sup>120</sup> The Clinic was unable to establish the exact nature and position in the military hierarchy of the Baw Bi Doh units, although they may have been involved in reconnaissance for future military operations or other efforts to “soften” resistance in advance of the Offensive. For a detailed discussion of the Baw Bi Doh, see Section VI.B.3.

## **B. 2006–2008: The Offensive**

As described above, many commentators place the beginning of the Offensive at 26 November 2005, when soldiers from Southern Command attacked Hee Daw Kaw village. The Clinic interviewed three individuals who described this attack, which was also detailed in numerous reports by local organizations.<sup>121</sup> Prior to the attack, soldiers from IB 75 arrested villagers from nearby Sho Ser village and forced them to guide their unit to Hee Daw Kaw village. On 26 November, they fired mortars and machine guns at the village, causing the residents to flee into the surrounding jungle. They then entered the village, capturing one man, who villagers believe was executed.<sup>122</sup> Before departing the village on 28 November, the soldiers burned approximately 30 homes and laid landmines in the village. One villager subsequently stepped on a landmine and lost one

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more, Ho Kee, 2003-2006), 95 (Kheh Der, 2004), and 97 (more patrols around Shah Si Boh, 2005).

<sup>119</sup> Clinic Database, Interview Nos. 2, 5, 11, and 36 (describes “more troops” in 2004 and 2005, but not attacks).

<sup>120</sup> Clinic Database, Interview Nos. 52, 86, 133, 142, and 146.

<sup>121</sup> Clinic Database, Interview Nos. 89, 124, and 128; FBR, “Burma Army Attack in Karen State,” 28 Nov. 2005, <http://www.freeburmarangers.org/2005/11/28/900-idps-as-villagers-flee-burma-army-attacks/> (attacking unit reported as IB 73, but corrected in later report); FBR, “Message from a Relief Team Leader,” 30 Nov. 2005, <http://www.freeburmarangers.org/Reports/2005/20051130.html> (also reported as IB 73, but corrected in later report); FBR, “300 Villagers Still in Hiding: Update to Burma attacks in Toungoo District, Northern Karen State, Burma,” 6 Dec. 2005, <http://www.freeburmarangers.org/Reports/2005/20051206.html>; FBR, “Message from a relief team at the burned village of Hee Daw Kaw,” 11 Jan. 2006, <http://www.freeburmarangers.org/Reports/2006/20060111.html>; KHRG, “Recent Attacks on Villages in Southeastern Toungoo District Send Thousands Fleeing into the Forest and to Thailand,” 16 Mar. 2006, <http://www.khrg.org/2006/03/khrg06b3/recent-attacks-villages-southeastern-toungoo-district-send-thousands-fleeing> (includes pictures); KHRG, “KHRG Photo Gallery 2006: The Northern Offensive (part 1),” 31 Mar. 2006, pictures 1:3-8.

<sup>122</sup> The Clinic was unable to confirm the villager’s disappearance and alleged execution.

of his legs.<sup>123</sup> This attack led to the displacement of an estimated 2,000 Karen villagers: 300 from Hee Daw Kaw and the remainder from surrounding villages.<sup>124</sup>

The attack on Hee Daw Kaw village would set a precedent for military conduct during attacks on hundreds of villages in eastern Myanmar in the three years that followed. Mortars, machine gun fire, and landmines would be routinely used against civilian targets with grave consequences.

In November and December 2005, Southern Command battalions continued offensive actions in northern Kayin State and eastern Bago Division, attacking villages and displacing civilians.<sup>125</sup> In January and February 2006, at least seven combat divisions, including LID 66, arrived in northern Kayin State and eastern Bago Division.<sup>126</sup> LID 66 appears to have come directly to Thandaung Township, while MOC 10, MOC 15, and MOC 16 moved into areas bordering Thandaung Township to the south.<sup>127</sup>

Although the Offensive affected parts of Kayah State and areas as far south as Mon State, the focus of the Myanmar military's activities was northern Kayin State and eastern Bago Division. In particular, the military attempted to solidify control over the plains in the western parts of Thandaung, Tantabin, Kyaukkyi, and Shwegyin Townships, and to penetrate the mountainous area to the east—including in Hpapun Township—which has historically been a KNLA stronghold.<sup>128</sup>

Historically, military operations in eastern Myanmar have followed seasonal patterns whereby active conflict diminishes during the rainy season (approximately May–September).<sup>129</sup> However, Myanmar Army units continued to attack the KNLA and civilian targets throughout the rainy season in 2006 and 2007. In early 2007, combat

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<sup>123</sup> Clinic Database, Interview Nos. 124 and 128.

<sup>124</sup> FBR, “Message from a relief team at the burned village of Hee Daw Kaw,” 11 Jan. 2006, <http://www.freeburmarangers.org/2006/01/11/message-from-a-relief-team-at-the-burned-village-of-hee-daw-kaw/>.

<sup>125</sup> Clinic Database, Interview Nos. 89, 93, 114, and 146; KHRG, “Recent Attacks on Villages in Southeastern Toungoo District Send Thousands Fleeing into the Forest and to Thailand,” 16 Mar. 2006, <http://www.khrg.org/2006/03/khrg06b3/recent-attacks-villages-southeastern-toungoo-district-send-thousands-fleeing>; Karen National Union, Press Release No. 49/05, 29 Dec. 2005. Additional confidential sources are included in the Clinic's database.

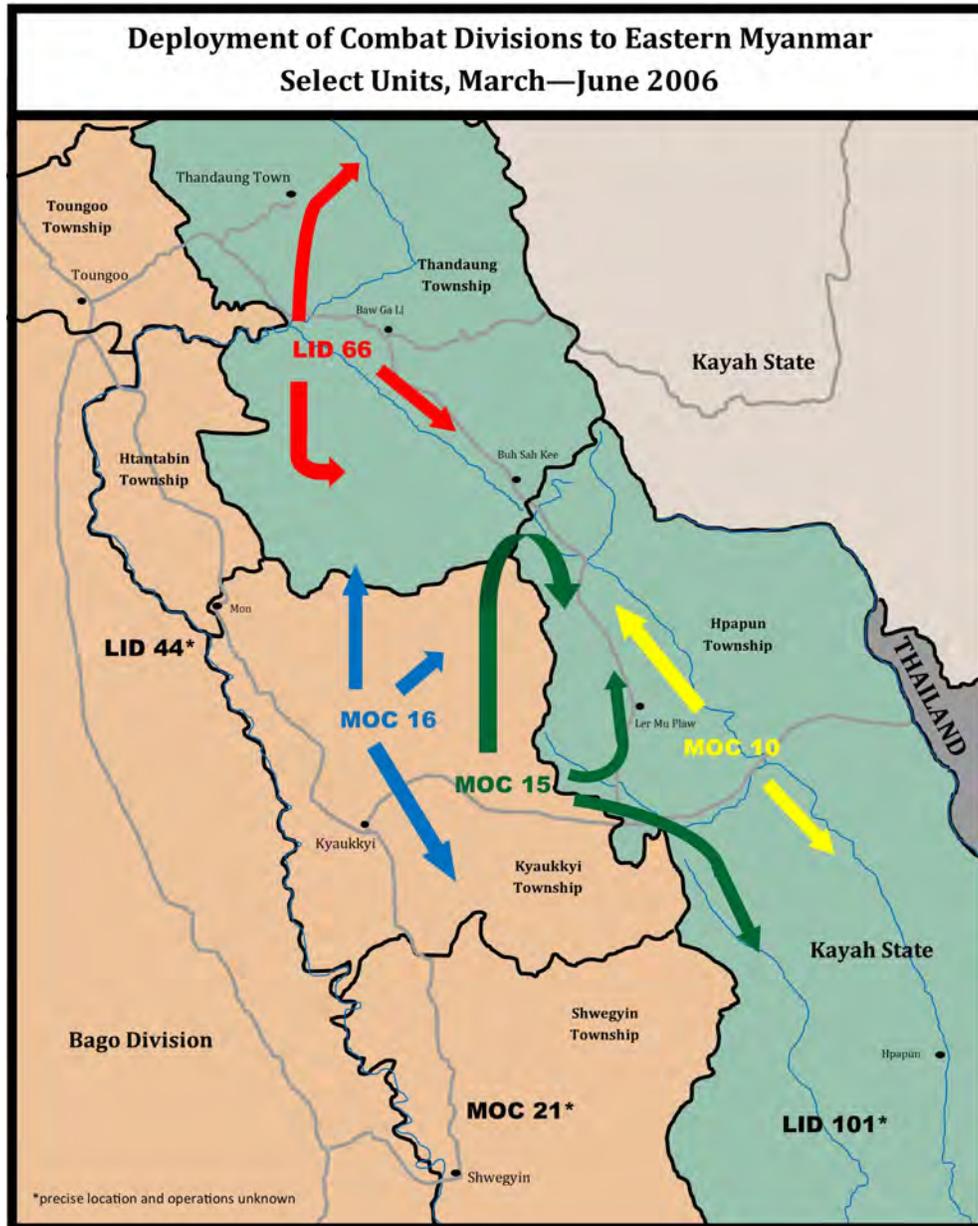
<sup>126</sup> Aegis Trust, “Case File,” p. 14; FBR, “Campaign of Brutality,” pp. 79–81.

<sup>127</sup> Aegis Trust, “Case File,” pp. 51–88.

<sup>128</sup> Amnesty International, “Crimes against humanity in eastern Myanmar,” p. 2; KHRG, “SPDC Attacks on Villages in Nyaunglebin and Hpapun Districts and the Civilian Response,” 11 Sep. 2006, <http://www.khrg.org/khrg2006/khrg06f9.html>.

<sup>129</sup> Clinic Expert Declaration, Expert 2, para. 75; Clinic Expert Declaration, Expert 3, para. 18; Clinic Expert Declaration, Expert 4, para. 23; Amnesty International, “Crimes against humanity in eastern Myanmar,” pp. 2, 4.

divisions, including LID 66, were rotated out of the region and replaced by others.<sup>130</sup> Beginning in 2007 and continuing into 2008, troop levels and conflict in eastern Myanmar diminished to pre-Offensive levels.<sup>131</sup>



<sup>130</sup> FBR, "Burma Army Rotates New Troops Into Northern Karen State," 29 Jan. 2007, <http://www.freeburmarangers.org/2007/01/29/burma-army-rotates-new-troops-into-northern-karen-state/>.

<sup>131</sup> Clinic Expert Declaration, Expert 4, para. 24.

During the Offensive, the Myanmar military established approximately 100 new army camps and was able to gain control over roads that bisected KNLA-controlled areas.<sup>132</sup> The operations of units taking part in the Offensive were highly coordinated. KHRG reported that units engaged in “pincer movements” involving multiple-battalion columns.<sup>133</sup> FBR similarly described “two-prong sweeps,” designed to clear valleys of civilians in a systematic fashion.<sup>134</sup> At the division level, units coordinated to gain control of geographic areas and secure transportation routes. For example, in June 2006, battalions from MOC 10 were pushing north from Ler Mu Plaw in Hpapun Township as a column from LID 66 was operating in southeast Thandaung Township, in an apparent effort to establish a corridor of military control and a transportation route through KNLA territory.<sup>135</sup>

The Myanmar military’s chief tactical objective during the Offensive—in line with the historic Four Cuts doctrine—was to drive the civilian population from KNLA-controlled areas to relocation sites in government-controlled areas or across the border into Thailand, where they could less easily provide material support to the armed group.<sup>136</sup> To accomplish this objective, the military engaged in various forms of unlawful conduct that are described in greater depth in Section V.

Experts indicate that Myanmar Army units actively sought to avoid confrontation with the KNLA while pursuing targets that were purely civilian in nature.<sup>137</sup> FBR, in a report on the Offensive, stated, “The Burma Army seems more focused on driving out the villagers of these areas than engaging the resistance directly.”<sup>138</sup> The Clinic documented military attacks on 43 villages in Thandaung Township in 2005 and 2006, and found no evidence that the attacks were linked to offensive operations directed against specific KNLA forces. Rather, in situations where the KNLA clashed with the Army near a civilian location, the Clinic believes that in many instances the KNLA initiated the conduct in order to slow the Myanmar Army soldiers and give civilians time to flee.<sup>139</sup>

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<sup>132</sup> FBR, “Campaign of Brutality,” p. 28.

<sup>133</sup> KHRG, “SPDC military begins pincer movement, adds new camps in Papun District,” 9 Aug. 2006, <http://www.khrg.org/2014/08/khrg06b10/spdc-military-begins-pincer-movement-adds-new-camps-papun-district>.

<sup>134</sup> FBR, “Campaign of Brutality,” p. 28.

<sup>135</sup> See, e.g., KHRG, “Offensive columns shell and burn villages, round up villagers in northern Papun and Toungoo districts,” 7 June 2006, <http://www.khrg.org/2006/06/khrg06b7/offensive-columns-shell-and-burn-villages-round-villagers-northern-papun-and>.

<sup>136</sup> See *supra* note 19.

<sup>137</sup> Clinic Expert Declaration, Expert 2, para. 90; Aegis Trust, “Case File,” p. 14; see also Amnesty International, “Crimes Against Humanity in Eastern Myanmar,” p. 2 (“It is far from clear, however, that the current offensive is being fought in the counter-insurgency context at all, as civilians have been the offensive’s primary targets—rather than just collateral damage—while the KNLA has often been overtly avoided by the *tatmadaw*.”).

<sup>138</sup> FBR, “Campaign of Brutality,” p. 30.

<sup>139</sup> Clinic Database, Interview Nos. 11, 28, 67, and 140. A Clinic researcher also had informal conversations with KNLA soldiers and villagers from Kayin State that confirm that the KNLA

One of the Clinic's researchers was able to visit villages that were attacked in 2006 and confirmed that the geographic location of villages, KNLA outposts, and Myanmar Army camps tends to corroborate this narrative of the Army's intentional targeting of civilian locations.

The military was brutally effective in accomplishing its goal of driving the civilian population out of KNLA-controlled areas. Virtually all of the civilians from black areas in Thandaung Township who were interviewed by the Clinic recalled fleeing their villages at some point during the Offensive, and many fled multiple times. Most experienced shootings, shellings, or the destruction of their homes. The Clinic documented events affecting nearly every village in Thandaung Township south of Thandaung Town—an area approximately 30 miles north to south, and 25 miles east to west. The intensity of attacks on civilians was likely nearly as high in Hpapun, Tantabin, Kyaukkyi, and Shwegyin Townships to the south. A humanitarian organization that provides assistance to displaced populations from eastern Myanmar estimated that 42,000 civilians were displaced by the Offensive.<sup>140</sup>

While displacement of the civilian population in the region was the tactical objective of the Offensive, the killing of civilians was a permissible tactic. Although it is difficult to quantify civilian deaths associated with the Offensive, the Clinic is confident that the 30 killings it documented are a small fraction of those that occurred. In 2008, FBR reported that more than 370 civilians had been killed during the Offensive.<sup>141</sup> This number likely does not include the deaths of prisoner porters used during the Offensive, which may number in the hundreds.<sup>142</sup>

To support this massive campaign of attacks and displacement directed at the civilian population in black areas, the military exploited and abused villagers residing in brown areas. Forced labor, including both routine camp-based labor and forced portering in combat zones, was used to support the increased troop levels in the region. Torture, killings, theft, and other forms of abuse also increased in brown areas during the Offensive.

### **C. Operations of Southern Command and LID 66 in Thandaung Township in 2006**

As noted above, Southern Command is an RMC and therefore has a permanent presence in its assigned territory.<sup>143</sup> Southern Command battalions were involved in actions in Thandaung Township in the years leading up to the Offensive, and

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often engages Myanmar Army forces specifically to slow their advance towards villages and other civilian locations.

<sup>140</sup> TBBC, "2007 Survey," p. 36.

<sup>141</sup> FBR, "Campaign of Brutality," p. 28.

<sup>142</sup> FBR, "Campaign of Brutality," p. 13, 32, 50 (reporting 265 dead, but citing witness that claim many more were killed).

<sup>143</sup> Clinic Expert Declaration, Expert 1, para. 28; Aegis Trust, "Case File," p. 13.

throughout its execution. Interviews by the Clinic indicate that Southern Command battalions were typically assigned to geographic areas, even though there may have been rotations among units in those areas. For example, during the Offensive, IBs 48 and 73 were frequently reported to be in southwestern Thandaung Township (in the area around Shah Si Boh),<sup>144</sup> and IB 124 was reported in the vicinity of Thandaunggyi.<sup>145</sup>

During the Offensive, Southern Command coordinated ground forces and provided logistical support for units involved in combat operations, including LID 66 and the other combat divisions that arrived in the area at the beginning of the Offensive.<sup>146</sup> Southern Command's own garrison battalions also participated in frontline combat operations, including attacks on villages and villagers.<sup>147</sup>

Individuals interviewed by the Clinic noted the arrival of LID 66 in southwest Thandaung Township in February 2006 and at locations further north and east in the weeks that followed.<sup>148</sup> Once in Thandaung Township, LID 66's battalions split from each other, establishing field camps or headquarters at locations including Thandaunggyi,<sup>149</sup> Ker Der Kah,<sup>150</sup> Baw Ga Li,<sup>151</sup> Ler Ghee Koh,<sup>152</sup> Klaw Mi Der,<sup>153</sup> and Play Hsa Loh.<sup>154</sup> During its deployment, LID 66 primarily operated in black areas, engaging in offensive operations and clearing civilian populations.

The movements and operations of Southern Command and LID 66 in Thandaung Township during the Offensive can be roughly divided into three spheres of operation.

First, units were involved in operations in southwestern Thandaung Township and eastern Tantabin Township in Bago Division. This area is west of the Yaw Loh River and south of the Toungoo-Baw Ga Li Road. The mountainous area towards the Yaw Loh River was likely a black area,<sup>155</sup> while the plains to the west, including the area around Shah Si Boh, was a brown area.<sup>156</sup> During the Offensive, LID 66 established

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<sup>144</sup> Clinic Database, Interview Nos. 12, 18, 22, 26, 33, 41, 42, 46, 47, 52, 74, 76, 77, 79, 86, 97, 99, 100, 106, 109, 116, 132, 133, 134, 146, 147, 151, and 162.

<sup>145</sup> Clinic Database, Interview Nos. 51, 148, and 150.

<sup>146</sup> Clinic Expert Declaration, Expert 1, para. 30-31.

<sup>147</sup> Clinic Database, Interview Nos. 28, 39, 89, 124, and 128.

<sup>148</sup> Clinic Database, Interview Nos. 38, 50 (does not explicitly name LID 66), 51, 77, 121, 142, and 143 (does not explicitly name LID 66).

<sup>149</sup> Clinic Database, Interview No. 51.

<sup>150</sup> Clinic Database, Interview Nos. 51, 120, and 151.

<sup>151</sup> Clinic Database, Interview Nos. 105, 121, and 137.

<sup>152</sup> Clinic Database, Interview Nos. 120 and 121.

<sup>153</sup> Clinic Database, Interview Nos. 38, 80, and 146.

<sup>154</sup> Clinic Database, Interview Nos. 38; Clinic Expert Declaration, Expert 2, para. 84.

<sup>155</sup> Clinic Expert Declaration, Expert 1, para. 85-86; *see also* Clinic Expert Declaration, Expert 2, para. 94; Clinic Database, Interview Nos. 52, 100, 103, 106, 111, and 146.

<sup>156</sup> Clinic Expert Declaration, Expert 1, para. 85-86; *see also* Clinic Expert Declaration, Expert 2, para. 94; Clinic Database, Interview Nos. 52, 103, and 146.

camps at Klaw Mi Der and Play Hsa Loh and appears to have led attacks into the mountains, while Southern Command battalions maintained a heavy presence in Shah Si Boh and the plains areas. A major objective of operations in this region appears to have been moving the civilian population to military-controlled locations such as Shah Si Boh and Play Hsa Loh. This was done primarily by providing relocation orders<sup>157</sup> and destroying villages.<sup>158</sup> The heavy military presence and high degree of government control led to a greater incidence of forced labor in this area.<sup>159</sup>

A second sphere of military operations was in central and southeastern Thandaung Township, where the military was attempting to solidify control over a road that ran from Baw Ga Li and Kaw Thay Der in the north to Buh Sah Kee in the southeast. Outside of these three locations, which were likely brown areas, the road ran through territory considered to be a black area.<sup>160</sup> LID 66 appears to have led the push down this road beginning in March 2006, establishing or re-establishing bases along the way.<sup>161</sup> Outside Baw Ga Li and Kaw Thay Der, the military had little or no control over the civilian population, which usually fled in advance of the military's approach.<sup>162</sup> The destruction of homes and agricultural fields was common in this region,<sup>163</sup> and the military strictly implemented its shoot-on-sight policy.<sup>164</sup> Large groups of prisoners and civilians from Baw Ga Li and Kaw Thay Der were used as porters to move supplies along the road.<sup>165</sup>

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<sup>157</sup> Clinic Database, Interview Nos. 12, 38, 46, 67, 80, 86, 106, 133, 134, 138, 143, and 146; Ethnic Nationalities Council, "Life in Burma's Relocation Sites," Jan. 2010, p. 66, [http://www.burmalibrary.org/docs09/Life\\_in\\_Burma%27s\\_Relocation\\_Sites.pdf](http://www.burmalibrary.org/docs09/Life_in_Burma%27s_Relocation_Sites.pdf).

<sup>158</sup> Clinic Database, Interview Nos. 12, 46, 106, 133, and 146; FBR, "Burma Army Begins New Attacks in Nyaunglebin and Toungoo Districts, Karen State," 30 June 2006, <http://www.freeburmarangers.org/2006/06/30/burma-army-begins-new-attacks-in-nyaunglebin-and-toungoo-districts-karen-state/>.

<sup>159</sup> Clinic Database, Interview Nos. 18, 22, 26, 31, 33, 42, 46, 52, 71, 73, 74, 82, 86, 91, 97, 100, 102, 109, 116, 123, 130, 134, 138, 146, 147, and 151.

<sup>160</sup> Clinic Expert Declaration, Expert 1, para. 86; *see also* Clinic Database, Interview Nos. 81, 112, 118, 128, 129, and 139.

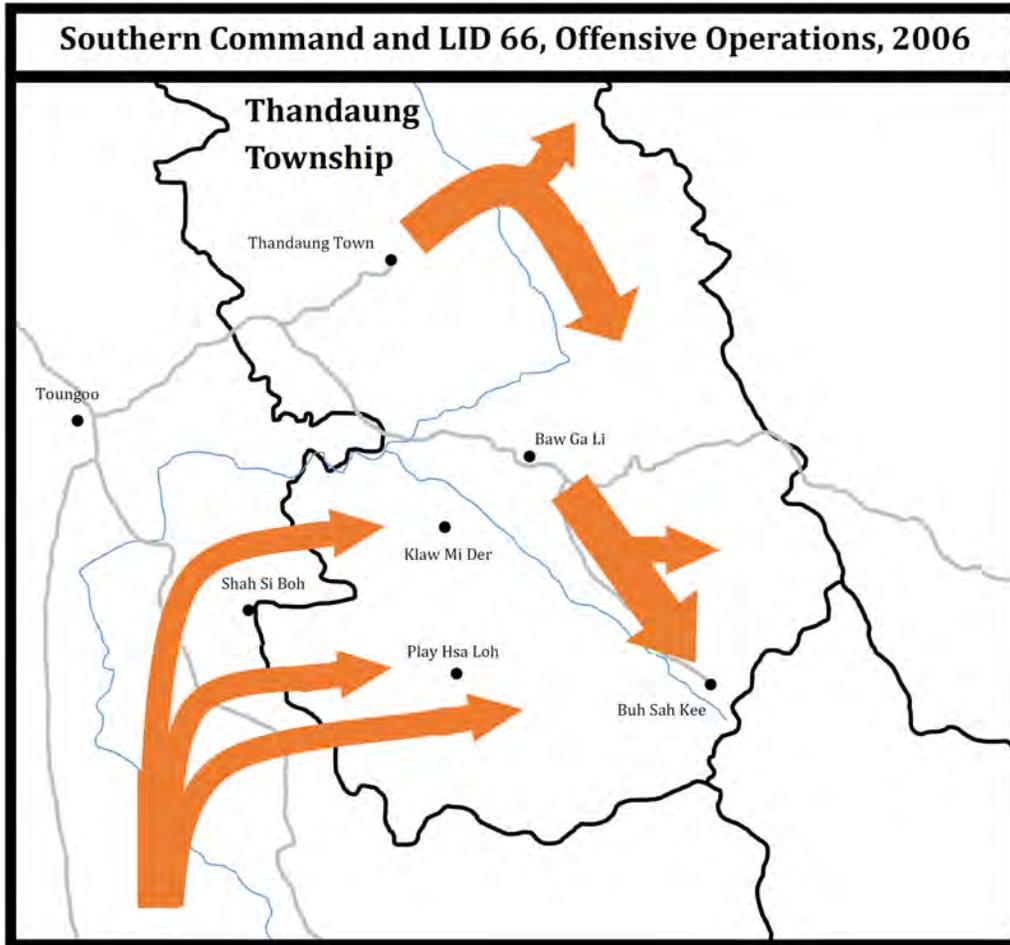
<sup>161</sup> Clinic Database, Interview Nos. 14, 77, 92, 103, 105, and 141; Clinic Expert Declaration, Expert 1, para. 75; Clinic Expert Declaration, Expert 2, para. 58.

<sup>162</sup> *See, e.g.*, Clinic Database, Interview Nos. 1, 13, 30, 58, and 92.

<sup>163</sup> Clinic Database, Interviews Nos. 2, 5, 11, 13, 30, 49, 92, and 141.

<sup>164</sup> Clinic Database, Interviews Nos. 58 and 118. Other interviews provide a general description of the Army shooting at villagers—or a fear that they will do so—without citing a specific incident that occurred during the relevant time period.

<sup>165</sup> Clinic Database, Interview Nos. 103 and 105; Clinic Expert Declaration, Expert 2, paras. 122–123; *see also* Clinic Expert Declaration, Expert 1, para. 123. Several reports by KHRG and FBR document the use of civilian porters in 2006, with pictures of soldiers walking with the porters on the road. KHRG and FBR document separate incidents in which 850 and 2,000 civilians were used. FBR, "Campaign of Brutality," p. 49; HRW and KHRG, "Dead Men Walking: Convict Porters on the Front Lines in Eastern Burma," July 2011, [http://www.hrw.org/sites/default/files/reports/burma0711\\_OnlineVersion.pdf](http://www.hrw.org/sites/default/files/reports/burma0711_OnlineVersion.pdf); KHRG, "From Prison to Front Line: Analysis of Convict Porter Testimony 2009-2011," 13 July 2011,



A final sphere of operations during the Offensive was the northern area around Thandaung Town and across the Day Loh River to the east. Interviewees from this area remember Southern Command battalions being in and near their villages for many decades, and recall LID 66's presence in 2006.<sup>166</sup> The area to the west of the Day Loh River was a brown area, where villagers had more frequent contact with military units and were often subject to forced labor.<sup>167</sup> The Clinic gathered information about agricultural fields being burned by military units in this area, but is unaware of villages

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<http://www.khrg.org/2011/07/khrg1102/prison-front-line-analysis-convict-porter-testimony-2009-%E2%80%93-2011>; KHRG, "Less than Human: Convict Porters in the 2005 – 2006 Northern Karen State Offensive," 22 Aug. 2006, <http://www.burmalink.org/wp-content/uploads/2013/12/KHRG-2006-Less-than-Human-Convict-Porters-in-the-2005-%E2%80%93-2006-Northern-Karen-State-Offensive.pdf>.

<sup>166</sup> Clinic Database, Interview Nos. 51, 57, 61, 62, 115, 120, 121, and 142.

<sup>167</sup> Clinic Database, Interview Nos. 51, 61, 69, 115, 120, and 121 (does not use "black" or "brown," but describes differential policies).

being destroyed. The area to the east of the Day Loh River was a black area.<sup>168</sup> Here, military units reportedly destroyed villages<sup>169</sup> and used landmines extensively in civilian locations.<sup>170</sup> The Clinic received a secondhand account of a meeting in Thandaunggyi where the military announced that LID 66 would “turn over the soil” in the area east of the Day Loh River.<sup>171</sup> This information corresponds with a series of attacks documented by the Clinic, FBR, and KHRG.<sup>172</sup>

#### **D. International Condemnation of the Offensive**

Numerous local and international human rights organizations reported on widespread and systematic abuses perpetrated by the Myanmar military during the Offensive.<sup>173</sup> These contemporaneous and extremely detailed reports raised concerns among the international community. Intergovernmental bodies, UN officials, foreign governments, and others highlighted these concerns in public statements and communications to the Government throughout the Offensive.

As early as February 2006 and continuing throughout the Offensive, the UN Special Rapporteur on the situation of human rights in Myanmar regularly condemned the Myanmar military’s conduct during the Offensive in reports to the UN General Assembly and Human Rights Council,<sup>174</sup> citing reports of attacks on civilians, extrajudicial killings, forced labor, torture, and sexual violence.<sup>175</sup> For example, in September 2006, the Special Rapporteur stated in relation to the Offensive:

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<sup>168</sup> Clinic Database, Interview Nos. 51, 61, 62, 69, 115, 119, 120 (describes areas as “KNU controlled” and states that villagers are not allowed to stay there), 121 (does not use “black” or “brown,” but describes differential policies), and 145.

<sup>169</sup> Clinic Database, Interview Nos. 27, 39, 51, and 115. Reports by KHRG and FBR document the burning of Maw Mee Ko and Thay Yah Yuh. *See, e.g.*, KHRG, “One Year On,” p. 15, 19; FBR, “News Flash: 11,000 People Displaced as Attacks Continue,” 24 Apr. 2006.

<sup>170</sup> Clinic Database, Interview No. 27 and 119; KHRG, “KHRG Photo Gallery 2006: The Northern Offensive (part 1),” 31 Mar. 2007, pictures 1:19-22; FBR, “Update on Situation in Karen State,” 8 Apr. 2006, <http://www.freeburmarangers.org/2006/04/08/toungoo-district-northern-karen-state/>; KHRG, “Without Respite” 12 June 2006, p. 13.

<sup>171</sup> Clinic Database, Interview Nos. 51 and 119.

<sup>172</sup> Clinic Database, Interview Nos. 27, 39, 51, and 115. Numerous reports by KHRG and FBR document the burning of Maw Mee Ko and Thay Yah Yuh. *See, e.g.*, KHRG, “One Year On,” p. 15, 19; FBR, “News Flash: 11,000 People Displaced as Attacks Continue,” 24 Apr. 2006.

<sup>173</sup> *See, e.g.*, KHRG, “Without Respite;” KHRG, “One Year On;” FBR, “Campaign of Brutality;” Amnesty International, “Crimes against humanity in eastern Myanmar.”

<sup>174</sup> The first such report was made to the Commission on Human Rights, which was replaced by the Human Rights Council in 2006.

<sup>175</sup> UN Commission on Human Rights, “Report of the Special Rapporteur on the situation of human rights in Myanmar,” Paulo Sérgio Pinheiro, U.N. Doc. E/CN.4/2006/34, 7 Feb. 2006, para. 104, <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Myan%20E%20CN4%202006%2034.pdf>.

[T]he above-mentioned serious human rights violations have been widespread and systematic, suggesting that they are not simply isolated acts of individual misconduct by middle- or low-ranking officers, but rather the result of a system under which individuals and groups have been allowed to break the law and violate human rights without being called to account.<sup>176</sup>

In May 2006, five UN Special Rapporteurs and the Independent Expert on Minority Issues called on the Government “to take urgent measures to end the counter-insurgency military operations targeting civilians in Northern Kayin and Eastern Pegu areas.”<sup>177</sup>

In April 2006, U.S. lawmakers condemned the Myanmar military for targeting Karen civilians and called for the UN Security Council to take action against the regime.<sup>178</sup>

In July 2007, the ICRC departed from its normal protocol by publicly condemning the Myanmar Government and military for violations of international humanitarian law associated with the Offensive.<sup>179</sup> The ICRC stated that it had repeatedly communicated with the Myanmar Government regarding abuses by the military—including killings, forced labor, arbitrary arrests, forced relocations, and destruction of food supplies—stating, “Despite repeated entreaties by the ICRC, the authorities have consistently refused to enter into a serious discussion of these abuses with a view to putting a stop to them.”<sup>180</sup> The Myanmar Government rejected the ICRC’s allegations, saying they were “lacking any factual basis.”<sup>181</sup>

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<sup>176</sup> UN General Assembly, “Report of the Special Rapporteur on the situation of human rights in Myanmar,” Paulo Sérgio Pinheiro, U.N. Doc. A/61/369, 21 Sep. 2006, para. 32, <http://www.altsean.org/Docs/Envoys%20Reports/Pinheiro%20UNGA%20September%202006.pdf>.

<sup>177</sup> UN Human Rights Experts Call on Myanmar to End Counter-Insurgency Operations Targeting Civilians in Northern Kayin State and Eastern Pegu Division,” Office of the High Commissioner for Human Rights, press release, 16 May 2006, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=4095&LangID=E>.

<sup>178</sup> Denis Gray, “Myanmar Offensive Uproots 11,000 Civilians,” *Associated Press*, 27 Apr. 2006.

<sup>179</sup> “Myanmar: ICRC denounces major and repeated violations of international humanitarian law,” International Committee of the Red Cross (ICRC), news release, 2 July 2007, <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/myanmar-news-290607.htm>.

<sup>180</sup> *Id.*

<sup>181</sup> Permanent Mission of the Union of Myanmar to the United Nations Office and other International Organisations, Press Release No. 3/2007, Geneva, 29 June 2007, [http://myanmargeneva.org/pressrelease\\_PMGeV/ICRC\\_Mission%20Press%20Release%2029%20Jun%2007.htm](http://myanmargeneva.org/pressrelease_PMGeV/ICRC_Mission%20Press%20Release%2029%20Jun%2007.htm).

(“The allegations regarding the use of prisoners as porters who were later killed indiscriminately are no more than one sided accusations lacking any factual basis, evidence or proof. Myanmar categorically rejects the groundless accusations that the Government targets civilian population. Even towards the insurgents, counter-insurgency operations are conducted only against those KNU elements that engage in terrorist activities against the civilians.”)

## V. CRIMES

This section analyzes the evidence collected by the Clinic under the framework of the Rome Statute of the International Criminal Court. First, it considers whether the contextual elements of war crimes and crimes against humanity have been satisfied. It then summarizes the evidence relating to specific war crimes and crimes against humanity. The Clinic concludes that during the Offensive, Myanmar military personnel committed international crimes including, at a minimum, the war crimes of attacking civilians, displacing civilians, destroying or seizing the enemy's property, pillage, murder, execution without due process, torture, and outrages upon personal dignity, and the crimes against humanity of forcible transfer of a population, murder, enslavement, torture, and other inhumane acts.

### A. Contextual Elements of War Crimes and Crimes against Humanity

The Rome Statute specifies a number of prohibited acts (discussed below in Section V.B) that constitute either war crimes or crimes against humanity when committed within a certain context. The criteria for establishing such a context are referred to as the contextual elements (or “chapeau elements”) of the crimes. The contextual elements of war crimes and crimes against humanity have been satisfied by the facts relating to the Offensive in eastern Myanmar.

#### 1. War Crimes

A prohibited act is a war crime if it “took place in the context of and was associated with” an armed conflict, and the perpetrator was “aware of factual circumstances that established the existence of” the armed conflict.<sup>182</sup> An armed conflict may be of either an international or non-international character.<sup>183</sup> A non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>184</sup> Internal disturbances, such as riots and isolated and sporadic acts of violence, do not rise to the level of non-international armed conflict.<sup>185</sup>

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<sup>182</sup> *Elements*, art. 8.

<sup>183</sup> Rome Statute, art. 8(2).

<sup>184</sup> *Prosecutor v. Tadic*, International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. IT-94-1, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 Oct. 1995, para. 70. *Tadic* has been interpreted as establishing a two-pronged test—which assesses the intensity of the violence and the organization of the parties—for determining when violence rises to the level of non-international armed conflict. Because the *Tadic* test is an objective one, a non-international armed conflict may exist even where the parties refuse to recognize it as such.

<sup>185</sup> Rome Statute, art. 8(2)(d).

The following factors demonstrate that the war between the Myanmar military and KNLA—including the fighting that occurred during the Offensive—constitutes “armed conflict” as per the terms of the Rome Statute:<sup>186</sup>

- Both the Myanmar military and the KNLA are highly organized military forces with combat weaponry, communications systems, hierarchical command structures, and relationships with constitutional governments as well as recruitment, training, and promotion protocols.<sup>187</sup>
- Throughout the history of the conflict in eastern Myanmar—and especially during the Offensive—there has been heavy militarization and intense fighting in the region.<sup>188</sup>
- The KNLA has consistently maintained control of significant territory in eastern Myanmar, including during the Offensive.<sup>189</sup>
- The conflict is “protracted,” in that the broader war has lasted more than half a century and the Offensive lasted for more than two years. There have been regular armed clashes throughout the greater and lesser time periods.<sup>190</sup>
- Throughout the history of the conflict, the Government of Myanmar and the KNU have engaged in peace negotiations, at times signing temporary ceasefire agreements.<sup>191</sup>

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<sup>186</sup> See *Prosecutor v. Limaj et al*, ICTY, Judgement (Trial Chamber), Case No. IT-03-66, 30 Nov. 2005, para. 90 (noting that organizational indicators may include “the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms”); *Prosecutor v. Haradinaj, Balaj, Brahimaj*, ICTY, Judgement (Trial Chamber), Case IT-04-84 3 Apr. 2008, para. 49 (noting that intensity indicators may include “the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones . . . [t]he involvement of the UN Security Council may also be a reflection of the intensity of a conflict.”)

<sup>187</sup> Maung Aung Myoe, *Building the Tatmadaw*; Ashley South, “Governance and Legitimacy in Karen State,” *Ruling Myanmar: From Cyclone Nargis to National Elections* (Singapore: Institute of Southeast Asian Studies, 2010), p. 66; Aegis Trust, “Case File,” p. 36–37; see also Clinic Expert Declaration, Expert 1; Clinic Expert Declaration, Expert 2.

<sup>188</sup> Aegis Trust, “Case File,” p. 35; Clinic Expert Declaration, Expert 1, para. 5; see generally Amnesty International, “Myanmar: The Kayin (Karen) State: Militarization and Human Rights,” AI Index: ASA 16/012/1999, 30 May 1999, <http://www.amnesty.org/en/library/info/ASA16/012/1999/en>; Clinic Expert Declaration, Expert 2 (cites casualty numbers during the Offensive, the use of combat weaponry, and the construction of more than 100 military camps during the Offensive as evidence of intense conflict).

<sup>189</sup> Ashley South, “Governance and Legitimacy in Karen State,” p. 63; Clinic Expert Declaration, Expert 1; Clinic Expert Declaration, Expert 3.

<sup>190</sup> Referring to the “protracted” requirement of Rome Statute, Article 8(2)(f) for “other serious violations” not specified in Common Article 3 of the Geneva Conventions.

<sup>191</sup> Ashley South, “Governance and Legitimacy,” p. 63–65.

The conclusion that there was a state of internal armed conflict in eastern Myanmar during the Offensive is supported by evidence collected by the Clinic. Interviewees noted the influx of combat divisions in early 2006<sup>192</sup> and a heavier military presence in the region during the Offensive.<sup>193</sup> They frequently saw military troop movements and were universally aware of fighting between the Myanmar military and the KNLA. Furthermore, terms used to describe situations which do not rise to the level of armed conflict—including “riots,” “isolated and sporadic acts of violence,” “banditry,” and “short-lived insurrections”<sup>194</sup>—are clearly not applicable to the conflict between the Myanmar military and the KNLA.

All of the acts documented by the Clinic and described in the section that follows “took place in the context of” and were “associated with” this armed conflict. As described above, the chief tactical objective of the Offensive was to drive the civilian population from areas where they could provide material support to the KNLA. Counterinsurgency policies and practices implemented during the Offensive sanctioned civilian targeting as a means of combating non-state armed groups. Accordingly, the acts documented by the Clinic are inextricably tied to the military’s strategy to fight the KNLA.

The perpetrators of acts documented by the Clinic were active duty soldiers in the Myanmar Army. While their particular knowledge about the Offensive and the acts they are alleged to have committed is addressed in Section VI below, it is clear that they were “aware of the factual circumstances that established the existence of an armed conflict.” Former soldiers who served in eastern Myanmar were cognizant of their role in a war being fought against the KNLA.<sup>195</sup> They wore uniforms, were assigned ranks, underwent combat training, and operated according to orders from superior officers. Additionally, they explicitly connected their treatment of Karen civilians to the war against the KNLA.

## 2. *Crimes against Humanity*

Article 7(1) of the Rome Statute states that a prohibited act is a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>196</sup>

Article 7(2)(a) further specifies that:

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<sup>192</sup> Clinic Database, Interview Nos. 38, 50, 51, 77, 121, 142, and 143.

<sup>193</sup> See, e.g., Clinic Database, Interview Nos. 14, 21, 34, 36, 45, 51, 59, 70, 71, 74, 83, 88, 92, 96, 100, 101, 107, 118, 129, 136, 140, 146, 153, and 159.

<sup>194</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), adopted 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 Dec. 1978, art. 13.

<sup>195</sup> Clinic Database, Interview Nos. 68, 90, 98, 125, 156, 157, and 160.

<sup>196</sup> Rome Statute, art. 7(1).

‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of [prohibited acts] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>197</sup>

Therefore, a prohibited act may constitute a crime against humanity if (1) there was an “attack” involving the multiple commission of prohibited acts; (2) the attack was “widespread or systematic;” (3) the attack was “directed against any civilian population;” and (4) the attack was carried out “pursuant to or in furtherance of State or organizational policy.”<sup>198</sup> Furthermore, in relation to the specific perpetrators of prohibited acts, it must be shown that their actions were “part of” the larger attack and that they knew or intended their conduct to be part of that attack.

In relation to the first element, the clearing operations undertaken by the Myanmar military during the Offensive constitute an attack directed at the Karen civilian population that involved the multiple commission of various prohibited acts. As described in the sub-sections that follow, the Clinic collected evidence of a large number of prohibited acts committed during the Offensive including attacks on civilians, forcible transfers and displacement of civilians, the destruction of civilian property, and acts of pillage, murder, enslavement, and torture. Given the limited scope of the Clinic’s investigation, the acts documented by the Clinic likely represent only a small fraction of those perpetrated during the Offensive. Indeed, reports from other sources describe an extremely high incidence of similar abuses perpetrated in various parts of eastern Myanmar throughout the entire duration of the Offensive.<sup>199</sup>

In relation to the second element, the Clinic has collected evidence demonstrating that the attack on the predominantly Karen civilian population during the Offensive was both widespread and systematic. The widespread nature of the Offensive is shown by the frequent commission of prohibited acts over a broad geographic area and multi-year timespan, and by the Offensive’s significant impact on an extremely large civilian population.<sup>200</sup> A report from a humanitarian aid organization serving displaced populations in eastern Myanmar indicates that more than 42,000 individuals were displaced by the Offensive, which affected parts of Bago Division and Kayin, Kayah, and

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<sup>197</sup> Rome Statute, art. 7(2)(a).

<sup>198</sup> 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. Clinic Expert Declaration, Expert 3, para. 57.

<sup>199</sup> See, e.g., FBR, “Campaign of Brutality;” KHRG, “One Year On;” KHRG, “Without Respite;” Amnesty International; “Crimes against humanity in eastern Myanmar.”

<sup>200</sup> Clinic Expert Declaration, Expert 3, para. 71.

Mon States, and continued through rainy seasons in 2006, 2007, and 2008.<sup>201</sup> The systematic nature of the Offensive is evident in the highly consistent patterns of conduct by Myanmar military personnel—including attacks on civilians, killings, forced labor, and forced relocations—that the Clinic documented.<sup>202</sup> There was a high degree of similarity between the experiences of victims of military actions throughout eastern Myanmar during the Offensive, as Myanmar Army soldiers routinely and repeatedly employed unlawful tactics.

That the attack was “directed against a civilian population”—the third element—is likewise demonstrated by the facts surrounding incidents documented by the Clinic. As described above, the chief tactical objective of the Myanmar military during the Offensive was the clearing of the civilian population from KNLA-controlled areas. The military accomplished this objective by directly targeting civilians and their property. The Clinic documented numerous attacks on civilian locations, shoot-on-sight incidents, the burning of villages, and instances of forced labor in which there was no apparent military target or feasible military justification. In fact, Myanmar military forces tended to actively avoid encounters with KNLA soldiers while pursuing purely civilian targets.

In relation to the fourth element, evidence collected by the Clinic clearly demonstrates that prohibited acts were committed “pursuant to State or organizational policy.” As described above, during the Offensive the Myanmar military undertook coordinated offensive operations designed to clear civilian populations from large swathes of territory in eastern Myanmar. These operations—which involved “pincer” assaults and “scorched earth” campaigns—were planned at the highest levels of military authority and implemented by officers throughout the military chain of command. On the ground, prohibited acts were facilitated by military counterinsurgency policies and practices that sanctioned the direct targeting of civilians.

Although the nexus between specific prohibited acts and the broader “attack” needs to be considered on a case-by-case basis, the military conduct documented by the Clinic was undoubtedly “part of” the attack on the Karen civilian population during the Offensive. In fact, the events described in this memorandum occurred in an area and during a time period that were central to the Offensive. Moreover, Southern Command and LID 66—the two units that were the focus of the Clinic’s investigation—were among those most responsible for the execution of the Offensive and the perpetration of prohibited acts. Their actions lie at the core of the Offensive and therefore cannot be divorced from body of prohibited acts that constitute an “attack” as defined by the Rome Statute.

The knowledge of particular military officers in relation to the Offensive and the acts for which they might be held responsible is considered in Section VI below. However, it is reasonable to conclude from the evidence collected by the Clinic that the direct perpetrators of prohibited acts committed during the Offensive were aware of their role

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<sup>201</sup> TBBC, “2007 Survey,” Oct. 2007, p. 36.

<sup>202</sup> Clinic Expert Declaration, Expert 3, paras. 72–73.

in an attack on Karen civilians. As stated throughout this memorandum, it was the intention of the Myanmar military to target Karen civilians in order to force them to leave KNLA-controlled areas. Moreover, facts surrounding events documented by the Clinic demonstrate that, in most cases, soldiers understood that the violence and destruction they employed were directed at civilians and their property.<sup>203</sup> Interviews with former soldiers who operated in eastern Myanmar confirm that they were aware of their role in perpetrating acts of violence against the civilian population.<sup>204</sup>

## B. Underlying Crimes

The Clinic has collected extensive evidence relating to the crimes discussed below. Reports by KHRG and FBR also provide additional information and describe incidents not documented by the Clinic.

### 1. *Attacking Civilians*

Intentionally attacking civilians and civilian objects is a war crime. To satisfy the elements of the war crime, it is necessary that the perpetrator intentionally direct an attack against a civilian population or individual civilians not taking direct part in hostilities.<sup>205</sup>

Civilians in Thandaung Township experienced several forms of “attack” by the Myanmar military in 2005 and 2006. The Clinic documented multiple instances in which military units shelled villages, agricultural fields, or IDP “hide sites” in Thandaung Township where there was no apparent military target or justification.<sup>206</sup> Military units at times entered villages and fired small arms at villagers in their homes or as they were fleeing.<sup>207</sup> The Clinic also documented the placing of landmines in villages and other locations frequented by civilians.<sup>208</sup>

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<sup>203</sup> See Section V.B.

<sup>204</sup> Clinic Database, Interview Nos. 68, 98, 156, and 157.

<sup>205</sup> Rome Statute, art. 8(2)(e)(i). In non-international armed conflict, civilians are protected from attack “unless and for such time as they take a direct part in hostilities.” AP II, art. 13. To constitute direct participation in hostilities, “(1) the act [of a civilian] must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).” ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva: May 2009), p. 16, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

<sup>206</sup> Clinic Database, Interview Nos. 28, 52, 65, 77, 80, 90, 128, 133, and 153.

<sup>207</sup> Clinic Database, Interview Nos. 16, 27, 30, 52, 90, 133, and 141.

<sup>208</sup> Clinic Database, Interview Nos. 27, 30, 51, 63, 67, 87, 119, 122, 124, 128, 136, and 138.

One interviewee's account is illustrative of the tactics used by the military to attack civilians in Thandaung Township during the Offensive.<sup>209</sup> 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.

The Clinic is unaware of any civilians who were armed at the time that they or their villages were attacked, which makes it unlikely that they were taking direct part in hostilities at the time of the attack. Although the KNLA often warned villagers of approaching military units,<sup>210</sup> the Clinic is aware of only a few situations in which an attack by the military was precipitated by a KNLA assault. Based on available evidence, the Clinic is unaware of any incidents in which civilian casualties could be considered lawful "collateral" damage.<sup>211</sup> One of the Clinic's expert declarants asserted that military units involved in the Offensive often avoided KNLA units in order to attack purely civilian targets.<sup>212</sup> This claim is supported by similar reports from KHRG and FBR.<sup>213</sup>

## ***2. Displacing Civilians and Forcible Transfer***

Ordering the displacement of a civilian population for reasons related to the conflict is a war crime when the perpetrator orders a civilian population to relocate where military imperatives or the security of the population do not so demand.<sup>214</sup> Similarly, the forcible transfer of a population is a crime against humanity. It requires that the perpetrator, without grounds permitted by international law, transfer civilians through physical force or the threat of force or coercion from a place where they are lawfully present.<sup>215</sup>

The Clinic received credible reports of at least fourteen villages or other groups of civilians in Thandaung Township being ordered to relocate in 2005 and 2006.<sup>216</sup> In general, the military moved civilian populations further from the mountains and KNLA-controlled areas and to villages or relocation sites near military camps in the plains. Many incidents involved the communication of relocation orders transmitted through village leaders, often by means of a letter sent to the village leader.<sup>217</sup>

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<sup>209</sup> Clinic Database, Interview No. 27.

<sup>210</sup> See, e.g., Clinic Database, Interview Nos. 11, 37, 39, 51, and 141.

<sup>211</sup> See, e.g., Clinic Database Interview Nos. 52 and 133.

<sup>212</sup> Clinic Expert Declaration, Expert 2, para. 90.

<sup>213</sup> See, e.g., KHRG, "Without Respite," p. 14; FBR, "Campaign of Brutality," p. 30.

<sup>214</sup> Rome Statute, art. 8(2)(e)(viii); *Elements*, art. 8(2)(e)(viii).

<sup>215</sup> Rome Statute, art. 7(1)(d); *Elements*, art. 7(1)(d).

<sup>216</sup> Clinic Database, Interview Nos. 12, 35, 38, 54, 67, 80, 86, 133, 134, 138, 143, and 146.

<sup>217</sup> Clinic Database, Interview Nos. 12, 38, 80, 134, and 143.

Some relocation orders were accompanied by explicit threats of violence, including the threat that villagers who did not relocate would be shot.<sup>218</sup> 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.”<sup>219</sup> Another village was shelled in conjunction with a relocation order,<sup>220</sup> and others were burned after villagers relocated.<sup>221</sup>

Many interviewees who could not recall any explicit threats used to enforce a relocation order nonetheless cited a general fear of violence at the hands of the military if they failed to comply.<sup>222</sup>

International law provides that the exceptions to the prohibition against ordering the displacement of the civilian population—military imperatives or the security of the population—can only be invoked in “the gravest of circumstances and only as measures of last resort.”<sup>223</sup> No information available to the Clinic suggests that relocation orders were issued in the interest of protecting the civilian population. Moreover, depriving opposition armed forces of their base of support is not a legitimate military necessity that could justify ordering the displacement of the local population.<sup>224</sup>

### ***3. Destroying or Seizing the Adversary's Property***

Destroying or seizing an adversary's property in certain circumstances is a war crime when the perpetrator's actions are not justified by military necessity.<sup>225</sup> The term “adversary” can apply to civilian populations aligned with an armed group.<sup>226</sup>

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<sup>218</sup> Clinic Database, Interview Nos. 38, 134, 143, 146, and 148.

<sup>219</sup> Clinic Database, Interview No. 143.

<sup>220</sup> Clinic Database, Interview No. 80.

<sup>221</sup> Clinic Database, Interview Nos. 46, 106, 133, and 134.

<sup>222</sup> See, e.g., Clinic Database, Interview No. 12.

<sup>223</sup> *Prosecutor v. Simic*, Judgement (Trial Chamber), Case No. IT-95-9-T, 17 Oct. 2003, para. 125, fn. 218.

<sup>224</sup> ICRC, *Commentary Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977 (ICRC Commentary on APII), pp. 1472–1473, note 4853; Clinic Expert Declaration, Expert 3, para. 116.

<sup>225</sup> Rome Statute, art. 8(2)(e)(xii); *Elements*, art. 8(2)(e)(xii). The definition of military necessity is “based on four foundations: urgency, measures which are limited to the indispensable, the control (in space and time) of the force used, and the means which should not infringe an unconditional prohibition.” ICRC, *Commentary Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 (ICRC Commentary on API), para. 1396.

<sup>226</sup> Andreas Zimmermann in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article by Article* (Munich, Verlag: 2008 (2<sup>nd</sup> ed.)), art. 8, para. 341; Aegis Trust, “Case File,” p. 163.

The Clinic documented numerous incidents in which the property of Karen civilians in Thandaung Township was destroyed in 2005 and 2006. Oftentimes, homes were burned or otherwise destroyed by military units after the inhabitants fled from their village.<sup>227</sup> In one instance, a Karen village leader who had been forced to go to the frontlines with units from Southern Command witnessed officers giving orders to burn civilian homes and soldiers carrying out those orders.<sup>228</sup> The Clinic also documented the destruction of agricultural fields,<sup>229</sup> food supplies,<sup>230</sup> livestock,<sup>231</sup> and personal property.<sup>232</sup> 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.”<sup>233</sup>

The Clinic received no information suggesting a possible military necessity which justified these actions. Rather, the motive for destroying civilian property appears to have been to force civilians to permanently abandon their homes, thereby depriving the KNLA of a civilian support base.<sup>234</sup> This is not a permissible military objective under international humanitarian law.<sup>235</sup>

#### 4. Pillage

Pillage is a war crime. It requires that the perpetrator appropriate property for private or personal use with an intent to deprive the owner of the property without the owner’s consent.<sup>236</sup>

The Clinic documented multiple incidents in which military personnel took the personal property of civilians in 2005 or 2006.<sup>237</sup> Soldiers took food or livestock most often, although they also seized other types of personal property.<sup>238</sup> In general, personal

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<sup>227</sup> Clinic Database, Interview Nos. 2, 5, 11, 12, 13, 16, 27, 30, 35, 38, 39, 44, 46, 49, 59, 63, 67, 89, 92, 93, 106, 114, 115, 122, 124, 128, 133, 134, 141, and 146.

<sup>228</sup> Clinic Database, Interview No. 163.

<sup>229</sup> Clinic Database, Interview Nos. 16, 87, 120, 121, 136, 141, and 142.

<sup>230</sup> Clinic Database, Interview Nos. 13, 46, and 134.

<sup>231</sup> Clinic Database, Interview Nos. 13, 46, 128, 146, and 154.

<sup>232</sup> Clinic Database, Interview Nos. 13, 16, 27, and 44.

<sup>233</sup> Clinic Database, Interview No. 135.

<sup>234</sup> Clinic Expert Declaration, Expert 4, Table A.1, p. 23 (“These practices appear to be designed to drive civilian populations into areas where non-state armed groups (NSAGs) cannot access them for support (“white areas”), following earlier government forced relocation campaigns.”)

<sup>235</sup> *Prosecutor v. Katanga et al.*, International Criminal Court (ICC), Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Pre-Trial Chamber), 30 Sep. 2008, para. 311.

<sup>236</sup> Rome Statute, art. 8(2)(e)(v); *Elements*, art. 8(2)(e)(v).

<sup>237</sup> Clinic Database, Interview Nos. 16, 37, 46, 59, 93, 106, 114, and 146.

<sup>238</sup> Clinic Database, Interview Nos. 93, 102, 146.

property was appropriated in one of two situations. First, property was demanded from civilians who came into contact with the military, usually in brown areas.<sup>239</sup> In these cases, the civilians usually complied out of fear of negative, and potentially violent, repercussions. Second, property was taken from villages, farms, and homes when villagers were absent or after they had fled.<sup>240</sup>

Pillage must be distinguished from requisitioning, which is permitted “only if the requirements of the civilian population have been taken into account” and if arrangements are made “to ensure that fair value is paid for any requisitioned goods.”<sup>241</sup> Not only were goods taken without consideration of the needs of the local community, it is apparent that they were taken precisely to deprive the civilian population of sustenance and livelihood. In none of the instances documented by the Clinic was compensation paid for goods that were taken.

### ***5. Murder and Execution without Due Process***

Murder is both a crime against humanity and a war crime. As a crime against humanity, it requires that the perpetrator kill one or more persons as part of a widespread or systematic attack against a civilian population.<sup>242</sup> As a war crime, it additionally requires that the perpetrator know the victim to be a civilian not taking direct part in hostilities, a member of the armed forces who has surrendered, or an individual who has been placed *hors de combat* by sickness, wounds, detention, or any other cause.<sup>243</sup> Execution without due process is a war crime. It requires that the perpetrator execute an individual “without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable,” and that the perpetrator know of the individual’s civilian or *hors de combat* status and the lack of a proper judgment.<sup>244</sup>

The Clinic received credible reports of the killing of at least 30 civilians by military personnel in Thandaung Township in 2005 and 2006, not including the deaths of prisoner porters described by interviewees.<sup>245</sup> A porter for LID 66, for example, witnessed Army soldiers shoot and kill other exhausted porters, who could no longer carry their loads, as they tried to flee.<sup>246</sup> Although it is difficult to quantify civilian deaths

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<sup>239</sup> Clinic Database, Interview No. 102.

<sup>240</sup> Clinic Database, Interview Nos. 16, 37, 46, 59, 93, 106, 128, and 146.

<sup>241</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted 12 Aug. 1949, 75 U.N.T.S. 287, entered into force October 21, 1950.

<sup>242</sup> Rome Statute, art. 7(1)(a); *Elements*, art. 7(1)(a).

<sup>243</sup> Rome Statute, art. 8(2)(c)(i); *Elements*, art. 8(2)(c)(i)-1.

<sup>244</sup> Rome Statute, art. 8(2)(c)(iv); *Elements*, art. 8(2)(c)(iv).

<sup>245</sup> Clinic Database, Interview Nos. 1, 4, 8, 12, 26, 31, 33, 35, 47, 49, 51, 52, 57, 58, 61, 76, 80, 82, 84, 86, 90, 92, 97, 99, 100, 105, 107, 109, 114, 118, 120, 132, 133, 136, 139, 142, 146, 147, and 151.

<sup>246</sup> Clinic Database, Interview No 142.

associated with the Offensive, the Clinic is confident that the 30 killings it documented are a small fraction of those that occurred. In 2008, FBR reported that more than 370 civilians had been killed during the Offensive.<sup>247</sup> This number likely does not include the death of prisoner porters used during the Offensive, which may number in the hundreds.<sup>248</sup>

Although the Clinic was unable to obtain eyewitness descriptions of the deaths of all 30 individuals alleged to have been killed, in most cases at least one interviewee saw the victim's body, saw the victim in military custody prior to his or her death, or was able to provide some firsthand account relevant to the event. Killings documented by the Clinic were of two broad types: (1) extrajudicial executions of civilians in the custody of military personnel, and (2) shoot-on-sight killings and other killings of civilians not in military custody.

The extrajudicial execution of civilians in the custody of military personnel occurred most often in brown areas. Some of these executions involved the killing of civilians who were forced to porter for the military.<sup>249</sup> Prisoner porters brought into the area from prisons in other parts of the country were killed on a large scale, with one interviewee reporting seeing 30 to 40 bodies in a single day.<sup>250</sup> He stated, "Every few steps there were one or two or three who had died."<sup>251</sup> The killing of civilians not in the custody of military personnel usually occurred in black areas and was often the result of the implementation of shoot-on-sight orders.<sup>252</sup>

The Clinic documented the killing of at least eleven villagers in 2006 (or possibly early 2007) in the area around Shah Si Boh village.<sup>253</sup> One villager recounted how soldiers killed four villagers with a hoe and shot and killed two others.<sup>254</sup> A seventh villager, who was still alive after having been shot, was subsequently stabbed to death with a bayonet.<sup>255</sup> All of these killings were attributed to Southern Command's IB 48, under officer Zaw Tun. 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.<sup>256</sup> One of the eyewitnesses

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<sup>247</sup> FBR, "Campaign of Brutality," p. 28.

<sup>248</sup> FBR, "Campaign of Brutality," p. 13, 32, 50 (reporting 265 dead, but citing witnesses that claim many more were killed).

<sup>249</sup> Clinic Database, Interview Nos. 8, 120, and 142 (prisoner porters).

<sup>250</sup> Clinic Database, Interview No. 105.

<sup>251</sup> *Id.*

<sup>252</sup> Clinic Database, Interview Nos. 58, 118, and 139.

<sup>253</sup> Clinic Database, Interview Nos. 26, 31, 33, 47, 76, 82, 86, 97, 99, 109, 132, 133, 147, and 151.

<sup>254</sup> Clinic Database, Interview No. 133.

<sup>255</sup> *Id.*

<sup>256</sup> Clinic Database, Interview Nos. 26, 31, 33, 47, 86, 99, 109, and 151 (additional citations redacted).

detailed that “he was shot through the eye, and the shot came out the back of the head. It was only one shot.”<sup>257</sup>

## 6. Enslavement

Enslavement is a crime against humanity. It requires that “the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”<sup>258</sup> Forced labor is one form of enslavement and entails involuntary work or service exacted under the threat of penalty.<sup>259</sup>

The Clinic interviewed 32 individuals who were forced to provide labor for military units in Thandaung Township in 2005 or 2006.<sup>260</sup> Many others spoke about family members or friends being required to provide labor for the military. Civilians were forced to undertake a variety of tasks including portering,<sup>261</sup> camp construction and maintenance,<sup>262</sup> watchmen and messenger duties,<sup>263</sup> and road maintenance.<sup>264</sup>

Civilian porters often worked in groups, with interviewees recounting the use of up to 200 civilians at a time.<sup>265</sup> FBR reported that approximately 2,000 civilians were used in a single incident,<sup>266</sup> and took pictures of soldiers from LID 66 with civilian porters in a separate incident allegedly involving 850 individuals.<sup>267</sup> Many porters were required to

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<sup>257</sup> Clinic Database, Interview No. 151.

<sup>258</sup> Rome Statute, art. 7(1)(c); *Elements*, art. 7(1)(c).

<sup>259</sup> *Elements*, art. 7(1)(c), fn. 11; ILO Convention No. 29 concerning Forced or Compulsory Labour (Forced Labor Convention), adopted 28 June 1930, 29 U.N.T.S. 55, art. 2(1). Forced labor may still constitute enslavement, even if compensation is provided. *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23&23-1, Judgment (Trial Chamber), 22 Feb. 2001, para. 542; *Prosecutor v. Kunarac et al.*, ICTY, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 119; *Prosecutor v. Brima et al.*, Special Court for Sierra Leone, Case No. SCSL-2004-16-T, Judgment (Trial Chamber), 20 June 2007, para. 740.

<sup>260</sup> Clinic Database, Interview Nos. 8, 9, 12, 13, 18, 22, 26, 31, 39, 46, 56, 71, 73, 80, 82, 86, 97, 100, 102, 103, 105, 106, 116, 120, 121, 127, 130, 138, 142, 143, 146, and 147.

<sup>261</sup> Clinic Database, Interview Nos. 8, 9, 12, 13, 18, 22, 31, 33, 39, 42, 46, 73, 86, 97, 100, 102, 105, 106, 107, 115, 116, 120, 121, 127, 134, 138, 142, 143, 146, and 147.

<sup>262</sup> Clinic Database, Interview Nos. 33, 52, 56, 71, 80, 82, 86, 91, 97, 100, 103, 107, 116, 120, 121, 123, 130, 142, 147, and 151.

<sup>263</sup> Clinic Database, Interview Nos. 134 and 151.

<sup>264</sup> Clinic Database, Interview Nos. 97, 103, and 105.

<sup>265</sup> Clinic Database, Interview No. 105.

<sup>266</sup> FBR, “Message from a Relief Team Leader and Situation Update,” 27 Apr. 2006, <http://www.freeburmarangers.org/2006/04/27/message-from-a-relief-team-leader-and-situation-update/>.

<sup>267</sup> FBR, “Villagers Forced to Porter for Burma Army, May 2006: 850 People Forced to Porter in Support of Burma Army Offensive in Toungoo District, Northwester Karen State, Burma,” 1 June 2006, <http://www.freeburmarangers.org/2006/06/01/villagers-forced-to-porter-for-burma-army-may-2006/>; FBR, “Forced Labor Continues in Burma; A Report with Photographs Sent

carry goods for multiple days in succession.<sup>268</sup> Some of these individuals went with military units to frontline areas and remained with military units for up to a month.<sup>269</sup> Porters were frequently required to walk in front of, or in between, soldiers to protect soldiers from landmines and KNLA attacks.<sup>270</sup> One interviewee also described civilians being assigned to actively clear landmines on roads.<sup>271</sup>

The military's use of forced labor was often patterned or systematic, for example by requiring each household to provide labor on a monthly or weekly basis.<sup>272</sup> In many villages, village leaders were required to collect laborers to fulfill the military's labor requirements.<sup>273</sup> In black areas, where forced labor was less common, the military occasionally arrested villagers whom they encountered and forced them to work.<sup>274</sup>

For many interviewees, forced labor was so common that they could not count, or distinguish between, incidents. One villager stated, "I noticed in 2006 that we never got any rest; we always had to work for the military. . . . The women only had to carry [supplies to the camp], but sometimes the men had to go with the soldiers when they went to go fight."<sup>275</sup> Another villager explained that parents would refer to their children as "Porter 1, Porter 2, and Porter 3" or say, in reference to their children, "These shoulders are for Burmese soldiers."<sup>276</sup>

No interviewee indicated that he or she was ever paid for labor exacted by the military. Some villagers reported being able to pay a fee or "protection money" to avoid forced labor.<sup>277</sup> Very few interviewees were able to identify specific threats that accompanied labor requirements, in part because demands were often communicated through village leaders. However, many cited a general fear of violence or repercussions for failing to participate.

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Directly from Relief Teams Now in the Field," 19 Dec. 2006, <http://www.freeburmarangers.org/2006/12/19/forced-labor-continues-in-burma-a-report-with-photographs-sent-directly-fom-relief-teams-now-in-the-field/> (high resolution photographs on file with the Clinic.).

<sup>268</sup> Clinic Database, Interview Nos. 8 (one month), 9, 13 (one week), 18 (three consecutive days of trips originating from home village), 22 (three days), 102 (one night with military), 105 (three occasions, up to 2-3 days), 120 (two occasions, two days each time), 142 (slept at home every night, but had to go with army every day for a period of over one month), and 146.

<sup>269</sup> Clinic Database, Interview Nos. 8 (one month), 22, and 146.

<sup>270</sup> See, e.g., Clinic Database, Interview No. 142.

<sup>271</sup> Clinic Database, Interview No. 105.

<sup>272</sup> Clinic Database, Interview Nos. 12, 18, 22, 31, 33, 39, 46, 52, 71, 73, 74, 76, 86, 103, 105, 107, 109, 117, 131, 146, 147, and 162.

<sup>273</sup> Clinic Database, Interview Nos. 74 (section leader), 97, 100, and 163.

<sup>274</sup> Clinic Database, Interview Nos. 13 and 39.

<sup>275</sup> Clinic Database, Interview No. 121.

<sup>276</sup> Clinic Database, Interview No. 105.

<sup>277</sup> Clinic Database, Interview Nos. 44, 80, 86, 105, 107, 109, 111, 117, 120, 138, and 146.

During the Offensive, the military also made use of prisoner porters drawn from prisons in other parts of Myanmar.<sup>278</sup> Several interviewees recounted seeing large numbers of prisoners being forced to carry supplies for the military.<sup>279</sup> They were able to identify the prisoners by their uniforms, which were often all white.<sup>280</sup> One interviewee provided an eyewitness account of the execution of two prisoner porters,<sup>281</sup> and another described seeing dozens of prisoner porters' bodies lying beside the Baw Ga Li-Buh Sah Kee Road.<sup>282</sup> Further investigation into the military's use and mistreatment of prisoner porters is merited.

### 7. Torture and Other Inhumane Acts

Torture is both a war crime and a crime against humanity. The war crime of torture requires that the perpetrator inflict "severe physical or mental pain or suffering" on a person with civilian or *hors de combat* status for such purposes as "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind."<sup>283</sup> The crime against humanity of torture requires the infliction of "severe physical or mental pain or suffering" upon a person in the custody or under the control of the perpetrator, except where such pain arises only from lawful sanctions.<sup>284</sup> Additionally, outrages upon personal dignity and other inhumane acts are war crimes and crimes against humanity, respectively.<sup>285</sup>

The Clinic documented a number of acts that occurred in Thandaung Township in 2005 or 2006 that could be considered torture, outrages upon personal dignity, or other inhumane acts. These include simulated drownings and suffocation,<sup>286</sup> the hanging of individuals from trees or other raised objects,<sup>287</sup> cuttings of the body,<sup>288</sup> and the burning of individuals with fire or hot objects.<sup>289</sup> The Clinic also documented the frequent beating of civilians, often while they were being forced to provide labor for the military.<sup>290</sup> On occasion, civilians were beaten in retaliation for attacks on military units

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<sup>278</sup> Clinic Database, Interview Nos. 105, 120, 137, 139, 142, and 146.

<sup>279</sup> Clinic Database, Interview Nos. 105, 120, 137, 139, 142, and 146.

<sup>280</sup> Clinic Database, Interview Nos. 105, 120 (describes blue uniforms), 137, and 146.

<sup>281</sup> Clinic Database, Interview No. 142.

<sup>282</sup> Clinic Database, Interview No. 105.

<sup>283</sup> *Elements*, art. 8(2)(c)(i)-4.

<sup>284</sup> *Elements*, art. 7(1)(f).

<sup>285</sup> The war crime of outrages upon personal dignity, in particular humiliating and degrading treatment, has an identical "severe physical or mental pain or suffering" definition to the war crime of torture, but without the additional purpose requirement. *Id.* at art. 8(2)(c)(ii). The crime against humanity of other inhumane acts requires the infliction of "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act." *Id.* at art. 7(1)(k).

<sup>286</sup> Clinic Database, Interview Nos. 13, 61, 133, and 151.

<sup>287</sup> Clinic Database, Interview Nos. 12, 13, and 47.

<sup>288</sup> Clinic Database, Interview Nos. 13, 133, and 146.

<sup>289</sup> Clinic Database, Interview Nos. 13, 18, 120, and 162.

<sup>290</sup> Clinic Database, Interview Nos. 47, 71, 80, 105, 117, 120, 121, 133, 142, and 146.

by the KNLA.<sup>291</sup> 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.<sup>292</sup> Beatings or other forms of mistreatment were often used to extract information about the KNLA from villagers.<sup>293</sup>

The Clinic has catalogued pictures of scars resulting from some of the beatings suffered by interviewees.

### **8. Rape**

Rape is both a war crime and a crime against humanity.<sup>294</sup> The Clinic interviewed one woman who recounted how she had been raped by a soldier during the Offensive.<sup>295</sup> Secondhand accounts of other rapes committed by military personnel were also recorded.<sup>296</sup> Some interviewees spoke generally of soldiers raping Karen women but provided no specific accounts.<sup>297</sup> KHRG has also reported on the alleged rape of Karen women by soldiers during the Offensive.<sup>298</sup> Additionally, the Clinic interviewed a former Myanmar Army soldier who witnessed, or perhaps participated in, the gang rape of two Karen women prior to the Offensive, and asserted that soldiers would not be punished for rapes committed in black areas, unless such rapes were reported in the media.<sup>299</sup>

The Clinic has not collected enough evidence to verify acts of rape committed during the Offensive or confirm their status as war crimes or crimes against humanity. Further investigation on this issue is warranted.

### **9. Persecution**

Persecution is a crime against humanity. It requires that the perpetrator severely deprive the victim of fundamental rights based on the victim's political, racial, national, ethnic, cultural, religious or gender identity, or "other grounds that are universally recognized as impermissible under international law."<sup>300</sup>

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<sup>291</sup> Clinic Database, Interview Nos. 47, 133, and 142.

<sup>292</sup> Clinic Database, Interview No. 133.

<sup>293</sup> Clinic Database, Interview Nos. 13, 47, 120, and 142.

<sup>294</sup> Rome Statute, art. 7(1)(g), 8(2)(e)(vi); *Elements*, art. 7(1)(g)-1, 8(2)(e)(vi)-1.

<sup>295</sup> Clinic Database, Interview No. 131.

<sup>296</sup> Clinic Database, Interview Nos. 42, 131 (reports a rape other than her own), 142, and 155 (rape occurred in 1988).

<sup>297</sup> Clinic Database, Interview Nos. 39 and 128.

<sup>298</sup> KHRG, "Forced Labour, Extortion and Abuses in Papun District," 29 July 2006, (report contains interview with victim); KHRG, "Attempted rapes and other abuses in northern Karen districts," 15 Mar. 2006, <http://www.khrg.org/2006/03/khrg06b2/attempted-rapes-and-other-abuses-northern-karen-districts>.

<sup>299</sup> Clinic Database, Interview No. 98.

<sup>300</sup> Rome Statute, art. 7(1)(h); *Elements*, art. 7(1)(h).

The Myanmar military's conduct during the Offensive violated numerous fundamental rights of the ethnic Karen population in eastern Myanmar, including the rights to life, liberty, security of person, and freedom of movement, and the right to be free from slavery and torture. Moreover, interviewees frequently expressed the opinion that mistreatment by the Myanmar military was based, in part, on racial enmity or historical conflicts of interest.<sup>301</sup> The Clinic's investigation has revealed several statements by military officers and enlisted soldiers that suggest an ethnic dynamic in the conflict in eastern Myanmar.<sup>302</sup> For example, several interviewees recalled soldiers referring to Karen villagers or KNLA soldiers as "nger pway," a type of underground worm or small animal.<sup>303</sup> Another villager recalled a Myanmar Army officer saying, "I don't like you, you are Karen people, so I will force [you] to work until you die."<sup>304</sup> However, to date, the Clinic has been unable to conclusively establish that the deprivation of rights during the Offensive was based on the population's ethnic identity or other impermissible grounds.

Further investigation into ethnic and political persecution in eastern Myanmar is warranted.

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<sup>301</sup> See, e.g., Clinic Database, Interview No. 150.

<sup>302</sup> Clinic Database, Interview Nos. 69, 121, 125, and 150.

<sup>303</sup> Clinic Database, Interview Nos. 121, 125, and 146.

<sup>304</sup> Clinic Database, Interview No. 150.

## VI. PERPETRATORS: UNITS AND COMMANDERS

Under international law, both the direct perpetrators of international crimes and their superior officers may be held criminally responsible for such crimes. The Clinic has collected significant evidence implicating specific units and officers in the perpetration of crimes described in Section V.

First, the Clinic has collected evidence that links units from Southern Command to crimes committed during the Offensive. This includes the identification of more than 25 lower-level officers who served in Southern Command and for whom there exist reasonable grounds to believe that they are directly responsible for crimes documented by the Clinic. Second, the Clinic has also documented the direct involvement of units from LID 66 in the perpetration of crimes outlined in Section V. However, the Clinic has been unable to identify specific lower-level officers from LID 66 who are responsible for crimes. Finally, the Clinic has collected sufficient evidence demonstrating the criminal liability of three high-level commanders—Major General Ko Ko of Southern Command, and Brigadier Generals Khin Zaw Oo and Maung Maung Aye of LID 66—for crimes committed by their subordinates. The evidence compiled by the Clinic would be sufficient to support the issuance of arrest warrants by the International Criminal Court for these three officers. However, additional evidence would be needed to prove the criminal responsibility of the three commanders to the standard required for conviction.

Section A below describes the evidentiary standard required for the issuance of an arrest warrant by the International Criminal Court. It also analyzes the evidence gathered by the Clinic under two modes of criminal responsibility provided by the Rome Statute: (1) individual responsibility under Article 25 and (2) command responsibility under Article 28. Section B discusses evidence related to the perpetration of crimes by Southern Command and LID 66—including the responsibility of the three commanders—and concludes with a discussion of the need for additional investigation of the military unit identified as the “Baw Bi Doh” (or “Short Pants” group).

### A. Legal Standards relating to Criminal Responsibility of Military Officers

#### 1. Arrest Warrant Standard

Article 58 of the Rome Statute states that, upon receiving an application from the Prosecutor, the Pre-Trial Chamber of the International Criminal Court shall issue an arrest warrant if “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court,” and if the arrest of the individual is necessary to ensure his presence at trial, protect against obstruction of the investigation or prosecution, or prevent the ongoing commission of crimes.<sup>305</sup> This standard is lower than the standard required for the confirmation of charges (“substantial grounds to

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<sup>305</sup> Rome Statute, art. 58(1).

believe that the person committed each of the crimes charged”<sup>306</sup> or conviction (“the Court must be convinced of the guilt of the accused beyond reasonable doubt”).<sup>307</sup> The standard does not require that the accused’s commission of the alleged crimes is certain. That the individual committed the crimes need not be the *only* reasonable conclusion, so long as it is *a* reasonable conclusion.<sup>308</sup>

## ***2. Individual Criminal Responsibility: Rome Statute Article 25***

Article 25 of the Rome Statute provides that an individual shall be criminally responsible for a war crime or crime against humanity if the individual:

- Commits the crime, individually or jointly with others;
- “Orders, solicits or induces” the commission of the crime;
- Aids or abets others in the commission of the crime;
- Intentionally contributes to the commission of the crime by a group of persons “acting with a common purpose”; or
- Attempts to commit the crime.<sup>309</sup>

The Clinic has determined that there are two categories of officers who may be held liable on the basis of individual criminal responsibility under Article 25. First, in a limited number of cases, the Clinic was able to identify specific military officers who were directly involved in the commission of crimes—either as the officer supervising the commission of crimes by subordinates on-sight or from a location just a few kilometers away. Second, the Clinic has identified high-level commanders who could be held liable under a theory of individual criminal responsibility with the collection of additional evidence, including details of specific orders issued by officers, records of meetings or specific communications among senior officers, and evidence relating to the use of existing military reporting structures. For example, existing reports indicate that the commanders of Southern Command and LID 66 gave direct orders to fire mortars villages and “clear” civilian areas.<sup>310</sup> Confirmation of these reports and the collection of

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<sup>306</sup> Rome Statute, art. 61(7).

<sup>307</sup> Rome Statute, art. 66(3). The Appeals Chamber of the International Criminal Court has held the arrest warrant standard must be interpreted in a manner that requires a lower evidentiary threshold than the conviction and confirmation of charges standards. *Prosecutor v. Omar Hassan Ahmad al Bashir*, ICC, Case No. ”, ICC-02/05-01/09-73, Judgment on appeal of the Prosecutor against the ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (Appeals Chamber), para. 30.

<sup>308</sup> *Id.* at paras. 31, 33, 39.

<sup>309</sup> Rome Statute, art. 25(3).

<sup>310</sup> These reports include alleged wire intercepts containing orders from the commanders of Southern Command and LID 66 involving the mortaring of villages and the “clearing” of civilian areas. Aegis Trust, “Case File,” pp. 33, 120. For example, according to an FBR report: “On 2 March 2006 at 8 p.m., southern commander Ko Ko ordered DIV 66 commander Khin Zaw Oo to order TOC 1, under commander Soe Htwey, and TOC 3, under commander Tin Aung, to mortar nearby villages with 81 and 60 mm mortars. TOC 3 commander Tin Aung mortared Yer

similar evidence could support the development of a case based on individual criminal responsibility under Article 25.

### **3. Criminal Responsibility of Commanders: Rome Statute Article 28**

Article 28 of the Rome Statute provides an alternate mode of liability, known as command responsibility, by which to hold commanding officers liable for crimes committed by their subordinates. In the context of the Offensive, it would likely be easier to prove the liability of senior commanders—including the three identified in this memorandum—under Article 28 than to prove individual criminal responsibility under Article 25. Nonetheless, to establish command responsibility under Article 28, it must be proven that subordinates did, in fact, commit crimes.

Article 28(a) of the Rome Statute specifies that a military commander shall be criminally responsible for crimes committed by subordinates if:

- The commander exercised effective command and control over the those who committed the crimes;
- The commander knew or should have known that crimes were being committed or about to be committed; and
- The commander “failed to take all necessary and reasonable measures . . . to prevent or repress [the commission of crimes] or to submit the matter to the competent authorities for investigation and prosecution.”<sup>311</sup>

The Clinic has identified a number of senior military officers who could—pending further investigation—be held responsible for crimes committed by military forces under their command during the Offensive in eastern Myanmar. Information collected by the Clinic to date is indicative of these officers’ effective command and control over subordinate units, knowledge of the commission of crimes, and failure to respond appropriately in the face of such knowledge.

#### *a. Effective Command and Control*

Under Article 28, effective command and control is a manifestation of the superior-subordinate relationship. Effective command and control requires more than mere influence over subordinates; a commander must have the power to prevent or repress the commission of crimes or refer them to the competent authorities for punishment.<sup>312</sup>

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Loh Village 7 times and 2 mortars hit the village. They fired mortars 3 times into Blaw Baw Der Village but only hit outside the village.” FBR, “Burma Army activities in Toungoo District, Western Kayin State,” 25 May 2006, <http://www.freeburmarangers.org/2006/05/25/burma-army-activities-in-toungoo-district-western-karen-state-25-may-2006/>.

<sup>311</sup> Rome Statute, art. 28(a).

<sup>312</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-

The International Criminal Court has articulated a number of factors that may indicate effective command and control.<sup>313</sup> These factors, which are evident in the superior-subordinate relationships among individuals in the Myanmar military chain of command—including Southern Command and LID 66—include the following:

i. Military Structure

- The continuity of command through six levels of authority stretching from the Ministry of Defence down to the battalion level;
- The intermediate control of battalions by SOCs and TOCs;
- The coordination of military units, such as the deployment of combat divisions to eastern Myanmar during the Offensive;
- The high degree of coordination in tactical maneuvers, including those designed to clear areas of civilian inhabitants;
- The use of convict porters relocated from outside the region by combat divisions; and
- The logistical and supply coordination among various units and levels of authority.

ii. Reporting and Communications Systems

- Significant military reporting infrastructure, including signal companies, signal platoons, and mobile signal groups;<sup>314</sup> and
- Robust reporting procedures and protocols outlined in official military documents, including the requirement that commanders and units travel with communications equipment and provide regular, detailed reports on movements and actions.<sup>315</sup>

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Pierre Bemba Gombo (Pre-Trial Chamber) (*Bemba Confirmation Decision*), 15 June 2009, paras. 414–415. *See also* Clinic Expert Declaration, Expert 3, para. 131.

<sup>313</sup> *Bemba Confirmation Decision*, para. 417 (“The Chamber takes the view that there are nonetheless several factors which may indicate the existence of a superior’s position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (*i.e.*, ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels [*sic*], to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.”).

<sup>314</sup> Clinic Expert Declaration, Expert 1, para. 41–43; Aegis Trust, “Case File,” p. 122.

<sup>315</sup> Battalions are required to produce “operational reports” every 12 hours, “local reports” including maps, and “battle reports” when necessary. TOCs are required to produce operational plans and monthly intelligence reports. Clinic Expert Declaration, Expert 1, para. 46–49; Aegis Trust, “Case File,” p. 123–125.

iii. Recall, Replacement, and Promotion

- The ability of senior officers to recall and replace subordinates during the Offensive;<sup>316</sup> and
- The promotion of commanders subsequent to their participation in the Offensive.<sup>317</sup>

iv. Commanders' Presence in the Field

- Division-level commanders' accompaniment of their troops to the area of conflict and exercise of command from a frontline headquarters.<sup>318</sup>

v. Execution of Orders

- The execution of division-level commander's orders by their subordinates, as evidenced through wire intercepts;<sup>319</sup>
- Testimony from former soldiers that they were under the tight control of superior officers, with an emphasis placed on obeying orders;<sup>320</sup>
- The execution of orders related to the differential treatment of civilians;<sup>321</sup> and
- The conduct of enlisted soldiers being dependent on orders received from superior officers who were sometimes several levels up the chain of command.

These factors demonstrate that the Myanmar military is a highly organized institution, operating "under a tightly controlled chain of command and system of reporting and communications."<sup>322</sup> This, in turn, indicates the likelihood that any one commander has a relationship of effective command and control over subordinates.

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<sup>316</sup> Between April and July 2006, the commanders of LID 66, MOC 10, MOC 15 and MOC 16 were all replaced. Clinic Expert Declaration, Expert 1, para. 44-45; Aegis Trust, "Case File," p. 123.

<sup>317</sup> The commanders of BSO 3 (one level of authority above a RMC), Southern Command, MOC 10, and LID 66 were all promoted following their service in eastern Myanmar. Clinic Expert Declaration, Expert 1, para. 59; Aegis Trust, "Case File," p. 16-19.

<sup>318</sup> Clinic Expert Declaration, Expert 1, para. 77; Aegis Trust, "Case File," p. 120. Khin Zaw Oo, the commander of LID 66, reportedly led a column of 135 soldiers in combat operations on at least one occasion during the Offensive. FBR, "Burma Army activities in Toungoo District, Western Kayin State," 25 May 2006, <http://www.freeburmarangers.org/2006/05/25/burma-army-activities-in-toungoo-district-western-karen-state-25-may-2006/>.

<sup>319</sup> According to an FBR report: "On 2 March 2006 at 8 p.m., southern commander Ko Ko ordered DIV 66 commander Khin Zaw Oo to order TOC 1, under commander Soe Htwey, and TOC 3, under commander Tin Aung, to mortar nearby villages with 81 and 60 mm mortars. TOC 3 commander Tin Aung mortared Yer Loh Village 7 times and 2 mortars hit the village. They fired mortars 3 times into Blaw Baw Der Village but only hit outside the village." FBR, "Burma Army activities in Toungoo District, Western Kayin State," 25 May 2006, <http://www.freeburmarangers.org/2006/05/25/burma-army-activities-in-toungoo-district-western-karen-state-25-may-2006/>.

<sup>320</sup> Clinic Database, Interview Nos. 90 and 156.

<sup>321</sup> Clinic Database, Interview Nos. 90 and 160.

<sup>322</sup> Clinic Expert Declaration, Expert 1, para. 55.

*b. Knowledge of the Crimes Committed*

The second element required for command responsibility is knowledge—namely that the commander “knew or, owing to the circumstances at that time, should have known” that subordinates committed or were about to commit the crimes.<sup>323</sup> To demonstrate that a commander “knew” requires that his actual knowledge of the crimes be proven through direct or circumstantial evidence. Circumstantial evidence sufficient to prove actual knowledge may be that the military commander is “part of an organized structure with established reporting and monitoring systems.”<sup>324</sup> In order to demonstrate that a commander “should have known,” it must be proven that the commander was “negligent in failing to acquire knowledge of his subordinates’ crimes.”<sup>325</sup>

High-level commanders serving in eastern Myanmar during the Offensive were highly likely to have possessed actual knowledge of the crimes being committed by their subordinates. The following factors tend to indicate such knowledge:

i. Reporting and Communication Systems

- Military reporting infrastructure, including signal companies, signal platoons, and mobile signal groups that were equipped with high frequency radios and other communications equipment;<sup>326</sup>
- Stringent reporting requirements outlined in official military documents, including the requirement that units provide to superior units twice daily operational reports, daily intelligence reports, battle reports, and operational plan reports;<sup>327</sup>
- Requirements that battalions submit “local reports” which include maps and describe “local conditions.” These reports are forwarded to TOCs and LID headquarters at the conclusion of operations;<sup>328</sup> and
- Requirements that TOCs send a copy of all orders given to subordinate battalions to the LID or OCC headquarters. LIDs and OCCs must forward this information to the Ministry of Defence and relevant regional commands.<sup>329</sup>

ii. Commanders’ Presence in the Field

- Division-level commanders’ accompaniment of their troops to the area of conflict and their exercise of command from a frontline headquarters.<sup>330</sup>

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<sup>323</sup> Rome Statute, art. 28(a)(i).

<sup>324</sup> Bemba Confirmation Decision, para. 431.

<sup>325</sup> Bemba Confirmation Decision, para. 432.

<sup>326</sup> Aegis Trust, “Case File,” p. 122, Clinic Expert Declaration, Expert 1, para. 41-43.

<sup>327</sup> See *supra* note 315.

<sup>328</sup> Clinic Expert Declaration, Expert 1, para. 49; Aegis Trust, “Case File,” p. 125.

<sup>329</sup> Clinic Expert Declaration, Expert 1, para. 44; Aegis Trust, “Case File,” p. 123.

<sup>330</sup> See *supra* note 318.

iii. Modus Operandi of Similar Acts

- The implementation of longstanding counterinsurgency policies derived from the historic Four Cuts doctrine that explicitly authorizes civilian targeting; and
- The prior experience of commanders in implementing the military's counterinsurgency doctrine.

iv. Orders to Commit Crimes

- Evidence that senior commanders gave direct orders to subordinate units to engage in conduct that included prohibited acts.<sup>331</sup>

v. Reporting by International Actors

- High profile statements on the Offensive by the UN Security Council, U.S. lawmakers, and five UN Special Rapporteurs condemning the military's actions, thereby putting commanders on notice of the crimes committed.<sup>332</sup>

vi. Widespread Nature of the Illegal Acts

- The application of the same modus operandi of civilian targeting implemented by battalions from Southern Command and LID 66 in three different regional spheres of military operation.<sup>333</sup>

vii. Period of Time Over which these Acts Were Committed

- The approximately three-year period of the Offensive during which crimes were consistently committed.

These factors indicate that commanders of units such as Southern Command and LID 66 knew or should have known that their subordinates were committing war crimes and crimes against humanity. The evidence that the Myanmar military is an “organized structure with established reporting and monitoring systems” may alone be sufficient to establish that the commanders held the requisite knowledge of the crimes.<sup>334</sup>

*c. Failure to Prevent or Repress Crimes, or Failure to Submit Crimes to Proper Authorities*

Under Article 28, commanders have three duties regarding crimes committed by subordinates: (i) to prevent the commission of crimes before they occur, (ii) to repress the commission of crimes, and (iii) to submit the matter of the committed crimes to the

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<sup>331</sup> See Section VI.A.3.a.v – Execution of Orders.

<sup>332</sup> See Section IV.D – International Condemnation of the Offensive.

<sup>333</sup> See Section IV.C – Operations of Southern Command and LID 66 in Thandaung Township in 2006. The three spheres of operation were: 1) southwestern Thandaung Township and eastern Htantabin Township in Bago Division, 2) southeastern Thandaung Township, where the military was attempting to solidify control over a road that ran from Baw Ga Li and Kaw Thay Der in the north to Buh Sah Kee in the southeast, and 3) the northern area around Thandaung Town, and across the Day Loh River to the east.

<sup>334</sup> *Bemba Confirmation Decision*, para. 431.

proper authorities for investigation and prosecution.<sup>335</sup> It is sufficient for criminal liability that a commander failed to fulfill any one of the three duties.<sup>336</sup>

Neither the Clinic nor the Clinic's expert declarants have been able to uncover any evidence of efforts made by military officers to prevent, repress, or submit the issue of crimes committed during the Offensive to the proper authorities. Although Myanmar's Defence Services Act provides a framework for the punishment of some crimes committed during the Offensive,<sup>337</sup> the Clinic has not found any information to suggest that military officers referred cases for investigation.

## **B. Identification of Perpetrators: Southern Command, LID 66, and the Baw Bi Doh**

This section outlines the evidence collected by the Clinic that identifies specific units and commanders as the perpetrators of crimes committed during the Offensive. The Clinic has collected evidence of the criminal liability of three high-level commanders that is sufficient to meet the standard required for the issuance of an arrest warrant under the Rome Statute. These three individuals are Major General Ko Ko of Southern Command, and Brigadier Generals Khin Zaw Oo and Maung Maung Aye of LID 66. In addition, the Clinic has identified more than 25 lower-level officers from Southern Command who could potentially be held responsible for their direct role in the perpetration of crimes. The Clinic has particularly strong evidence of the criminal liability of Zaw Tun, an officer who commanded IB 48 during the Offensive. The section outlines evidence related to Southern Command and LID 66 and then concludes with a discussion of the need for an additional investigation of the military unit called the "Baw Bi Doh" (or "Short Pants").

### **1. Southern Command**

Southern Command is an RMC. As described above, RMCs are responsible for military operations in assigned territories and with a permanent presence in those areas. RMCs control garrison battalions that are headquartered in their territories and also oversee combat divisions brought into their areas for offensive actions.

During the Offensive, Southern Command's territory included Bago Division and parts of Kayin State north of Hpapun Town.<sup>338</sup> Southern Command controlled 22 garrison battalions in this region: IB 26, IB 30, IB 39, IB 48, IB 53, IB 57, IB 60, IB 73, IB 75, IB 92, IB 124, IB 264, LIB 349, LIB 350, LIB 351, LIB 439, LIB 440, LIB 589, LIB 590,

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<sup>335</sup> *Bemba* Confirmation Decision, paras. 438–440.

<sup>336</sup> *Bemba* Confirmation Decision, para. 436 and fn. 575.

<sup>337</sup> The Defence Services Act of 1959, art. 71 (Myan.). The Defence Services Act incorporates civil law, including the Myanmar Penal Code.

<sup>338</sup> Clinic Expert Declaration, Expert 1, para. 29; Aegis Trust, "Case File," p. 13.

LIB 598, and LIB 599.<sup>339</sup> During the Offensive, Southern Command also oversaw up to seven combat divisions that were brought into the region, including LID 66.<sup>340</sup>

*a. Identification of Low-Level Perpetrators*

The Clinic has identified more than 25 lower-level officers who served in Southern Command and may be held criminally liable for crimes committed during the Offensive.<sup>341</sup> Because Southern Command battalions were permanently based in Thandaung Township and operated extensively in brown areas where civilians and military personnel interacted more frequently, interviewees were often able to identify officers associated with these units by name.

Military personnel from Southern Command garrison battalions were involved in many incidents documented by the Clinic. Southern Command battalions were frequently connected to the use of civilian forced labor during the Offensive,<sup>342</sup> and were involved in killings,<sup>343</sup> attacks on civilians,<sup>344</sup> and the destruction of homes and civilian property.<sup>345</sup> Southern Command appears to have taken the lead in the relocation of the civilian populations in northern Kayin State and eastern Bago Division, with interviewees describing numerous relocation orders issued by its battalions in southwest Thandaung Township.<sup>346</sup> One individual interviewed by the Clinic described meetings held by senior Southern Command officers in 2003 and 2005 in which village leaders from southwest Thandaung Township were ordered to relocate their villages.<sup>347</sup>

IB 48 was a particularly notorious Southern Command battalion. Many interviewees identified IB 48 as “the worst” unit or more violent or “cruel” than other units.<sup>348</sup> One interviewee stated that IB 48 was the “unit that you were not safe with,” and said that soldiers from that unit were more likely to shoot villagers found outside of the village (which was in a brown area).<sup>349</sup> Another interviewee was beaten by soldiers from IB 48, and said that more villagers were abused when IB 48 was in the village, compared to

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<sup>339</sup> Clinic Expert Declaration, Expert 1, para. 37; Aegis Trust, “Case File,” p. 13.

<sup>340</sup> Aegis Trust, “Case File,” p. 13; *see also* Clinic Expert Declaration, Expert 1, para. 35. At times, the General Staff Office issues orders directly to field units, bypassing the formal chain of command. Clarifying email from Clinic Expert Declarant, Expert 1 citing to interviews with former Myanmar military officers.

<sup>341</sup> *See* Clinic Database.

<sup>342</sup> Clinic Database, Interview Nos. 8, 12, 13, 18, 22, 33, 39, 42, 46, 52, 71, 73, 74, 80, 82, 86, 97, 100, 109, 116, 123, 127, 130, 138, 143, 146, 147, and 151.

<sup>343</sup> Clinic Interview Nos. 8, 12, 26, 31, 33, 47, 52, 76, 82, 86, 97, 99, 100, 109, 132, 146, 147, 133, and 151.

<sup>344</sup> Clinic Database, Interview Nos. 28, 87, 89, 124, and 128.

<sup>345</sup> Clinic Database, Interview Nos. 5, 11, 39, 87, 89, 124, 128, and 146.

<sup>346</sup> Clinic Database, Interview Nos. 12, 46, 51, 54, 80, 86, 106, 119, 133, 143, and 146.

<sup>347</sup> Clinic Database, Interview No. 163.

<sup>348</sup> *See, e.g.*, Clinic Database, Interview Nos. 33, 133, and 146.

<sup>349</sup> Clinic Database, Interview No. 146.

other units.<sup>350</sup> IB 48 was responsible for the deaths of at least eleven civilians near Shah Si Boh in late 2005 and early 2006,<sup>351</sup> as well as two killings in Klaw Mi Der<sup>352</sup> and numerous other incidents. Many of these incidents were attributed directly to Zaw Tun, an officer from IB 48 who was identified by numerous interviewees<sup>353</sup> and regularly described as “very bad.”<sup>354</sup>

*b. High-Level Commanders: Major General Ko Ko*

The commander of Southern Command from 2003 to 2008 was Major General Ko Ko.<sup>355</sup> He subsequently commanded BSO 3 and is currently the Minister of Home Affairs in the Government of Myanmar.<sup>356</sup> As Commander of Southern Command, Major General Ko Ko was the military officer responsible for the execution of the Offensive in northern Kayin State and eastern Bago Division. In this capacity, he oversaw both Southern Command garrison battalions and combat divisions (including LID 66) that were involved in the Offensive.

The Clinic has collected sufficient evidence of Major General Ko Ko’s criminal responsibility for crimes committed by soldiers from Southern Command, LID 66, and other combat divisions to meet the “reasonable grounds to believe” standard set by Article 58 of the Rome Statute for the issuance of an arrest warrant by the International Criminal Court.

First, his effective command and control over Southern Command, LID 66, and other combat divisions 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,<sup>357</sup> (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. In

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<sup>350</sup> Clinic Database, Interview No. 133.

<sup>351</sup> Clinic Database, Interview No. 26, 31, 33, 47, 76, 82, 86, 97, 99, 100, 109, 132, 133, 147, and 151.

<sup>352</sup> Clinic Database, Interview No. 146.

<sup>353</sup> Clinic Database, Interview Nos. 47, 62, 74, 86, 100, 108, 109, 132, and 133.

<sup>354</sup> Clinic Database, Interview No. 108.

<sup>355</sup> Clinic Expert Declaration, Expert 1, para. 25; Aegis Trust, “Case File,” p. 16.

<sup>356</sup> Aegis Trust, “Case File,” p. 16.

<sup>357</sup> According to an FBR report: “On 2 March 2006 at 8 p.m., southern commander Ko Ko ordered DIV 66 commander Khin Zaw Oo to order TOC 1, under commander Soe Htwey, and TOC 3, under commander Tin Aung, to mortar nearby villages with 81 and 60 mm mortars. TOC 3 commander Tin Aung mortared Yer Loh Village 7 times and 2 mortars hit the village. They fired mortars 3 times into Blaw Baw Der Village but only hit outside the village.” FBR, “Burma Army activities in Toungoo District, Western Kayin State,” 25 May 2006, <http://www.freeburmarangers.org/2006/05/25/burma-army-activities-in-toungoo-district-western-karen-state-25-may-2006/>.

addition, commanders subordinate to Ko Ko were both replaced during the Offensive and promoted after they left eastern Myanmar.

Second, Major General 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.

Third, the Clinic was unable to find any evidence of efforts made by Ko Ko to prevent or repress crimes, or to submit the issue of crimes committed during the Offensive to the proper authorities.

This evidence establishes the elements of command responsibility under Article 28 to the standard required for the International Criminal Court to issue a warrant for his arrest. With further investigation—particularly related to Ko Ko's orders, meetings, and involvement in planning operations for the Offensive—there may also be sufficient evidence to issue a warrant based on individual criminal responsibility under Article 25.

## ***2. Light Infantry Division 66***

LID 66 is a combat division in the Myanmar Army. Unlike RMCs, combat divisions do not operate in the vicinity of their headquarters. Rather, they are deployed to active conflict areas.<sup>358</sup>

During the Offensive, LID 66 was headquartered in Pyay, Bago Division and was comprised of IB 1, IB 11, IB 14, IB 35, IB 80, LIB 4, LIB 5, LIB 6, LIB 10, and LIB 108.<sup>359</sup> In January or February 2006, LID 66 arrived in eastern Myanmar to contribute to the Offensive, coming under the operational control of Southern Command.<sup>360</sup> In early 2007, LID 66 was rotated out of eastern Myanmar and ceased participating in the Offensive.<sup>361</sup>

### *a. Low-Level Perpetrators*

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<sup>358</sup> Clinic Expert Declaration, Expert 1, para. 32; Aegis Trust, "Case File," p. 14.

<sup>359</sup> Clinic Expert Declaration, Expert 1, para. 38; Aegis Trust, "Case File," p. 140-141.

<sup>360</sup> Aegis Trust, "Case File," pp. 62-72; *see also* Clinic Database.

<sup>361</sup> FBR, "Burma Army Rotates New Troops Into Northern Karen State," 29 Jan. 2007, <http://www.freeburmarangers.org/2007/01/29/burma-army-rotates-new-troops-into-northern-karen-state/>.

The Clinic has strong evidence that LID 66 is responsible for many crimes committed during the Offensive but has not identified specific officers who could be held responsible for the direct perpetration of crimes. For example, individuals interviewed by the Clinic attributed to LID 66 the killing of at least seven Karen civilians during the Offensive.<sup>362</sup> LID 66 is also alleged to have made extensive use of civilian and prisoner porters.<sup>363</sup> Interviewees reported incidents in which 100 to 200 civilians were forced to carry supplies for the military at the same time.<sup>364</sup> Villagers were also forced to walk in front of soldiers from LID 66 to find or “detect” landmines, and in between soldiers to discourage attacks by the KNLA.<sup>365</sup> Two interviewees described soldiers from LID 66 killing prisoner porters, with one claiming to have seen the bodies of 30 to 40 prisoners.<sup>366</sup> The Clinic also spoke with individuals who stated that LID 66 had relocated civilians,<sup>367</sup> attacked villages,<sup>368</sup> destroyed villages and agricultural fields,<sup>369</sup> and used landmines against civilians.<sup>370</sup>

While many individuals interviewed by the Clinic identified LID 66 as the unit that carried out alleged crimes, they often did so based on secondhand knowledge, having never seen or personally interacted with soldiers from LID 66 during the Offensive.<sup>371</sup> This is likely due to LID 66’s role as a combat division that operated primarily in black areas. Villagers in black areas usually fled in advance of the military’s approach. Oftentimes, when they returned to their villages, they saw their homes destroyed or evidence of other actions by military personnel. Interviewees who attributed such actions to LID 66 usually did so based on information received from the KNLA or other villagers. These are hearsay accounts, which help indicate what may have happened to these villages, but do not provide the necessary evidence to unequivocally prove that soldiers from LID 66 were the perpetrators.

The Clinic collected significant evidence, however, placing LID 66 in the vicinity of crimes that its soldiers are alleged to have committed. Several interviewees noted the arrival of LID 66 in southwestern Thandaung Township in February 2006 and locations further north and east in the following month.<sup>372</sup> A villager from a brown area village in western Thandaung Township described a meeting in which officers from Southern

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<sup>362</sup> Clinic Database, Interview Nos. 51, 57, 61, 92, 107, and 136.

<sup>363</sup> Clinic Database, Interview Nos. 31, 102, 105, 107, 115, 120, 121, and 142.

<sup>364</sup> Clinic Database, Interview No. 105.

<sup>365</sup> Clinic Database, Interview Nos. 105 and 142.

<sup>366</sup> Clinic Database, Interview Nos. 105 and 142.

<sup>367</sup> Clinic Database, Interview No. 134.

<sup>368</sup> Clinic Database, Interview Nos. 30, 77, and 141.

<sup>369</sup> Clinic Database, Interview Nos. 30, 92, 115, 120, 121, 134, 136, and 141.

<sup>370</sup> Clinic Database, Interview Nos. 30, 63, 67, 136, and 141.

<sup>371</sup> Clinic Database, Interview Nos. 14, 31, 38, 40, 46, 51, 52, 53, 57, 61, 62, 63, 66, 67, 77, 79, 80, 100, 101, 102, 103, 105, 106, 114, 115, 120, 121, 129, 132, 133, 134, 136, 137, 142, and 146.

<sup>372</sup> Clinic Database, Interview Nos. 38, 50 (does not explicitly name LID 66), 51, 61, 77, 121, 142, and 143 (does not explicitly name LID 66).

Command told him that LID 66 would be establishing a base in his village as part of a plan to “destroy the KNU within 17 months,” and that all villagers must relocate.<sup>373</sup> This villager fled to Thailand before LID 66 arrived, but another villager, who was moving to a location to the west, recalls seeing a large group of soldiers headed towards their village at the time.<sup>374</sup> Three individuals positively identified soldiers from LID 66 in the area west of the Day Loh River based on numbers on their badges or guns. One of these individuals was a village head, who had many meetings with officers from LID 66 during 2006, and provided the names of several of these officers.<sup>375</sup> Another village head attended a meeting in Baw Ga Li in March 2006 where military officers from LID 66 were present.<sup>376</sup> A villager from Baw Ga Li described three occasions in which he was forced to carry supplies or clear brush along the Baw Ga Li-Buh Sah Kee and Baw Ga Li-Mawchi Roads for a unit that he believed to be, but could not positively identify as, LID 66.<sup>377</sup> His description of these incidents, which involved the use and killing of many prisoner porters, corresponds closely with reports by FBR and KHRG that identify LID 66 as the responsible unit.<sup>378</sup>

In addition to the identification of LID 66 by interviewees, the Clinic has collected photographs which place LID 66 in Thandaung Township during the Offensive. These photographs were taken by FBR team members. Several pictures show soldiers from LID 66, with badges visible in some photographs, leading civilian porters through Kaw Thay Der village. Others show a camp at Play Hsa Loh that the photographers state was established by LID 66. One of the Clinic’s expert declarants accompanied the team members who took these pictures and saw the forces that were photographed, although not from a close enough distance that would allow him to personally identify the unit.<sup>379</sup>

*b. High-Level Commanders: Brigadier Generals Khin Zaw Oo and Maung Maung Aye*

The commander of LID 66 at the time of its deployment to eastern Myanmar was Brigadier General Khin Zaw Oo.<sup>380</sup> In May 2006, Khin Zaw Oo was promoted to the

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<sup>373</sup> Clinic Database, Interview No. 146.

<sup>374</sup> Clinic Database, Interview No. 143.

<sup>375</sup> Clinic Database, Interview Nos. 6, 121, and 142.

<sup>376</sup> Clinic Database, Interview No. 142.

<sup>377</sup> Clinic Database, Interview No. 105.

<sup>378</sup> FBR, “Message from a Relief Team Leader and Situation Update,” 28 Apr. 2006, <http://www.freeburmarangers.org/2006/04/27/message-from-a-relief-team-leader-and-situation-update/>; FBR, “Campaign of Brutality,” p. 49; FBR, “Villagers Forced to Porter for Burma Army, May 2006: 850 People Forced to Porter in Support of Burma Army Offensive in Toungoo District, Northwester Karen State, Burma,” 1 June 2006, <http://www.freeburmarangers.org/2006/06/01/villagers-forced-to-porter-for-burma-army-may-2006/>; KHRG, “Offensive columns shell and burn villages, round up villagers in northern Papun and Toungoo districts,” 7 June 2006, <http://www.khrg.org/2006/06/khrg06b7/offensive-columns-shell-and-burn-villages-round-villagers-northern-papun-and>.

<sup>379</sup> Clinic Expert Declaration, Expert 2, paras. 85–86.

<sup>380</sup> Clinic Expert Declaration, Expert 1, para. 66; Aegis Trust, “Case File,” p. 16.

rank of Major General and assumed command of Coastal Regional Command.<sup>381</sup> He was subsequently appointed the Adjutant General of the Myanmar Armed Forces,<sup>382</sup> and in September 2014, he was transferred to assume command of BSO 4.<sup>383</sup> Khin Zaw Oo was replaced by Brigadier General Maung Maung Aye, who assumed command of LID 66 in May 2006.<sup>384</sup> Maung Maung Aye was subsequently promoted to become the Commander of Naypyidaw Regional Military Command.<sup>385</sup>

The Clinic has collected sufficient evidence of Brigadier Generals Khin Zaw Oo and Maung Maung Aye's liability as commanders to meet the standard for the issuance of arrest warrants under the Rome Statute. Under Article 58, there are "reasonable grounds to believe" that the two commanders of LID 66 are liable for crimes committed by their subordinates based on a theory of command responsibility.<sup>386</sup> First, 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 TOCs, (iv) close coordination of LID 66 battalions, and (v) routine placement in advance locations in close proximity to the frontlines due to their positions as division commanders.

Second, 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 three regional spheres of operation, and (vi) the three-year period during which crimes were committed.

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<sup>381</sup> Clinic Expert Declaration, Expert 1, para. 63; Aegis Trust, "Case File," p. 16.

<sup>382</sup> Clinic Expert Declaration, Expert 1, para. 63; Aegis Trust, "Case File," p. 16. See Aung Thet Wine, "Tipped as Next Burma Army Chief, Mya Tun Oo Gets Promotion," *The Irrawaddy*, 23 July 2014, <http://www.irrawaddy.org/burma/tipped-next-burma-army-chief-mya-tun-oo-gets-promotion.html>.

<sup>383</sup> Ei Ei Toe Lwin, "Military shuffles generals," *Myanmar Times*, 12 September 2014, <http://www.mmtimes.com/index.php/national-news/11605-major-reshuffles-in-tatmadaw-ranks.html>.

<sup>384</sup> Clinic Expert Declaration, Expert 1, para. 27; Aegis Trust, "Case File," p. 17.

<sup>385</sup> "More Detail on Military Reshuffle Emerges," *The Irrawaddy*, 30 Aug. 2010; [http://www2.irrawaddy.org/article.php?art\\_id=19337](http://www2.irrawaddy.org/article.php?art_id=19337). There are unconfirmed reports that he has since retired from the military.

<sup>386</sup> The evidentiary standard necessary for the issuance of an arrest warrant is that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." Rome Statute, art. 58.

Third, the Clinic was unable to find any evidence of efforts made by Khin Zaw Oo and Maung Maung Aye to prevent or repress crimes, or to submit the issue of crimes committed during the Offensive to the proper authorities.

This evidence establishes the elements of command responsibility under Article 28 to the standard required for the International Criminal Court to issue warrants for the arrest of both Khin Zaw Oo and Maung Maung Aye. With further investigation—particularly into the commanders’ orders, meetings, and involvement in planning operations for the Offensive—there may also be sufficient evidence to issue arrest warrants for both Khin Zaw Oo and Maung Maung Aye based on their individual criminal responsibility under Article 25.

### 3. *Baw Bi Doh*

During its field missions, the Clinic learned about a special military unit called the “Baw Bi Doh” (or “Short Pants”), so termed because of the short pant uniforms they, at times, wore.<sup>387</sup> The Clinic was unable to ascertain the exact nature of this group which, based on descriptions of their operations, could be a highly trained special force, a mobile hit squad, and/or a special reconnaissance force. However, the Baw Bi Doh were known for their ruthlessness and may have played a “shock and awe” role in forcing villagers to comply with military directives. Interviewees identified several Baw Bi Doh officers by name.

Interviewees uniformly described the violence and cruelty of the Baw Bi Doh. For example, when Baw Bi Doh soldiers passed civilians on a path, they would force the villagers to sit down and give an order not to look at their faces, accompanied by threats of violence.<sup>388</sup> Interviewees stated that the Baw Bi Doh “killed villagers a lot,”<sup>389</sup> and suggested that they might not be subject to the same operational constraints as ordinary soldiers. However, they provided unverified accounts of killings that they attributed to the Baw Bi Doh.<sup>390</sup> Interviewees also described two beatings and the burning of a field by the Baw Bi Doh.<sup>391</sup> One interviewee stated that the Baw Bi Doh were disbanded in 2003,<sup>392</sup> while others asserted they were still active as late as 2005 or 2006.<sup>393</sup>

It is unclear what exact role, if any, the Baw Bi Doh played in the Offensive in eastern Myanmar. However, the possibility that the Baw Bi Doh may have been given wider

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<sup>387</sup> Clinic Database, Interview Nos. 52, 86, 133, 142, and 146.

<sup>388</sup> Clinic Database, Interview No. 142.

<sup>389</sup> Clinic Database, Interview No. 133.

<sup>390</sup> Clinic Database, Interview Nos. 142 (women raped and killed by unknown units presumed to be the Baw Bi Doh) and 146 (hearsay account of killings in Mwee Loh with no details provided).

<sup>391</sup> Clinic Database, Interview No. 142.

<sup>392</sup> Clinic Database, Interview No. 133.

<sup>393</sup> Clinic Database, Interview Nos. 142 and 146.

latitude to use violence against the Karen civilian population suggests the need for a more rigorous and focused investigation of the group.

## VII. CONCLUSION AND RECOMMENDED INVESTIGATION STRATEGIES

### A. Conclusion

This memorandum describes a Myanmar military counterinsurgency offensive that involved the widespread targeting of civilians in northern Kayin State and eastern Bago Division. Myanmar Army soldiers fired mortars at villages, opened fire on fleeing villagers, destroyed homes, laid landmines in civilian locations, forced villagers to work and porter, and captured and executed civilians. The impact on the population was massive. Tens of thousands of individuals were displaced during the campaign and many were killed. In Thandaung Township—the area which was the focus of the Clinic’s investigation—nearly every village was affected by the Offensive and almost all of the villagers residing in black areas were forced to flee.

Evidence collected by the Clinic during the investigation demonstrates that the actions of Myanmar Army personnel during the Offensive constitute crimes under international criminal law. These crimes include the war crimes of attacking civilians, displacing civilians, destroying or seizing the enemy’s property, pillage, murder, execution without due process, torture, and outrages upon personal dignity, and the crimes against humanity of forcible transfer of a population, murder, enslavement, torture, and other inhumane acts. The Clinic has also collected evidence relevant to the war crime of rape, as well as the crimes against humanity of rape and persecution. More research and analysis is necessary to determine whether these crimes could be included in a criminal case associated with the Offensive.

The perpetration of international crimes by the Myanmar Army during the Offensive can be attributed, in part, to the implementation of military policies and practices documented by the Clinic. A chief objective in counterinsurgency operations, including those implemented during the Offensive, has been the “clearing” of civilians from territories deemed to be controlled by non-state armed groups. A color-classification system gave military personnel wide latitude to direct violence against civilians in KNLA-controlled black areas during the Offensive. In these regions, soldiers were consistently permitted or required to attack all non-Army personnel, whether or not they were armed or affiliated with the KNLA. The shelling of villages, forcible transfers, the destruction of civilian property, and the use of landmines in civilian locations were also common in these areas. In brown areas, where the military enjoyed at least partial control, civilian forced labor was used in a systematic fashion and villagers were subject to extrajudicial executions, torture, and other forms of abuse.

In many cases, the Clinic was able to identify soldiers from Southern Command as the direct perpetrators of crimes committed in Thandaung Township in 2005 and 2006. Moreover, individuals interviewed by the Clinic indicated that forces from LID 66 were responsible for many additional crimes during this period. While the Clinic was able to

establish LID 66's presence in Thandaung Township in 2006, further investigation is recommended to more directly connect military personnel from LID 66 to alleged crimes.

The Clinic also collected evidence indicative of the criminal responsibility of senior officers—including the commanders of Southern Command and LID 66—for crimes committed by subordinate forces. In relation to these commanders and other low-level officers, the Clinic's evidence is sufficient to satisfy the standard set by the Rome Statute for the issuance of an arrest warrant by the International Criminal Court.

## **B. Recommended Investigation Strategies**

Evidence collected by the Clinic highlights the enormous human impact of military conduct in Myanmar. Urgent action is needed to ensure that perpetrators of international crimes are held accountable. For this reason, the Clinic recommends further investigation in order to continue to gather information on the criminal responsibility of the military commanders identified in this memorandum, collect evidence about the conduct of other units involved in the Offensive, and address abuses in the context of other offensives. Further investigation should focus on the following:

### ***1. Named Individuals***

This memorandum identifies three senior commanders who could be held accountable for their role in the perpetration of war crimes and crimes against humanity during the Offensive. The Clinic's investigation yielded considerable evidence indicative of the criminal responsibility of these three individuals. However, further research is necessary to document their actions to a higher degree of specificity and thus support efforts to hold them accountable. Evidence should be sought from sources including the following:

- Individuals who served as long-term porters for Southern Command or LID 66 during the Offensive. The Clinic believes that many civilians and prisoners from other parts of the country carried supplies for these units in frontline areas during the Offensive. These individuals likely witnessed attacks on villages, destruction of civilian property, shootings of civilians, and other crimes documented by the Clinic.
- Individuals who attended meetings convened by officers from Southern Command or LID 66 during the Offensive. For example, the Clinic received information that LID 66 held a meeting with villagers from Thandaunggyi in 2006 during which they described a plan to undertake a scorched earth campaign east of the Day Loh River. An individual who attended such a meeting could provide valuable, firsthand information connecting LID 66 to

documented crimes. To date, the Clinic has not been able to speak with anyone who attended this meeting.

- Village leaders, who are mostly Karen, that interacted with military officers during the Offensive. The Clinic has already interviewed several village leaders who provided valuable information about military operations during the Offensive. However, additional village leaders could further corroborate the connection between military personnel and commanders from Southern Command and LID 66 and events documented by the Clinic.
- Former soldiers who served in Southern Command or LID 66 during the Offensive. These individuals would likely be able to provide detailed information about the military's planning and conduct during the Offensive, including the role of specific officers in the perpetration of prohibited acts.
- Individuals who monitored military radio communications in eastern Myanmar during the Offensive. These persons may be able to provide evidence about the orders given by military commanders and reports that they received from subordinates. They may also be able to help the Clinic locate transcripts of such communications or other forms of evidence.
- Internal military documents relating to the Offensive. One of the Clinic's expert declarants has reviewed many official military documents, including those describing counterinsurgency strategies for particular military operations. It is likely that specific documents exist that describe military objectives, policies, and strategies relating specifically to the Offensive.

The Clinic believes that there are likely thousands of individuals who possess information about the military's actions during the Offensive. However, the Clinic's ability to identify and interview additional key witnesses has been hampered by a lack of access to towns and villages in eastern Myanmar. If such access could be secured, evidentiary gaps could be closed more quickly.

## *2. Other Military Units Involved in the Offensive*

Southern Command and LID 66 were not the only units involved in the Offensive. Additional evidence, including from witnesses, former soldiers, and internal military documents, should be compiled about other units that likely committed prohibited acts in other districts as part of clearing operations. Further investigation into other units should focus on the following:

- Military conduct associated with the Offensive which occurred outside the geographic and temporal scope of the Clinic's investigation, including events

that occurred in Hpapun, Tantabin, Kyaukyi, and Shwegyin Townships through the year 2008.

- The conduct of other military units—including Southeast Command, Western Command,<sup>394</sup> MOC 10, MOC 15, MOC 16, MOC 21, LID 33, LID 44, LID 99, LID 101, and the Baw Bi Doh (“Short Pants”) military group—during the Offensive.

### ***3. Other Actions by Military Units Named in the Memorandum***

The Clinic’s research implicates two particular military units or groups that could be investigated more thoroughly given reports of abuses beyond the Offensive. The Clinic recommends further examination of:

- LID 66, which has been linked to violence in other contexts and locations. LID 66 is alleged to have been involved in violently suppressing pro-democracy street protests in 2007 under the command of Brigadier General Maung Maung Aye. The unit has also been reported to have been involved in the recent conflict in Kachin State and northern Shan State.
- The Baw Bi Doh (“Short Pants”) military group, which is reported to have operated in eastern Myanmar before and during the Offensive. Further investigation should be undertaken to ascertain the rules of engagement that governed Baw Bi Doh soldiers, the conduct of Baw Bi Doh soldiers during the Offensive, and the current status of the group.

### ***4. Other Offensives and Actors***

The Clinic’s investigation was limited in scope, addressing the conduct of two specific military units in one township during a two-year period. There is a need to address similar abuses in other locations and time periods. Specifically, the Clinic recommends investigation of the following:

- Abuses associated with past armed conflict, militarization, and communal violence in other parts of Myanmar.
- Potential ongoing abuses in Kachin State and northern Shan State, where the Myanmar Government is accused of grave abuses against local populations associated with its offensive against the Kachin Independence Organization and the Kachin Independence Army and other non-state armed groups.

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<sup>394</sup> Although Western Command was not assigned territory in the region affected by the Offensive, some of its battalions are reported to have traveled to eastern Myanmar to participate in the Offensive. FBR, “Campaign of Brutality,” p. 79.

- Abuses committed by non-state armed groups and other actors in the context of armed conflict in Myanmar.

While the focus of this investigation is on events in Thandaung Township that have occurred as part of the Offensive, violence has been a facet of life for many in Myanmar for decades. In some parts of the country, conflict remains and abuses continue. The legacy of such violence and the accompanying insecurity it has instilled has yet to be adequately addressed. Until that time, Myanmar's transition will remain incomplete.