

SEEKING ACCOUNTABILITY FOR

ENDING IMPUNITY IN BURMA



ANALYSIS OF WAR CRIMES
LEGAL AID NETWORK

Seeking Accountability for Ending Impunity in Burma Analysis of War Crimes

Taking Place in Ethnic States

Northern Shan State

Karenni State

Kachin State



Contents

	Acknowledgement	1
	Executive Summary	2
	Introduction	
Part I	A Brief Background of War Crimes	4
Part II	Geopolitical Importance of the Mong Ko Territory	10
Part III	Types of War Crimes	14
Part IV	Excessive Use of Military Might, Resulted in Commission of Heinous War Crimes (Using the Detained Villagers as Human Shield)	15
Part V	Independent Status of the Karenni State, Natural Resources Exploitation and War Crime	22
Part VI	The Economic Relevance of the Tanai Territory, The Self-determination and War Crimes	28
Part VII	Superior/Command Responsibility & Chain of Command (Mong Ko War Crimes)	39
Part VIII	Concluding Analysis and Recommendations	43

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Legal Aid Network
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Executive Summary

This report provides detailed analysis of three recent incidents of war crimes committed with impunity by the Myanmar Army in northern Shan State, Karenni State and Kachin State. In each case, the politico-economic context of the conflict is analyzed, and the atrocities are examined from the aspects of the Rule of Law, human rights and federalism.

The first incident – involving large-scale use of villagers as human shields - occurred in November 2016, in Muse District, northern Shan State, when the Myanmar Army were fighting against the Northern Alliance forces at Mong Ko, close to the Chinese border. The Myanmar troops were in danger of losing a tactical hilltop base close to Mong Ko, and were using every means to defend it, including heavy artillery and air power, due to the geo-political and economic importance of this border trading zone.

On November 20, Myanmar troops under Light Infantry Division 99 came to the nearby village of Man Jat and forced 147 villagers to come to their hilltop base. They were forced to lie face down on the ground around the base, without moving, while guns and mortars were fired over their heads. They remained there for thirteen days. Thirteen villagers were injured by gunfire and grenades, and two killed. One of the injured men lay bleeding all night without being treated, until Myanmar military medics came and amputated his arm; even after the amputation, he was made to continue lying on the ground as a human shield. Only on December 3, during a lull in the fighting, were all the villagers finally able to escape.

The second incident described is the extrajudicial killing of three Karenni soldiers and one Karenni civilian by Myanmar Army troops on December 20, 2017, after the Karenni troops had challenged the Myanmar troops for transporting illegal timber past a Karenni National Progressive Party (KNPP) checkpoint. Details of the killing, whereby the victims were disarmed and tricked into posing for a photograph, only to be shot in cold blood, provide clear evidence that this was a war crime. It is analyzed that the crime was intended to intimidate the Karenni National Progressive Party (KNPP) from challenging the Myanmar Army's theft of the natural resources in Karenni State, and also to pressure the KNPP into signing the Nationwide Ceasefire Agreement.

The third incident took place when nearly 4,000 civilians were fleeing the Myanmar Army offensive in gold and amber mining areas of Tanai, Kachin State in January 2018. The civilians were deliberately blocked Myanmar troops from leaving the area for 13 days, in order to serve as human shields against the Kachin Independence Army (KIA). They were ordered to take a path known to be planted with land mines; their property was looted; men were tortured; and delivery of humanitarian assistance was blocked.

The pretext for the Myanmar Army "clearance operation" in the Tanai area was to stop illegal mining and protect the environment. However, it is analyzed that the real intention is to seize control of the rich natural resources of the area themselves, as in the Phakant jade mining area. Tanai also lies in a strategic location, along the old Ledo road, linking China and northeast India.

It is analyzed that as long as civil war continues, such war crimes will continue to take place with impunity, but that genuine peace cannot be achieved under the current so-called peace seeking process, centered on the Nationwide Ceasefire Agreement (NCA). Myanmar military leaders are simply exploiting the process to strengthen the operation of the 2008 Constitution, and accelerate the extraction and exploitation of natural resources owned by the Ethnic States.

The Legal Aid Network therefore makes the following recommendations:

- United and coordinated efforts are urgently needed for the emergence of a democratic federal Constitution, along with Constitutions of the Ethnic States based on federalism principles.



- To overcome the deadlock in the peace process, the role of a Third Party, possibly formed by government representatives from China, Japan, Indonesia, Switzerland and Canada, should be demanded and facilitated.
- In order to take effective legal action against the Myanmar Army perpetrators who have committed heinous crimes, the UN Fact Finding Mission (UN FFM) should consider providing recommendations to the UN Security Council to transfer the situation of Burma to the International Criminal Court (ICC) or to form a new International Criminal Tribunal for Burma (ICTB).
- International and national organizations focusing on human rights must express their ethical and moral stand by condemning the Aung San Suu Kyi government, which is accountable under the practice of international law, namely, 'Superior/Command Responsibility', for their silence on the heinous crimes taking place in Ethnic States, including against the Rohingyas in Rakhine State.
- Economic sanctions should be imposed on Burma, as investments by foreign and national companies in Ethnic States are ignoring the rights of these States and their indigenous inhabitants.



Introduction

It is extremely sad to observe that there have been fewer calls for justice for severe human rights violations in Burma after the democratically elected government, led by Aung San Suu Kyi, took office in March 2016. Accountability for promotion and protection of human rights is completely missing, while human rights abuses are increasingly occurring in every corner of the country, becoming everyday practices involving different levels of authorities, particularly the Myanmar Army. At the same time, former democracy icon Aung San Suu Kyi and the National League for Democracy (NLD) are not speaking out for human rights at all, and are conspicuously silent on those human rights abuses which constitute heinous crimes – war crimes, genocide and crimes against humanity. Furthermore, no comprehensive policy on human rights has been drawn up by the NLD-dominated government since they took office.

As far as the legal system of Burma is concerned, the relationship between international law and national law is quite blurred. Many times, international law conflicts with national laws produced in line with the military-drafted 2008 Constitution. No existing law connects in any way with international human rights norms, especially with international humanitarian law, specifically the Geneva Conventions to which Burma is a party. Both legislative and executive branches are failing to comply with their first and foremost task, to ensure that these international human rights and legal norms are reflected in the drawing up of any national laws and regulations, while practicing them daily.

It is highly regrettable that, except for some ethnic based CSOs, almost no national organization claiming to be working for human rights, is pointing out the government's failure to take action on the aforementioned heinous crimes, raising questions about the legitimacy of those so-called human rights organizations, who are breaching their own ethics.

At the national level, due to lack of jurisdiction, independent existence and competency, civilian courts are unable and unwilling to seek accountability for heinous crimes allegedly committed by the Myanmar Army – which in major cases may be implied to be partially or fully authorized by the government. This has negatively resulted in impunity being permanently enjoyed by the perpetrators, and has abetted them in continuously committing such crimes one after another.

In spite of their declared intention to facilitate peace-seeking in Burma, a noticeable part of the international community, which is primarily oriented to economic interest rather than human rights, justice, and the rule of law, is now supporting the process of the 21st Century Panglong conference and the so-called political dialogues being conducted under the incumbent Nationwide Ceasefire Agreement. This has further aggravated the underlying issues of civil war in Burma instead of promoting genuine peace, while accountability for serious human rights violations amounting to international heinous crimes has been intentionally neglected. So long as such a situation continues to exist, the achievement of genuine peace in Burma will be unattainable.

This report will not be a complete compilation, as we cannot cover all the war crime cases which have happened in the Ethnic States from 2011 onwards, but we have focused on war crimes which occurred in Mong Ko, in the northern part of Shan State at the end of 2016. We have also attempted to uncover the truth in a similar case which happened at the start of 2018 in Kachin State. Nevertheless, we hope that this will to a reasonable extent become prima facie evidence of acts of war crimes by which the international community – with the increasing support and cooperation of our national ethnic CSOs, accountable media, victims of those heinous crimes and other people – can take action against the perpetrators, who have been enjoying ongoing impunity. In so doing, we expect that, with the underpinning of the Rule of Law, the situation of human rights can be promoted, and a societal change be facilitated, leading to achievement of genuine peace, which will pave the way for development of the Ethnic States and peoples living therein.



I. A Brief Background of War Crimes

The civil war in Burma is the longest-running in the world. It was born together with the independence of the country from the British in 1948, lasting 70 years until this year. It has inflicted countless casualties and atrocities on people, especially the ethnic minorities in the war torn zones. Almost all were committed by the Myanmar Army under successive military governments, including the civilian-camouflaged military government of President Thein Sein from 2011 to 2016. More heinous war crimes and genocide have been committed by the same perpetrators under the so-called democratically elected civilian government which assumed power in 2016.

In order to terminate the civil war, commencing with the Communist Party of Burma (CPB), ethnic armed revolutionary organizations have been attempting for many decades to settle political issues through political means, by establishing political dialogues among the belligerent parties. Unfortunately, these attempts have been ignored by successive Myanmar military regimes. The CPB was overthrown by the United Wa State Party (UWSP) in April, 1989: and, in the ensuing months the Myanmar military regime, led by General Khin Nyunt, entered into a formal ceasefire with the latter. Since then, the term 'ceasefire' has come into force. In 1990, the Democratic Alliance of Burma (DAB)¹ – an armed alliance of democratic and ethnic forces – publicly demanded a nationwide ceasefire – which would encompass the entire country, rather than a part or some parts of it – in support of their call for peaceful political dialogue. However, the Myanmar military regime repeatedly turned a blind eye to this.

A few months after the Thein Sein regime took office in 2011 under the 2008 Constitution, fighting between the Myanmar Army and the Kachin Independence Organization (KIO) reignited; and as a result, the ceasefire agreement between the former Myanmar military regime and the KIO in 1994 was broken.

Subsequently, the new military regime reactivated the ceasefire-oriented political ploy in 2012, rhetorically articulating peace in a way that the KIO could be lured into a ceasefire again, by adding the term 'nationwide'. This created conditions for the emergence of the Nationwide Ceasefire Agreement (NCA). A dichotomy exists between the nationwide ceasefire previously demanded by the DAB, and the Nationwide Ceasefire Agreement primarily fabricated by the Thein Sein regime: the former was to be declared, endorsed and applied unilaterally by the military regime only for a ceasefire first, and later pursued by the armed revolutionary organizations without signing any formal agreement; the latter – currently being manipulated by the Myanmar Army led by Commander-in-Chief Min Aung Hlaing – is a formal agreement to be used as a tool for legitimization of the so-called peace seeking process. The Thein Sein regime coaxed the EAOs which had already insisted upon a nationwide ceasefire, to be a part of the NCA.

Considering to take advantage of the opportunity for possible dialogue, the United Nationalities Federal Council (UNFC), led by the KIO, talked with the Thein Sein regime in order that underlying political agreements, to be procured after having dialogue, could be incorporated in the NCA, rather than releasing it as just a ceasefire agreement. As a result, the following political agreement can be found in Chapter (1) Para (1) (A) of the NCA notwithstanding contradiction of the status of the NCA, which must deal only with issues arising out of the ceasefire:

¹ The DAB – which was based in the Manaplaw liberated area, primarily established and controlled by the Karen National Union in Karen State – was a powerful revolutionary alliance, comprising democratic as well as ethnic forces. It initiated the drawing up of the future Constitution of the Federal Union of Burma (Draft) beginning in 1990. Subsequently, that process was inherited and carried out by the National Council of the Union of Burma (NCUB) and the Federal Constitution Drafting and Coordinating Committee (FCDCC). Reflecting the will of the ethnic leaders and their own States, described not only in the 1947 Panglong Accord, but also in the federalism principles enshrined in the Taunggyi Conference convened in 1961, the draft Constitution proposed 'National States' and 'Nationalities States' – in terms of constituent units of the Federal Union – while rejecting formation of 'Divisions' applied in accordance with the 1974 Constitution, which has been adopted by the 2008 Constitution.

In the ensuing years, the Burma Lawyers' Council provided legal academic assistance; the Women League of Burma (WLB), ethnic CSOs, and ethnic youth and human rights organizations also joined the process; with the participation of constitutional and legal experts from the international community, a series of meetings, workshops and seminars were held. After taking about 18 years, the second draft of the Federal Constitution was produced under the sponsorship of the FCDCC.



Aiming to non-disintegration of the union, non-disintegration of national solidarity and perpetuation of sovereignty², based on the principles of democracy and federalism and in the spirit³ of Pang Long, the Union – that fully guarantees democratic rights, national equality and the right to self-determination – is to be established in accordance with the outcomes of the political dialogue on the basis of freedom, equality and justice.⁴

However, due to the vague terms described not only in the above paragraph but also in other parts of the document, confusion, exacerbating the status of human rights, has ensued rather than stability of the country. For instance, instead of invoking specific agreements enshrined in the Panglong Accord, executed on February 12, 1947, the document merely mentions the term ‘spirit’ of Panglong. Similarly, there are no accurate definitions of ‘federalism’ ‘national equality’ and ‘the right to self-determination’ in the entire text. As such, when an attempt to enforce the above mentioned political agreement is exerted, no specific progress can be made for the emergence of a genuine federal Union; on the contrary, the whole process is now ending up within the framework of the 2008 Constitution.

In the above political agreement, the exception phrase – ‘in accordance with the outcomes of the political dialogue’ – dominates the entire paragraph. It connotes that even though ‘federalism’ ‘national equality’ and ‘the right to self-determination’ should be expected as per the NCA, the potential for this depends only on the subsequent processes of the forthcoming so-called political dialogues, rather than on the accurate definition and realization of the terms already provided for in the NCA.

Later, it can be clearly found that the said potential has already disappeared: in accordance with Para 6.2 of the Framework for Political Dialogue, resulting from the NCA, strict procedural control over so-called political dialogues has already been imposed by the Myanmar military leaders as follows:

‘Important matters submitted to the Union Peace Conference by the Working Committee including those related to the establishment of a Union based on federal principles, national security, and security reintegration must be approved by at least 75 percent of the attendees from each group, and by at least 75 percent of all the attendees.’

Accordingly, the emergence of a genuine Federal Union⁵ can never be expected, given that whenever there is a motion to decide on federal principles, the ethnic leaders will lose, as the minimum required number of votes is too high, while representatives from the Myanmar Army can apply a minority veto. This is the negative result caused by the Framework for Political Dialogue arising from the NCA.

In addition, the NCA lacks an enforcement mechanism, which is an essential requirement for every contract. Even though the NCA is invoked by the signatory organizations, re-ignition of fighting by the Myanmar Army has not been able to be deterred. The worst is that in the entire text of the NCA, there is no provision which establishes a nexus between the NCA and the effective laws in the country. The agreements in the NCA are not judiciable. Consequently, from the aspect of enforcement, the existence of the NCA is meaningless: the aggrieved party cannot rely on the courts to adjudicate disputes arising out of the NCA, as a last resort, while the Joint Monitoring Committee⁶ is unable to work effectively due to the fact

² The term ‘sovereignty’ here is quite vague: it reflects ‘State Sovereignty’ oriented to the establishment of a Unitary State, wherein ‘Rigid Centralization’ is primarily practiced. It is not suited to federalism in which ‘Optimum Centralization’ must be sought while endorsing ‘Popular Sovereignty’ and ‘Provincial Sovereignty’. As such, in regard to ‘Sovereignty’, the future Burma should exercise the principle, ‘the sovereignty of the Union belongs to the Ethnic States, which constitute the Federal Union, and people residing therein.’

³ Here, the term ‘spirit’ is not only ambiguous but also utterly irrelevant. If it is enforced, complexities will arise. How can a spirit be enforced? If Pang Long is referred to, the agreements reached in the said Accord should be invoked.

⁴ The Chapter (1), Paragraph (1) (a) of the NCA

⁵ When federalism is practiced, particularly for Burma, natural resource management – which should be done in line with an appropriate land policy – is of paramount importance. Any land policy to be practiced by governments, regardless of whether federal or state governments, should legally recognize the right to ownership of land by individuals (with limitation) and collective ownership and right of land use by indigenous people, while primarily authorizing the governments of the Ethnic States to manage other lands as per the new land laws, reflecting the UN Declaration on the Right to Development and the UN Declaration of the Rights of Indigenous Peoples, to be enacted in accordance with the Constitution of the Federal Union of Burma.

⁶ Chapter 4 Para 12 of the NCA



that it is not an independent institution, but formed primarily with representatives from the belligerent parties. Quite apart from the enforcement issue arising from lack of implementation of the measures to be taken during the interim period,⁷ even the 'ceasefire' itself has not been able to be maintained.⁸

Hence, the NCA has not become a legal document which would underpin the Rule of Law, sine qua non for promotion and protection of human rights. Rather, it has become a document which legitimizes the so-called peace talks. The 21st century Panglong conference and subsequent political dialogues being convened under the NCA, have to a noticeable extent been able to divert the attention of people in Burma and the international community from severe human rights violations, including war crimes, which have happened in Mong Ko territory in northern Shan State and other ethnic States. It is evident that the incumbent NCA is not enabling a genuine peace seeking process to materialize.

As such, both the content of the NCA and the procedures to enforce it has complicated the entire so-called peace seeking operation. Already, during the process of completion of the NCA, the efforts of the ethnic leaders to include concrete, comprehensive and accurate political agreements have been overridden by the Myanmar military leaders – former and incumbent. By taking an upper-handed position, the Thein Sein regime twisted the terms of the NCA gradually in favor of the military, in line with the framework of the 2008 Constitution, through a series of long talks, making the ceasefire dialogues seem like an actual peace process.

In addition, violating public commitments to include all EAOs in the peace seeking process, the regime steadfastly refused to allow some EAOs to participate in the process. Afterwards, the then Thein Sein regime exerted unjustified pressure on the EAOs and rushed them into signing the NCA before the general elections on 8th November 2015, as the military foresaw that their proxy party, the Union Solidarity and Development Association (USDP), might lose to the National League for Democracy led by Aung San Suu Kyi.

The crippled negotiation talks continued feebly till eight out of fifteen EAOs reached agreement to the repeatedly revised NCA and signed it on 15 October 2015. The rest of the EAOs, including the members of the UNFC, declined or dropped out of the process due to perceived unfairness and distorted terms in the NCA. Nevertheless, they have continued to hold dialogues, believing that underlying political issues of Burma must be resolved by peaceful political means, and have continued to ask for discussion on amending the terms in the NCA to reach a fair and mutually beneficial agreement, which might pave the way for the emergence of a genuine federal Union.

In the aftermath of the signing of the NCA on October 15, 2015, the UNFC, led by the KIO, submitted 8 points in order that further dialogue could be established to find a way out of the crisis arising from the NCA. Unfortunately, no fruitful result can be seen up to the present time, as the Myanmar military leaders have kept on adhering to the NCA, without providing any opportunity to let it be amended.

Despite the fact that Aung San Suu Kyi and the NLD prioritized internal peace in their three election campaign slogans,⁹ they had to compromise with the Myanmar Army leaders after winning the elections to be able to form the NLD-led government, agreeing not to interfere in military affairs. Since then, the Myanmar Army has enjoyed full autonomy in all military affairs, and the Aung San Suu Kyi government has been completely silent when the former scaled up the war in Mong Ko using heavy artillery and jet fighters. Even under the previous administration led by ex-General Thein Sein, at least two Presidential Orders were issued to cease fighting in Kachin State, in support of establishing dialogues.

⁷ Chapter 6 Para 25 of the NCA

⁸ Maintenance of a ceasefire depends only on the will of the leaders of the Myanmar Army, and is against the Rule of Law. Although the UWSP reached a ceasefire agreement with the Myanmar military leaders in 1989, it has not yet entered the NCA. However, there has been no fighting at all between the two belligerent parties. Similar to the UWSP, the Shan State Progressive Party reached a ceasefire agreement in January, 2012. Unfortunately, the Myanmar Army has attacked the SSPP over two hundred times. The Shan State Restoration Council (RCSS) has already signed the NCA. Nevertheless, clashes happened in October, 2016 and later.

⁹ Achievement of Internal Peace, the Rule of Law and the Amendment of the State Constitution



This has not been the case for the elected government until now, due to unavoidable restrictions imposed by the 2008 Constitution: only when the election winning party is able to negotiate with and appease the leaders of the Myanmar Army, which control all State security institutions – the armed forces, the police and intelligence organizations – can it formally set up a government. As a result, the NLD has had to practice an undeclared policy: the civilian government does not interfere at all in the Myanmar Army's military affairs.

Therefore, it is evident that, in order to get the opportunity to form a government, the NLD leaders, led by Aung San Suu Kyi, have had to sacrifice the rule of law, human rights, and genuine principles of federalism in exchange for token power, and has sought the appeasement of the leaders of Myanmar Army.

After the NLD was sworn in as the new administration at the end of March 2016, the Myanmar Army intentionally launched fierce military operations, primarily targeting the non-NCA signatory groups - KIA, TNLA, AA and MNDAA. As of now, the NLD government has been keeping silent about all these operations, despite the clear evidence that heinous crimes have been committed by the Myanmar Army against civilians in ethnic States.¹⁰

The Myanmar Army launched offensives against the Arakan Army (AA) in mid-April 2016, against the 2nd Brigade of KIA in early April 2016, against the KIA in Mungsi township from 15th to 18th of May 2016, and against the TNLA and RCSS in the areas of Nam Kham, Man Tong and Kyaukme from 1st to 7th of May 2016. In addition, special military operations were also launched against Gidon Hilltop, a strategic defensive position for the KIO Headquarters in Laiza, with heavy airstrikes commencing from 17th August 2016. This is an undisputed violation of the agreement made between the KIO and the regime in October 2013, to reduce the momentum of the war.

The Myanmar Army has deliberately carried out these synchronized military operations on the one hand, while on the other, the National Reconciliation and Peace Center, formed by Aung San Suu Kyi's new administration in July 2016, has been striving to persuade the non-signatory EAOs to sign the NCA and participate in the current sham peace process. After Commander-in-Chief Min Aung Hlaing and Aung San Suu Kyi delivered their speeches at the opening ceremony of the 21st Century Panglong Conference on August 31, 2016, both respectively highlighted that the NCA was the only peace seeking process and it was obligatory for all EAOs to sign it first. With the political support of the NLD government and Aung San Suu Kyi, the Myanmar Army accelerated its military operations against the KIA by using more powerful air strikes and heavy artillery.

While the Myanmar Army was increasing its ferocious military operations on the ground, Commander-in-Chief Min Aung Hlaing reaffirmed his rigid position in his speech on August 31, 2016, asserting that agreeing to the NCA was a must, and was the only process for EAOs to participate in the current so-called peace process, in accordance with his six-point peace policy.¹¹ By observing points 5 and 6 alone, it can be realized that it is totally impossible to achieve genuine peace. This is primarily because they stipulate that the 2008 Constitution¹² will continue to exist as an untouchable sacred entity, while the entire country will have to abide by a number of draconian laws which deny the individual rights of people as well as the collective rights of all ethnic nationalities, enacted under the 2008 Constitution.

¹⁰ Prof. Yanghee Lee, UN Special Rapporteur on Human Rights Situation for Myanmar, stated that Aung San Suu Kyi was responsible in terms of "complicity, or neglecting to do anything about it, or halting this," <https://asiancorrespondent.com/2018/02/aung-san-suu-kyi-guilty-crimes-humanity/#ifxgTRrO6Qz5KmeF.99>

¹¹ <http://www.nationmultimedia.com/asean&beyon/Tatmadaw-outlines-6-point-policy-for-peace-talk-30243970.html>

The six-point policy of the commander-in-chief is:

1. to have a keen desire to reach eternal peace,
2. to keep promises agreed to in peace deals;
3. to avoid capitalizing on the peace agreement,
4. to avoid placing a heavy burden on local people
5. to strictly abide by the existing laws, and
6. to march towards a democratic country in accord with the 2008 Constitution.

¹² Article 445 of the 2008 Constitution grants blanket amnesty to past military regimes which have committed heinous crimes. As such, so long as the said Constitution continues to exist, impunity will continue and repeated violations of human rights can never be prevented.



Since the time of independence of Burma, unfair exploitation of land and natural resources by successive democratic governments as well as military regimes -- ignoring their original owners which are the ethnic Provinces¹³ - has been a major root cause of civil war, leading to severe human rights violations. Article 37 of the 2008 Constitution provides that the State is the ultimate owner of all lands and all natural resources; and Article 47 denotes the State¹⁴ as the legislative and executive authority which assumes power at the central level. Both Articles constitutionally authorize the central government -- effectively dominated by the Myanmar military leaders -- to continue exploiting land and natural resources for whatever they deem fit, thereby exacerbating resentment of the ethnic nationalities in their own Provinces which constitute the Union.

Hence, under the 2008 Constitution, fair management of land and fair sharing of natural resources owned by the Ethnic Provinces, can never be expected nor can civil war be terminated.

The same is true for other effective laws which have deprived the Ethnic States of their right to own lands and natural resources. For instance, the Special Economic Zone law enacted in 2011/2014 endows power only to the central government to continue exploiting lands and natural resources. Hence, Commander-in-Chief Min Aung Hlaing's rigid principle -- to strictly abide by existing laws -- can never work for termination of civil war, as it does not lead to fair sharing of natural resources.

In the aftermath of the Union Peace Conference, also known as the 21st Century Panglong Conference, the Myanmar Army even escalated military offensives against the KIA with major air strikes, combined with heavy artillery support. As a consequence, KIO/KIA representatives have been reluctant to participate in any NCA talks held after October 2016.

The Myanmar Army increased and extended its military operations not only against the KIA, but against the Myanmar National Democratic Alliance Army (MNDAA), Ta'ang National Liberation Army (TNLA) and Arakan Army (AA) around the Mong Ko area, Muse District in northern Shan State. All the above-mentioned prevailing conditions cornered the KIA and the other marginalized EAOs -- TNLA, AA and MNDAA -- in the last resort into forming a military alliance called the Northern Alliance in December 2016 to defend themselves together against the Myanmar Army.

In conclusion, the following factors pressured the Northern Alliance to launch a coordinated counter assault on the Myanmar Army in the end of 2016:

1. Even if any type of dialogue had continued under the incumbent NCA, a political way-out which might lay down a foundation for the emergence of a genuine federal Union could not be seen;
2. Repeated demands by the Northern Alliance itself or previously through the UNFC, for talks instead of war, were totally ignored by the leaders of the Myanmar Army as well as the NLD government; and,
3. By using excessive military power, the Myanmar Army had launched major offensives against the KIA and other members of the Northern Alliance, which resulted in increasing number of IDPs in addition to serious human rights violations; meanwhile, the NLD government had been keeping silent.

In order to crush this counter assault, in addition to using heavier artillery with more powerful airstrikes, the Myanmar Army forced local people, numbering about 160, to be human shields in defending their Tactical Hill in Mong Ko town. It also committed a series of other war crimes in northern Shan State. When no action against the Myanmar Army was taken for their violation of international humanitarian law, similar war crimes were also committed in Tanai township in Kachin State in January, 2018.

¹³ Here, the term 'Province' is used to discriminate it from another term 'State' which encompasses the entire country under the 2008 Constitution.

¹⁴ In order to hoodwink the international community, incorrect translation was made by the Myanmar military leaders in the 2008 Constitution: if Burmese term နိုင်ငံတော် is translated into English, it should be the *State* but not the *Union*. the *Union* is ပြည်ထောင်စု in Burmese language.

II. Geopolitical Importance of the Mong Ko Territory

Mong Ko territory is situated in an area of crucial strategic geopolitical and economic importance.

Shwe Gas & Oil Pipeline

The Mong Ko territory was and is a main center of conflict because of the economic and strategic resources connected to its location. The Shwe gas and oil pipelines, the nearby Muse-Mandalay highway, and the 105 Mile border trade zone are determining factors for geopolitical developments on a national, regional and supra-regional level.

The strategic relevance of this territory extends throughout Burma because of the importance of the highway as the main link for imports and exports between China and Burma and future developments related to the Chinese One Belt One Road OBOR initiative. The final destination of the oil and gas pipelines from Rakhine State, with the planned extension of Special Economic Zones SEZs and the Kyauk Pyu deep-sea port, must also be considered.

In addition, the “Act East” policy of the current Indian government also represents a parallel further dimension in the economic relevance of this area, in relation to possible geopolitical conflicts between the two main regional powers, with foreseeable competing interests and potential crises extending to large areas of northern and eastern Myanmar.

The development of dry ports along the “corridors” connecting the region is one of the main goals of the development of the area. One of the plans for Muse will probably be connection with India through the central hub of Mandalay, crossing the Myanmar-India border dry port located in Tamu.¹⁵ Moreover there are plans to upgrade the Muse-Mandalay highway¹⁶ and the construction of a railway¹⁷ on the same route, involving possible extension and overhauling of the whole national railway system.¹⁸

By developing the Kyauk Pyu deep-sea port, as a further step in fully utilizing the capacity of the pipeline, China can avoid the South China Sea to transport about 6 per cent of its total crude oil imports. The investment for the deep-sea port is about \$7.2 billion, while an additional \$2.3 billion will be invested in an industrial park, with plans to attract industries such as textiles and oil refining.¹⁹ Although negotiations are not finalized yet, it seems that a consortium led by China's CITIC corporation will have a 70% share of the ownership of the project. The remaining share will probably be split between the Myanmar Government and 52 Burmese companies.²⁰

In the Northeast, the China-Myanmar pipeline passes through northern Shan State, where four EAOs are active, while in the Southwest it runs through Rakhine State, contested by the Arakan Army (AA). In northern Shan state, in Muse and

¹⁵ Win A. N. Gilmore S. Kerry Logistics kicks off Myanmar's dry port plan. *Myanmar Times*. January 13, 2016. <https://www.mmmtimes.com/business/18450-kerry-logistics-kicks-off-myanmar-s-dry-port-plan.html> Accessed February 22, 2018.

¹⁶ Frontier Myanmar. *Myanmar Transport Infrastructure Brief*. 23-29 November 2017. p.6 <http://transport.frontiermyanmar.com/sites/all/libraries/ckfinder/userfiles/files/MTIB%2029%20November%202017.pdf> Accessed February 22, 2018.

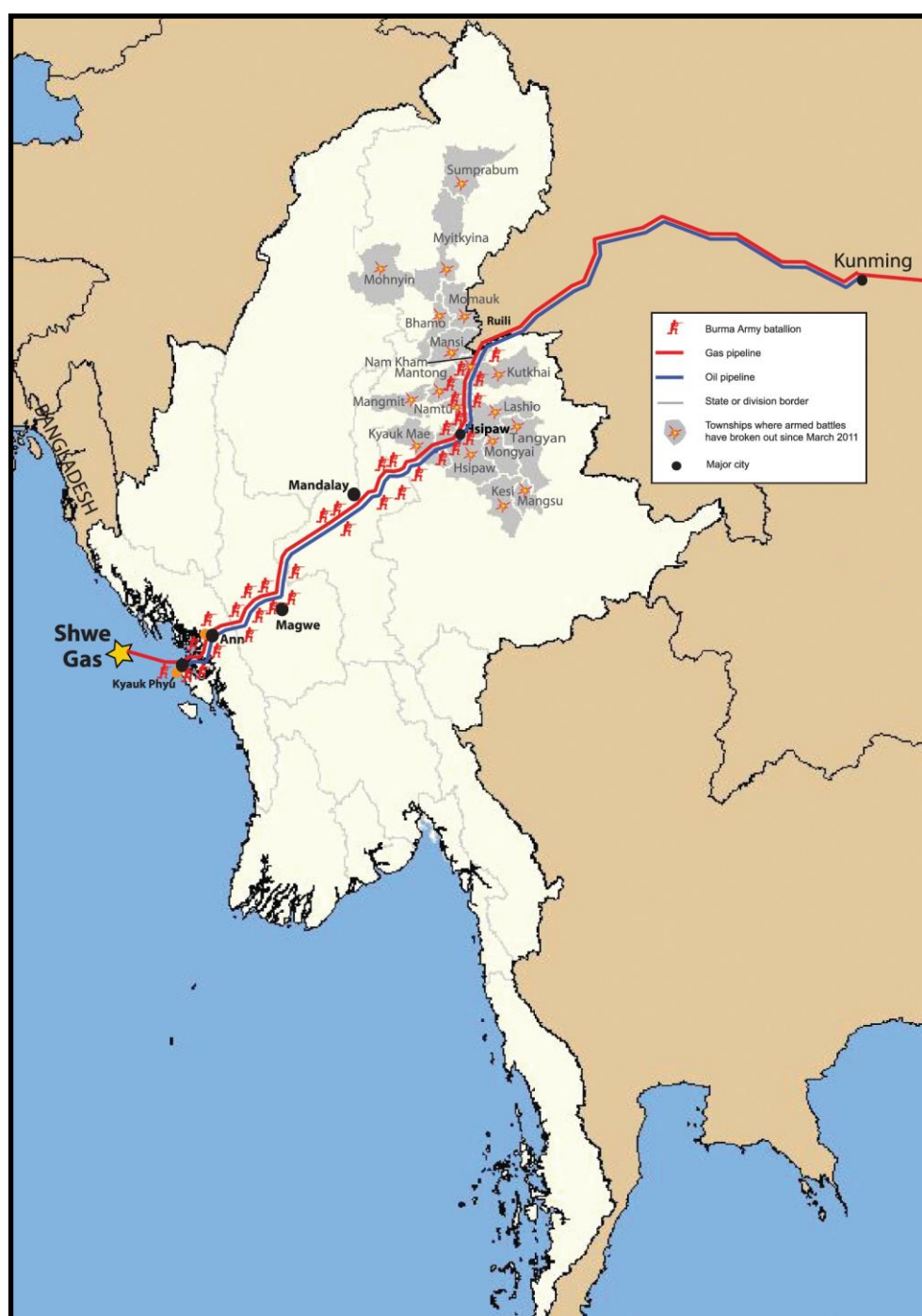
¹⁷ Editor notice. Myanmar rail news roundup. *Railprofessional.com*. June 23, 2017. <https://www.railprofessional.com/news/myanmar-rail-news-roundup> Accessed February 22, 2018.

¹⁸ Rupakjyoti B. India-Myanmar-Thailand Trilateral Highway: A Promise to Transform the Region's Economic Landscape. *Japan Forward*. August 28, 2017. <https://japan-forward.com/india-myanmar-thailand-trilateral-highway-a-promise-to-transform-the-regions-economic-landscape/> Accessed February 22, 2018.

¹⁹ Yimou L., Wa L. China's \$10 billion strategic project in Myanmar sparks local ire. *Reuters*. January 8, 2017. <https://www.reuters.com/article/us-china-silkroad-myanmar-sez/chinas-10-billion-strategic-project-in-myanmar-sparks-local-ire-idUSKBN18Z327> Accessed February 22, 2018.

²⁰ Yimou L., Thu Thu A. China to take 70 percent stake in strategic port in Myanmar – official. October 17, 2017. <https://www.reuters.com/article/china-silkroad-myanmar-port/china-to-take-70-percent-stake-in-strategic-port-in-myanmar-official-idUSL4N1MS3UB> . Accessed February 22, 2018.

Laukkaing districts, the Kokang Army/Myanmar National Democratic Alliance Army (MNDAA) is the main ethnic armed organization. The Kachin Independence Army KIA's Brigades 4 and 6 primarily operate in Muse and Kutkai townships, while the Ta'ang National Liberation Army (TNLA) designates the Palaung Self-Administered Zone, consisting of Manton and Namhsan townships, as its territories, in addition to others. The above mentioned infrastructure and development plans are being undertaken mostly in these areas. Moreover, the 'Wa' Self-Administered Division, claimed by the UWSP as Wa State, is about 100 kilometers distant from the pipeline. Mong Ko is about 80 kilometers away from the point at which the pipeline enters China (see the map).



Shwe Gas & Oil Pipeline goes across the Mong Ko area

Since 1989, the Myanmar Army has portrayed itself as one of the main actors in the development of the border areas and ethnic nationalities residing therein. However, this top-down development program implemented by successive military regimes, claiming to be developing ethnic minority regions, mainly through the expansion of physical infrastructure and the state bureaucracy,²¹ has been a complete failure.

²¹ Brenner, D. (2017). The Development-Insecurity Nexus: Geo-economic Transformations and Violence in Myanmar. *LSE Global South Unit Working Paper Series. Working Paper No 1 2017*.

Border Trade

There are four official border trade points between Burma and China: Muse (well-known as the 105 Mile Border Trade Zone), the biggest one, in northern Shan State; Lwejel in Kachin State; Chin Shwehaw in northeastern Shan State' and Kanpita Tee in Kachin State. The bilateral border trade volume of the Muse (105 Mile Border Trade Zone) alone reached about 5.378 billion US dollars in the 2015-2016 fiscal year, while that of the fiscal year 2016-2017 decreased slightly to 5.362 billion dollars. However, it is likely to increase this current fiscal year 2017-2018 since the total volume was about 4.118 billion dollars at the end of December, 2017.²²

No	STATION	2015-2016			2016-2017			2017-2018		
		EXPORT	IMPORT	TRADE VOLUME	EXPORT	IMPORT	TRADE VOLUME	EXPORT	IMPORT	TRADE VOLUME
1	MUSE	3809.517	1568.36	5377.877	3703.898	1657.791	5361.689	2865.922	1252.174	4118.096
2	LWEJEL	64.338	12.617	76.955	186.193	15.877	202.07	142.243	10.597	152.84
3	CHIN SHWEHAW	332.989	52.786	385.775	515.6	57.579	573.179	425.359	37.171	462.53
4	KANPITETEE	28.796	67.448	96.244	64.094	42.477	106.571	45.633	24.806	70.439
5	KYAING TONG	6.482	7.349	13.831	2.09	2.398	4.488	0.208	1.276	1.484
6	TARCHILEIK	9.66	64.929	74.589	14.46	66.94	81.4	12.448	48.93	61.378
7	MYAWADOY	43.785	682.327	726.112	60.199	868.402	928.601	59.372	617.933	677.305
8	KAWTHAUNG	46.38	86	132.38	69.284	64.637	133.921	87.444	47.388	134.832
9	MYEIK	140.829	30.17	170.999	157.109	52.419	209.528	136.934	52.617	189.551
10	NABULAE/ HTEE KHEE	2.01	11.181	13.191	11.19	0.696	11.886	3.535	5.679	9.214
11	MAWTAUNG	0.401	2.111	2.512	2.274	0.965	3.239	3.367	1.722	5.089
12	MESE				0.219	0.228	0.447	0.237	0.336	0.573
13	SITTWE	5.346	0.981	6.327	4.465	0.184	4.649	8.503	0.086	8.589
14	MAUNG DAW	5.37	0.065	5.435	5.918	0.027	5.945	8.31		8.31
15	TAMU	32.771	12.791	45.562	38.465	9.779	48.244	23.64	2.923	26.563
16	RHI	20.256	5.826	26.082	24.996	14.656	39.652	18.617	9.535	28.152
	TOTAL	4548.93	2604.941	7153.871	4860.454	2855.055	7715.509	3841.772	2113.173	5954.945

Source: Ministry of Commerce, Union of Myanmar

Comparatively, Muse border trade is about 75% of the total border trade volume made through all 16 official border trade points with China, Thailand, Bangladesh and India, in 2015-2016, and 69% in 2016-2017. The trade volume across the Muse border crossing in the fiscal year 2015-2016 was about 20% of the entire trade volume of the country and 18% in the fiscal year 2016-2017.²³

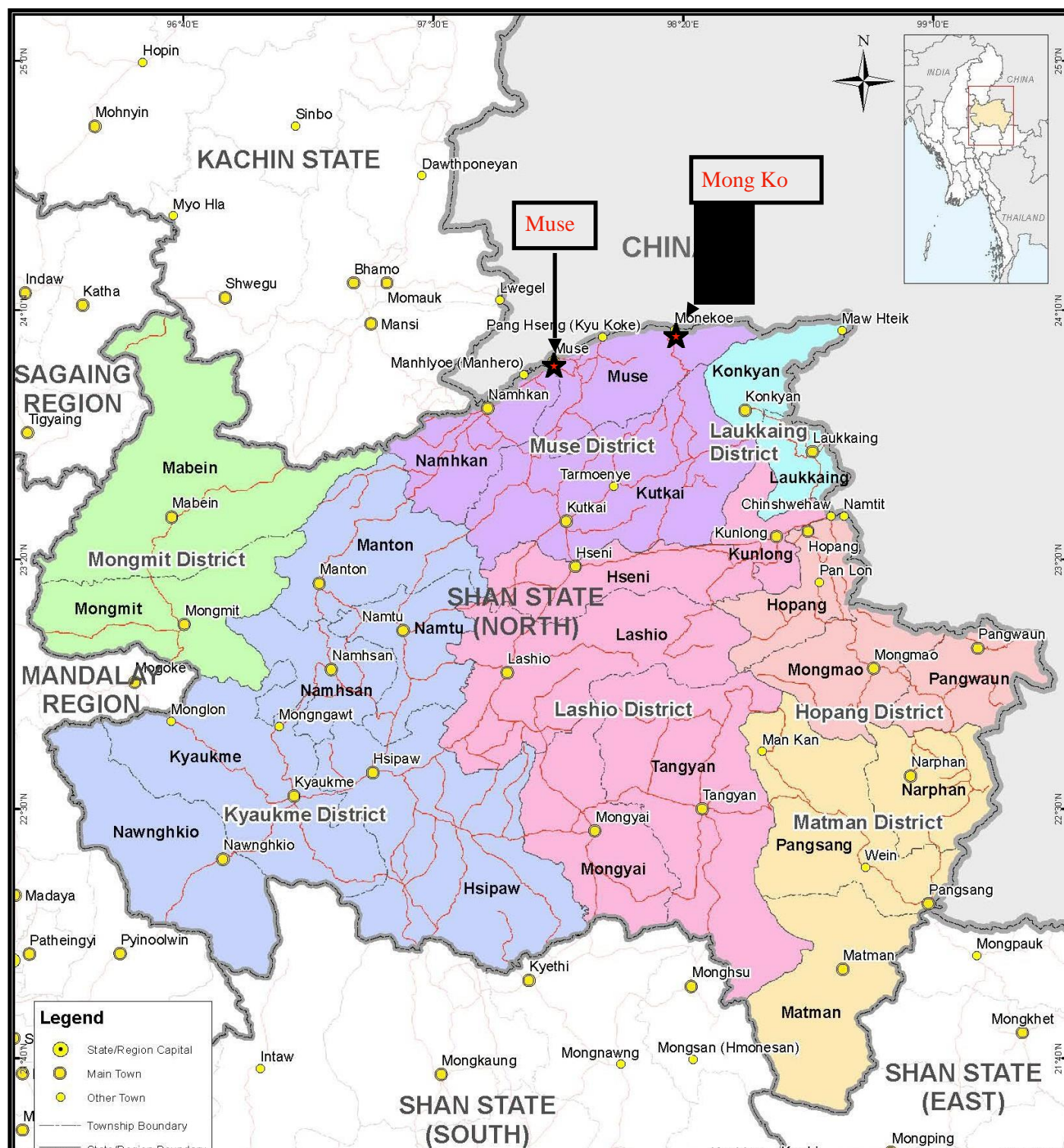
Therefore, the volume of the trade that goes across the Muse border point alone is approximately 15 million US dollars a day, representing a huge amount of income. China's Xinhua news agency even reported on December 1, 2016 that border trade had plunged about 210 million US dollars due to the Mong Ko battles in late November 2016.²⁴

It is evident that Muse is of politico-economic importance. That is the prime reason for the Myanmar Army's ferocious military operations, supported by air strikes and heavy artillery, in late 2016. They wanted to control and defend Muse and the surrounding areas, including the motor roads to Muse and other strategic points, namely the Mong Ko Tactical Hilltop. This involved serious violations against a number of local people in the Mong Ko territory, amounting to war crimes.

²² <http://www.commerce.gov.mm/en/article/exportimport-border-trade-situation-myanmar-2012-2013-fical-year-2017-2018-fical-year-2>

²³ <http://www.commerce.gov.mm/en/content/ပုံမှန်-နယ်စပ်-ပို့ကုန်-သွင်းကုန်>

²⁴ http://www.xinhuanet.com/english/2016-12/01/c_135873745.htm

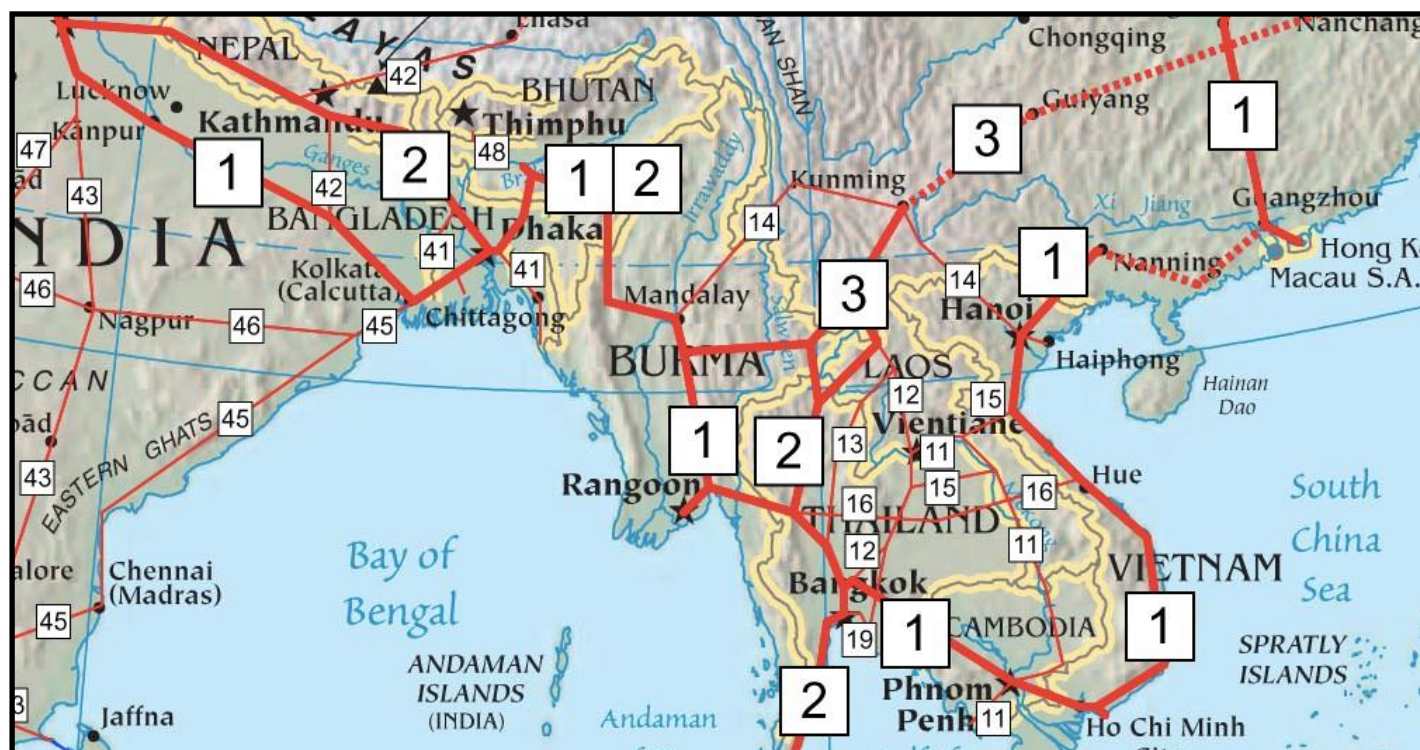


Mong Ko is close to Muse (105 Miles) Border Trade Point

Asian Highway 14 (One Belt One Road)

Apart from the Shwe Gas & Oil pipeline projects and Muse (105 Miles) Border Trade Zone and Special Economic Zone projects, another crucial factor adding to the importance of this strategic location is the multinational mega project, the Asian Highway Network (also known as Great Asian Highway) which traverses at least 32 countries and is endorsed by the UN ESCAP and the Asia Development Bank. This road project has already started and is well embedded in the Chinese initiated One Road One Belt Initiative. At least AH 1, AH2, 14 and AH 41 are linked and go through Burma.²⁵ Most importantly, AH 14 will go through Mong Ko territory, via Muse. (see Map)

²⁵ https://en.wikipedia.org/wiki/Asian_Highway_Network



Asian Highway 14 (AH 14) goes across Muse

III. Types of War Crimes

The following types of war crimes²⁶ occurring in Ethnic States have been observed:

1. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operation
2. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives
3. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities
4. Torture
5. Intentionally directing attacks against buildings dedicated to religion; education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives
6. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions
7. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated
8. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
9. Committing rape
10. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

²⁶ Provided for in the Article 8 of the Rome Statute of the International Criminal Court



11. Willful killing and willfully causing great suffering, or serious injury to body or health
12. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
 - i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture
 - ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment
 - iii. Taking of hostages
 - iv. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
13. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;
14. Enforcing disappearances. (Primarily constitute crimes against humanity)

IV. Excessive Use of Military Might, Resulted in Commission of Serious War Crimes (Using the Detained Villagers as Human Shield)

The Northern Alliance Forces and the Myanmar Army started combat near Mankang village, about 2 miles away from Mong Ko, and the latter suffered many casualties. Afterwards, the former penetrated and swept into the outskirts of the contested town of Mong Ko and they were almost able to seize the entire town. A Military Tactical Hilltop, established and heavily fortified by the Myanmar Army as a military base of one of the battalions of No. 99 Light Infantry Division, is stationed near Mong Ko. During the Mong Ko battles, this hilltop was a major defensive position for the Myanmar Army to control the entire territory. If it could be occupied by the Northern Alliance Forces, Mong Ko town and the entire nearby territory, of crucial geopolitical and economic importance, would be under their total control. Therefore, the Myanmar Army used multiple tactics to retaliate, from heavy artillery and jet fighters to living human shields.

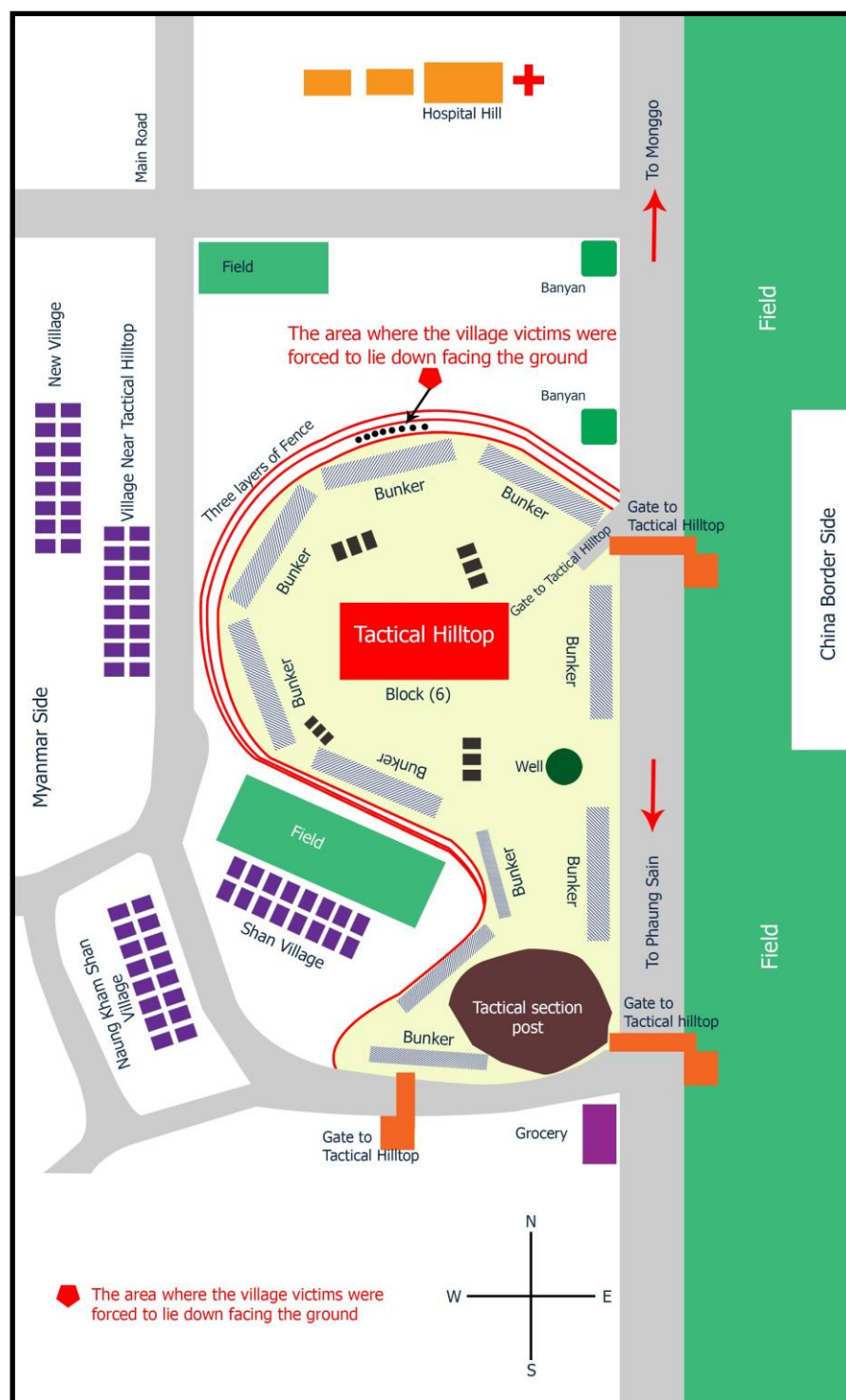
Mong Ko Tactical Hilltop is about 10 minutes' walk from Man Jat village tract in Mong Ko township. There are about 600 people in Man Jat village, inhabited by 47 Chinese and 43 Kachin households. Heavy combat broke out between the Myanmar Army and the Kokang (MNDAA)/Northern Alliance forces, which attempted to seize this tactical hilltop, at around 11 pm on November 19, 2016. The combat stopped at about 1 am the next day on November 20, 2016.²⁷

At about 4:00 am, on November 20, the Myanmar soldiers from that hilltop came to Man Jat village and arrested villagers. They shouted out in Burmese: "Why didn't you give us information about the (MNDAA) Kokang soldiers coming?"

The Myanmar soldiers took many villagers from a house where wedding celebrations were planned for the next day, to their Tactical Hilltop. The soldiers also robbed all the food prepared for the wedding. After that, the soldiers ordered the detained villagers to squat, with their faces looking down, in front of the house. The soldiers threatened the villagers with guns, and took all of them and some animals, such as cows and chickens, to Mong Ko Tactical Hilltop. 147 villagers were detained villagers, most of whom were Lisu (Kachin) and Chinese. In the evening of 20 November 2016, the Myanmar Army soldiers freed some women and children.²⁸

²⁷ Testimony collected by the Legal Aid Network - LAN's War Crimes Evidence Collection Group - WCECG

²⁸ *ibid*



Sketch of Mong Ko Tactical Hilltop where the civilians were used as human shields

The Mong Ko Tactical Hilltop was encircled with three rows of fences reinforced with barbed wire. The detained villagers were forced to lie down facing the ground between the first and second row. From November 20 to Dec 3, 2016, the villagers were kept there under tight restrictions by the Myanmar soldiers, who did not allow them to go anywhere, except for the call of nature. The villagers were not even allowed to move. They had to stay lying face down on the ground the entire day. Because of being forced to stay outdoors, the villagers had to suffer from scorching heat in the day, and severe cold at night. Only a few times, the villagers were allowed to sit up for an hour in a day. Most of the time they remained lying facing down on the ground.

The villagers were kept detained for 13 days. When the MNDAA/Northern Alliance forces attacked the Mong Ko Tactical Base hilltop, the Myanmar Army soldiers in the camp either stood above the detained villagers or came close to them and fired over them. The villagers were between the two military forces.



Not only were the Myanmar Army soldiers firing very close to them, but the MNDAA/Northern Alliance soldiers – exchanging fire with them and trying to seize the Tactical Hilltop – were very near as well. The Myanmar Army soldiers threw hand-grenades over the villagers' heads.

At first, the Myanmar soldiers did not provide the villagers with any food after they were captured and detained. They were only allowed to urinate twice a day. When the villagers asked for food and water on the fourth day, the Myanmar soldiers told the villagers, "We have rice, but we don't have to feed you. Go to the village and search every house for food. Then cook for all of us." Then, some soldiers and four villagers went into the village and took supplies, such as rice and blankets, and some villagers cooked in the houses near the Tactical Hilltop.

Later, Myanmar soldiers summoned some villagers who lived near their hill and ordered them to cook for all of them. The detained villagers knew that there were about sixty Myanmar soldiers in the hilltop base, because they saw their rice packets which were sent to them.

On 27 November 2016, the seventh day after being arrested, during an exchange of gunfire, a cartridge that came from a Myanmar military bunker hit the left arm of Witness (1), he yelled out in pain and asked for help. Even though he and other villagers were screaming for help, the Myanmar soldiers did not care about what had happened and instead, threatened to shoot them. The soldiers ordered, "Don't shout! Don't put your head up, or we will shoot at you all!" Nobody came to treat the injured man's wound. That night, with the help of some fellow villagers, he could compress his wound, but all of his clothes were stained with blood. His wound bled the whole night, and he fell unconscious many times. He was given no medication, and suffered extreme pain.

In the morning of the next day, 28 November 2016, he was unable to get up or even talk, but he was still provided with no medical treatment. He was in agony for 17 hours. His Chinese friend, Tung San, asked the Myanmar soldiers many times to look after his wound, but they did not do so.

Only at about 12 midday on 28 November, two military medics arrived. The villagers carried the patient inside the encampment and the medics checked his wound. One of them told him, "We have to cut off your arm as it has broken into pieces." He had no choice but to agree. They injected him twice with anesthetics and prepared to cut his arm with an ordinary knife; as there was not enough anesthetic, they poured two bottles of alcohol into his mouth. He almost passed out with pain.

After the amputation, he was unconscious until midnight. The next morning, his arm was buried somewhere within the compound of the Tactical Hilltop by Mr. Tung San, who took care of him. He was not given any medication after his arm was amputated. He had to return again to the grass as before; as a result, his wound became infected and bad smelling.

On the same day that he was wounded, another twelve detained villagers were seriously injured because of grenades thrown by the Myanmar soldiers, and two Chinese nationals died as well. They were Yang Si, 40 years old, and Jiu Pha's son, 19 years old.

At that time, MNDAA/Northern Alliance soldiers were encircling the Myanmar military's Tactical Hilltop. They shouted at the Myanmar soldiers; "Drop your guns! Put your heads up! Are you scared?"

On the 13th day of detention, at about 10 o'clock, in the morning of 3 December 2016, fighting between the MNDAA/Northern Alliance and Myanmar Army started again. Since the MNDAA/Northern Alliance combatants did not know that the villagers were detained and being used as human shields, they also kept on throwing hand-grenades. The villagers shouted to the MNDAA/Northern Alliance combatants that they were civilians and were behind two rows of fencing.



From that time, the MNDAA/Northern Alliance troops ceased firing and shouted back to the villagers in Kokant language, “We can’t fight because you are there. Hurry to run from there! If you don’t, all of you will die with the Myanmar soldiers. Hurry up!” At the same time, Myanmar soldiers ordered, “Don’t run, or we’ll shoot.”

The detained villagers were frightened by both sides of soldiers. However, they knew that if they stayed at the Myanmar military’s Tactical Hilltop, they would be killed, so they decided to risk running away when the gunfire stopped for a while.

The escaped villagers carried four wounded villagers to the MNDAA/Northern Alliance camp. The Alliance sent 46 of the escaped villagers to the border with China.

The total number of detained villagers was 147 at first. Most of them were Lisu (Kachin) and Chinese people. Later, women and children were released. Some villagers also ran away when they went to cook or were allowed to go to urinate. Finally, only 48 persons remained until they escaped from that embattled area.

After November 20, 2016, the Myanmar Army committed many more abuses, including arrests, torture and murder, apparently in retaliation for having suffered so many casualties.²⁹ Many houses and properties were damaged and many villagers injured and killed by indiscriminate bombing of civilians.³⁰ Many belongings of villagers were looted and destroyed by the soldiers after the villagers had fled from their homes for safety.^{31 32}

Unlike recent preceding battles, the Myanmar Army intentionally attacked civilian targets by various means -- shelling civilian housing areas, bombing indiscriminately, and burning civilian houses -- which could be defined as war crimes according to the Geneva Convention.

As the military operations escalated in Northern Shan State after November 20, 2016, the local people in the areas of Mong Ko, Hpawng Seng, Wadin Kapna, Pang Hseng, Namtau and other nearby villages fled in fear from their homes to seek refuge elsewhere.

Other war crimes besides the use of human shields

Apart from the atrocious cruelty of using human shields, there were other crimes committed by the Myanmar Army during the Mong Ko battles.

(1) Attacking or bombarding non-military objectives: towns, villages, dwellings or buildings, etc.

Myanmar Army soldiers from the Infantry battalions under Division 11 and 99 intentionally burned the houses and property of villagers in Man Jat on December 5, 2016. An eyewitness said that platoons from Division 11 and 99, consisting of about 5 soldiers each, burned at least eleven houses in Man Jat village on December 5, when the villagers fled up the hills to the China side.³³ Another eyewitness also confirmed burning of houses and animal stocks.³⁴

²⁹ Testimony collected by the Legal Aid Network - LAN’s War Crimes Evidence Collection Group - WCECG

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ Testimony collected by the Legal Aid Network - LAN’s War Crimes Evidence Collection Group - WCECG

³⁴ *ibid*



Houses, livestock, rice barns in Man Jet village seen from China side of the border

Daw E Lawng (60 years), U Aik San (50 years) and Maung Awng San (12 years) died of bombardment from a war plane at about 10:30 am on December 4.³⁵ Daw Aye Lawng and U Aik San died by one bomb at the same time and same place. Maung Awng San died at his house in another place.



Daw E Lawny (60 years) and Maung Awng San (12 years) died of bombardment by jet fighters

Soldiers from Division 11 captured 24 villagers from Namkha village on December 5, who were brought to Hpaung Sai village to use as porters. Maung Ai Hai was shot dead on the way by the soldiers since he could not walk any longer on December 6, and villagers from Hpaung Sai village had to bury him.³⁶ Another person, Ko Lut Aung, was killed on 14 December 2016 on his way to Muse for business. The Myanmar Army soldiers killed him without reason and burnt his motorbike.³⁷

³⁵ ibid

³⁶ Testimony collected by the Legal Aid Network - LAN's War Crimes Evidence Collection Group - WCECG

³⁷ ibid



(2) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

When the villagers returned to Mong Ko town on December 5, 2016, after the battles, their houses were found destroyed and their property lost. One lost his camera, and other property at his home was left unusable.³⁸ Saya U Tan Gun Awng's family lost his sewing machine and other belongings and Daw Lu Mai lost computers and related accessories. Food and other goods were also lost from Aik Khwal's Store and Yi Kham's Store.³⁹

During the time of combat, in the evening of 4 December 2016, at least 12 houses from Block 6 of Naung Hkam Village Tract, Mong Ko, were burnt down by the soldiers from Division 11 and 99. The owners of the houses were: (1) Mr. Hawng Hkawng, (2) Mr. Hawng Zawng, (3) Mrs. Nan Htang, (4) Mr. Zawng Hkawng, (5) Mr. Sue Aye, (6) Mr. Hli Man, (7) Mr. Sung Aye, (8) Mr. Sue Set, (9) Mr. Yan Chine, (10) Mr. Saus Gjein, (11) Mr. Myitung Hka and (12) Mr. Zawng Dau.⁴⁰

About 20 Myanmar Army soldiers set fire to houses and cowsheds on November 23, 2016, in Mong Ko. The Myanmar Army soldiers thought there may be hidden weapons or bullets of the Kokant/Northern Alliance armies. A house and five cowsheds were burned.⁴¹

(3) Willful killing and willfully causing great suffering, or serious injury to body or health

Hawng Kawng from Quarter 6 of Mong Ko was killed by bullets fired from the Tactical Base hilltop of Mong Ko between 2 am and 3 am on November 22, 2016.⁴²

(4) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

There was fighting again in the Mong Ko area commencing at about 9 am on December 4, 2016. Awng San, a 12-year-old student and son of Daw E Lwe, was killed on the spot on the street by the aerial bombardment.⁴³

The Myanmar military dropped bombs over Namkha village at about 11 am on December 5, 2016. Aik Hkam Awng, son of U Ah Hin, was seriously injured by the bombs exploding near their house.⁴⁴

In the morning of 20 November 2016, combat between MNDAA/Northern Alliance and the Myanmar Army started. During the combat, Daw Dashi Nan Li, Man Kan Village, Mong Ko Township, was hit by a mortar shell at around 2.30 am. Her son Ma H pang (7 years), and her 2 daughters, Lashi Bawk San (8 years) and Htang Dim (12 years) were wounded as well.⁴⁵

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ Testimony collected by the Legal Aid Network - LAN's War Crimes Evidence Collection Group - WCECG

⁴¹ *ibid*

⁴² *ibid*

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ *ibid*



Two of their neighbors, Tangbau Lum Nan, (33 years) and Lasi Tum Lum (38 years), were wounded by gunshots and then later died of their wounds. The car driven by clergymen from the village who came at around 8 am the next morning to assist them, was also shot at, but luckily no one was hurt.⁴⁶

On 5 December 2016, the Myanmar army attacked Man Kan village by air with shelling from helicopters and from the ground with gunshots. U Chan Hawng (60 years), U Daw Yau, U Daw Chan and his wife (unnamed) died because of the aerial bombardment.⁴⁷

(5) Intentionally directing attacks against buildings dedicated to religion and education

The Roman Catholic Church in Mong Ko was destroyed by aerial bombardment at around 11:30 am on December 3, 2016. It was a Church with 367 members. About 150 families used to attend prayers and other services at this church. Apart from the church, the State High School was destroyed by aerial bombardment on the same day as well. The school had 20 teachers and 556 students were attending this school.



Roman Catholic Church and State High School in Mong Ko destroyed by bombardment by jet fighters

(6) Enforcing disappearances

On 4 December 2016, U Bar Myar Tar @ See Tai (ID No. PSA 00075) from Kha Lai village, Pang Sang township, disappeared on his way from Kha Lai village to Man Kaung village. There were three other villagers taken by the Myanmar Army together with him, one called U Lahpai Gam. On the day that U Bar Myat Tar was believed to be arrested, 80 Myanmar Army trucks with reinforcements and food supplies were traveling to Mong Ko and there was no combat. One witness called U Tun Kyaw said that he saw the incident (the arrest).⁴⁸

U Laphai Gam (29 years) from May Khong Tract of Hka Lin Village, Kyu Koke-Pang Hseng Township, was arrested on 4 December 2016 by the Myanmar army. On 5 December 2016, the administrator of Hpai Kawng, U Zau Hkam arranged for U Lahpai Gam's wife, Daw Hkawn Htoi to speak with Myanmar military officer Aung Aung Kyaw. Aung Aung Kyaw replied that they would free him after 3 or 4 days. On 9 December 2016, his wife together with other village leaders met again with

⁴⁶ Testimony collected by the Legal Aid Network - LAN's War Crimes Evidence Collection Group - WCECG

⁴⁷ *ibid*

⁴⁸ Testimony collected by the Legal Aid Network - LAN's War Crimes Evidence Collection Group - WCECG



the military officer and asked about the circumstance (of the arrest) again. The military officer replied that the rebels had arrested him because they saw that he was talking with Myanmar army soldiers. Daw Hkawn Htoi tried again to talk to the military officer of Hpai Kawng with the help of friends. She provided the military officer with the name and identification card number of U Lahpai Gam by phone. The next day, the officer asked the name again and said that they would release U Laphai Gam the next day, 18 December 2016. In spite of these contacts, U Laphai Gam was not released on 18 December and no one could do anything further for his release.⁴⁹

V. Independent Status of the Karenni State, Natural Resources Exploitation and War Crimes

Independent Status of the Karenni State

Karenni State⁵⁰ is quite unique from the aspect of its background history. Its independence was recognized by Myanmar Kings as well as by the British colonialists that annexed Burma into their empire. Afterwards, the independence of the Karenni States was implicitly recognized in the 1947 Constitution, drawn up in accordance with the 1947 Panglong Pact signed by the then leaders of the frontier areas and General Aung San on behalf of Burma. The 1947 Constitution of Burma was approved after convening a constituent assembly. Chapter (1) Article (2) of the said Constitution is as follows:

The Union of Burma shall comprise the whole of Burma, including –

- (i) all the territories that were heretofore governed by his Britannic Majesty through the Governor of Burma, and
- (ii) the Karenni States

Accordingly, the Karenni States were not a part of Burma before the emergence of the 1947 Constitution; and they were independent. After the 1962 military coup led by Gen. Ne Win, the 1947 Constitution was abolished. As such, since then the Karenni States have regained their independence legally as of now.

The natural resources of Karenni State are timber, water and minerals, such as tungsten and tin, together with land as the essential base for agriculture. Deforestation, environmental impacts of mining and hydropower dams, and land rights are thus the main issues related to the unfair management of natural resources carried out by successive ruling Myanmar military regimes in this state.

Deforestation has multiple causes. However, a main factor has been the large-scale logging concessions granted by the union or central Myanmar government authorities invoking laws underpinned by the 2008 Constitution.⁵¹ Moreover, “illegal” large and small scale logging and unsustainable use of the forest by local communities are also contributing to the shrinking of this natural resource. This is causing serious environmental degradation, such as the depletion of natural water sources essential for the provision of drinking water in rural areas.⁵²

The Baluchaung Hydropower Plant, known as Lawpita, was originally built by Japanese financial assistance based on a post-war compensation agreement in 1954. The facilities were renovated and refurbished in late 1980. Some units were added in 1992, and were again rehabilitated and renewed through a Japan International Cooperation Agency (JICA) project completed in 2016. They are operated by the Myanmar Electric Power Enterprise MEPE⁵³ and are an essential source in the provision of power to the whole country.

⁴⁹ Testimony collected by the Legal Aid Network - LAN's War Crimes Evidence Collection Group - WCECG

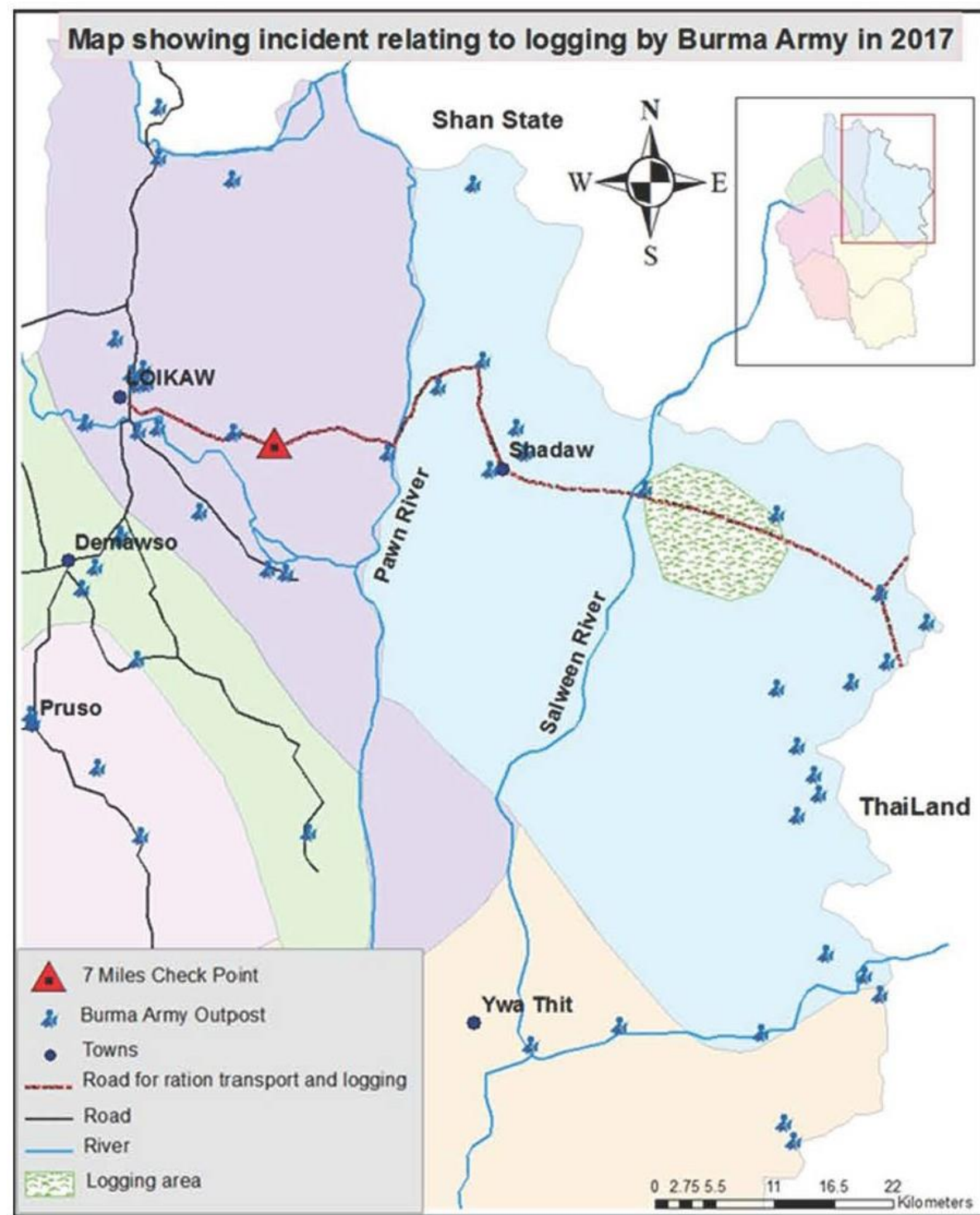
⁵⁰ Also known as Kayah State

⁵¹ The 2008 Constitution, Schedule One Paragraph 6 (f)

⁵² Consortium of INGOs and national NGOs. Kayah State socio-economic analysis. 2013. p.54-56. <https://data2.unhcr.org/en/documents/download/50137>. Accessed March 3, 2018.

⁵³ <https://www.jica.go.jp/myanmar/english/office/topics/press140628.html>. Accessed March 3, 2018.

The dam and power plant have been the cause of a high number of human rights violations, including sexual violence, killing and forced labour, resulting from the deployment of Myanmar Army troops in the area. The military planted more than 12,000 land mines in the area so as to protect the plant and transmission lines from attacks by Ethnic Armed Organizations (EAOs).



Plans are underway for another dam on the Salween River at Ywathit in Karenni State by the Datang (Yunnan) United Hydropower Developing Co., which signed a Memorandum of Understanding (MoU) to develop the project with the government of Myanmar in 2010. Already starting from 1996, 212 nearby villages and at least 37,000 residents have been forcibly relocated following military operations. Military camps of the Myanmar Army were established to secure the area and there is no possibility for access by citizens or civil society organizations (CSOs).⁵⁴

Mining has also heavily affected the state, both as a cause of environmental degradation and of conflict between the Myanmar Army and local EAOs. In the 1930s the Mawchi mine was the most important source of tungsten in the world. Today the mine is jointly controlled by the No. 2 Mining Ministry and the Myanmar military-owned Union of Myanmar Economic Holdings Limited. It is the cause of frequent landslides in surrounding villages.⁵⁵ Plans for the expansion of the mining zones with the participation of international mining companies are facing resistance from activists and environmentalist organizations.^{56 57}

It is evident that land rights – which should be primarily enjoyed by local indigenous peoples, in terms of collective ownership and land use rights, as well as by the Ethnic States, in terms of management of virgin land in their own respective states – are a fundamental factor in the management of natural resources and promotion of sustainable economic

⁵⁴ <https://www.internationalrivers.org/resources/briefing-current-status-of-dam-projects-on-burma%E2%80%99s-salween-river-7868>. Accessed March 3, 2018.

⁵⁵ <http://karennisdc.org/karenni-state/>. Accessed March 3, 2018.

⁵⁶ Ibidem

⁵⁷ Martov S. Australian Mining Firm Abandons Exploration Bid in Contested Karenni State Area. *The Irrawaddy*. April 8, 2017. <https://www.irrawaddy.com/news/burma/australian-mining-firm-abandons-exploration-bid-contested-karenni-state-area.html>. Accessed March 3, 2018.



development. By contrast, large-scale development projects being carried out by the central government are undermining local community's land rights in a number of cases.⁵⁸

Under the doctrine of State Sovereignty being practiced under the 1974 and 2008 Constitutions or without any Constitution, successive Myanmar military governments – whether elected or non-elected – have been exercising rigid centralization, denying the abovementioned land rights of local indigenous peoples as well as of their own Ethnic States. This underlying issue can be resolved only when a genuine federal union is established with the principles of, inter alia, popular sovereignty and provincial sovereignty, which must be enjoyed by the Ethnic States – naturally including Karenni State, which was historically clearly independent. Only then will enforcement of the rule of law and equitable share of natural resources become a reality and genuine peace achieved.

The following case study, among many others, can be observed as a serious violation of the above-mentioned land rights. The Myanmar Army leaders and the government authorities have been committing one heinous crime after another, constituting serious human rights violations.

Background of the Karenni War Crime case

The exploitation of natural resources owned by Karenni State underpins the unlawful arrest and extrajudicial killing of three Karenni soldiers from the Karenni National Progressive Party (KNPP) and one Karenni villager by the Myanmar Army in Karenni State – a war crime which took place even though the KNPP and the ruling Myanmar military regime have signed ceasefire agreements at both provincial as well as Union levels.

The four persons were killed by the Myanmar Army at the KNPP's 7-mile check point on the Loikaw-Shadaw road on December 20, 2017. This extrajudicial killing undoubtedly constitutes a war crime.

This check point was primarily set up to prevent timber and narcotic drug smuggling. On the day that the crime occurred, four Karenni soldiers were posted there and one civilian was visiting them. On December 19, at around 5:00 pm, a convoy of about 21 Myanmar Army trucks, transporting timber illegally, was stopped by the Karenni soldiers on duty. At that time, three or four trucks had already passed. When the remaining trucks were checked, a variety of timber⁵⁹ covered with firewood was found. The Myanmar Army troops occasionally carry timber on their trucks when coming back from sending supplies or reshuffling of military officers at the frontline posts.⁶⁰

Khu Maung Lar,⁶¹ the Karenni soldier in charge of the post, questioned the Myanmar Army personnel about who had granted them a permit to carry the prohibited timber. They replied that they had got permission from the Da-ka-sa (Regional Military Operational Command - Loikaw). The Karenni soldiers complained that they had not been informed about this transport. However, they allowed the convoy to pass the post.

It appears that the Myanmar Army troops were upset by the fact that their illegal extraction of timber was uncovered by the Karenni soldiers, and this motivated them to commit the war crime – to threaten the KNPP not to similarly question them in the future. This would enable the Myanmar Army to continue exploiting all natural resources, including timber, owned by Karenni State, without any obstruction not only from the KNPP but also all other EAOs operating in and around the territories of Karenni State. This is one factor which caused commission of such a heinous crime.

⁵⁸ Consortium of INGOs and national NGOs. Kayah State socio-economic analysis. 2013. p.54-56. <https://data2.unhcr.org/en/documents/download/50137>. Accessed March 3, 2018.

⁵⁹ The main type of timber they were carrying was Padauk (a precious hardwood with the Botanical name, *Pterocarpus macrocarpus*)

⁶⁰ Extract from the letter sent by Khu Daniel, Secretary 2 of the Karenni National Progressive Party, to Chief Minister, of Kayah (Karenni) State Government, December 26, 2017.

⁶¹ Khu Maung La was interviewed by Legal Aid Network on March 4, 2018.



Another factor relates to the ongoing discussions about signing the Nationwide Ceasefire Agreement (NCA). The war crime occurred precisely when the attempts of the Myanmar Army leaders were at their apex in persuading and pressurizing the United Nationalities Federal Council (UNFC) – a major ethnic armed alliance in which the KNPP was taking a leading role – to sign the NCA;⁶² and, to this end, terror tactics were employed against the KNPP.

The next day, on December 20, 2017, at around 6:00 am, about 50-60 Myanmar Army soldiers came to the KNPP post and surrounded it. At that time, the four Karenni soldiers were on duty, while the civilian was still present there.

Without any resistance, the Karenni soldiers withdrew from the post to an area which was about two hundred yards away. Immediately after that, Khu Maung Lar telephoned to a senior Karenni official, Khu Lyar Oo, responsible for the KNPP's Liaison Office with the government authorities, and asked what they should do. Khu Hte Bu,⁶³ one of the Executive Committee members of the KNPP and also the Interior Minister of the KNPP government, ordered the Karenni soldiers not to resist violently and, assuring them there would be no problem, told them they could go back to their post and prepare their food. This was because the KNPP had already reached a bilateral ceasefire agreement with the Myanmar Army at both Union as well as State (Province) levels.



Photo of 3 KNPP Soldiers and 1 Civilians Slaughtered by Regional Operation Command (Loikaw) [Da-Ka-Sa (Loikaw)]

instructed, the Karenni soldiers did not react violently and went back to their post, took off their uniforms, and started cooking. The Myanmar Army officers then ordered them to hand over their guns and ammunition. They obeyed, transferring three rifles – two AK-47s and one M-22 – with ammunition over to the Myanmar soldiers. Afterwards, the Myanmar soldiers asked the Karenni soldiers to put on their uniforms again and sit on a bench to take a photograph as a record. Although there was no camera to be seen, the Karenni soldiers complied with the order of the Myanmar soldiers.

⁶² Statement made by Ku Thaw Reh, Minister of Justice of the KNPP government: 'In the aftermath of commission of that war crime, the KNPP sent a demand to the Chief Minister of the Kayah State government and asked to form a joint-investigative body on Dec 26, 2017; however, the Myanmar Army leaders formed an investigation team unilaterally and also replied that the KNPP should sign the NCA first.'

⁶³ Statement made by Khu Hte Bu.

The bench was small and could not accommodate all four Karenni soldiers and the civilian, so Khu Maung Lar sat on the ground and prepared for the photograph, while Maw Reh, Kwel Reh, Matia, and Maw Dae sat on the bench. At that time, five Myanmar soldiers carrying guns were in front of them. One of them mumbled that he was sorry. He then suddenly switched his assault rifle from the safety-lock position to a fully automatic position and started firing at the Karenni soldiers and the civilian. Two other Myanmar soldiers also fired with their rifles.

Two Karenni soldiers and the civilian died on the spot. Another Karenni soldier, Maw Reh, was seriously injured but tried to flee. Khu Maung Lar, the soldier sitting on the ground, was not injured and was able to flee the scene of the crime. The Myanmar soldiers chased Maw Reh for about 200 yards and then shot him dead.



Ashes of the slaughtered KNPP Soldiers & Civilian were handed over by Regional Operation Command (Loikaw) [Da-Ka-Sa(Loikaw)]

Legal Analysis of the Karenni War Crime Case

This incident clearly shows how the Myanmar Army intentionally killed the four people, primarily the three Karenni soldiers, only after they had been disarmed. It evidently constitutes a war crime as it breached the following provision:⁶⁴

In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

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

⁶⁴ Article 8 (2) (c) of the Rome Statute of the International Criminal Court.



The crime was prepared through the order to wear uniforms. In this way the Myanmar Army commander was creating a justification for the murder, since later the Myanmar military authorities stated that the Karenni soldiers were killed during combat. Also, the refusal to consign the corpses to the KNPP and their transfer to the Loikaw Myanmar Army military base, where they were cremated, clearly indicate that the Myanmar Army commanders attempted to conceal the actual events.

This is clearly a case of multiple murder or violence to life under international customary humanitarian law in a non-international armed conflict.⁶⁵ In human rights law arbitrary deprivation of the right to life is non-derogable also during armed conflict, since only people actively participating in combat can be targeted or killed.

The ethnic armed revolutionary organizations, including the KNPP, have publicly rejected the 2008 Constitution. Thus, they are not under it nor its legal framework, including Military Tribunals – established by the Myanmar Army leaders – where the Commander-in-Chief of the Armed Forces exercises appellate judicial power in the administration of Military justice, which is explicitly separated from the civilian judicial system, in accordance with Section 293 (b) and 343 of the 2008 Constitution. Justice will never be achieved if the Myanmar soldiers alleged to have committed war crimes against the three Karenni soldiers and one civilian, are tried at any of these military tribunals.

Seeking accountability on this war crime case

In regard to this case, accountability must be sought from the aspect of not only the perpetrators, but also those who concealed the crime, who ignored superior/command responsibility, and who convinced the victims to place themselves in an unprotected situation.

1. Colonel Myo Min Gyi (G-1, Loikaw's Regional Operation Command or Da-Ka-Sa) and Captain Thet Soe (Loikaw's Military Security Affairs or Sa-Ya-Pa) are the persons bearing most responsibility, being commanders of the Myanmar troops which committed the war crime on the ground.
2. In terms of the military institution, the Myanmar Army's Regional Operation Command in Loikaw or Da-Ka-Sa is the most responsible body in Karenni (Kayah) State, while the Office of the Commander-in-Chief of the Myanmar Army's Defence Service, headed by Senior General Min Aung Hlaing, bears the same responsibility at the top level. Da-Ka-Sa is primarily responsible not only for commission of this crime but also for concealing the actual incident.
3. In terms of the government institution, the Prime Minister of Karenni (Kayah) State is the most responsible person, while in the National Defence and Security Council (NDSC), former President U Htin Kyaw and State Counsellor Daw Aung San Suu Kyi were in positions of superior/command responsibility. Accordingly, the incumbent President U Win Myint has taken over the responsibility of his predecessor President U Htin Kyaw.
4. From the aspect of the perpetrators, the Office of the Commander-in-Chief of the Defence Services is obliged to not apply the 1959 Army Act, along with its Amendment Act produced on Nov 4, 2010, as the said act does not prescribe any provision relevant to war crimes. Nor do Courts of Inquiry, to be formed in accordance with Paragraph 176 (1) of the Defence Service Rule have any authority to investigate this war crime or to collect evidence.
5. From the aspect of victims, the Karenni National Progressive Party (KNPP) is primarily responsible to uncover the truth, to prosecute the perpetrators, to seek a reasonable amount of remuneration for family members of the deceased victims and to seek full justice. To this end, the said party should adhere to its courageous statement issued on Dec 26, 2017, which asked for formation of a joint investigative body with representatives from both sides, and for the perpetrators to be indicted and tried by a tribunal to be formed with the participation of international legal academicians, proposed by both sides, and to impose harsh penalty upon them. Even if the KNPP has any intention to

⁶⁵ ICRC. IHL Database, Customary IHL, Rule 89. Violence to Life. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule89. Accessed March 3, 2018.



sign the NCA, such an intention should not be a hindrance to proceed effectively with the justice seeking process. This process should at least be fully completed before signing the NCA, if that is the intention. Only when perpetrators are indicted and adjudicated by this international tribunal, or at least by a hybrid court, will similar commission of war crimes against other Karenni soldiers, KNPP leaders and Karenni nationals be deterred.

6. All other Ethnic Armed Organizations should not be keeping silent. Rather, they should join hands with the KNPP and fight for justice until the time that the abovementioned demand of the KNPP has been met. Only then, will a genuine peace seeking process come into existence.
7. Efforts of Karenni civil society organizations, along with Karenni nationals, to deal with this war crime case have been remarkable, and should not under any circumstance weaken. Rather, momentum should be maintained and increased effectively.
8. All other civil society organizations and legal communities – national and international – which have been struggling for human rights and the Rule of Law should also contribute to this justice seeking process in one way or another.
9. The UN Fact Finding Mission should also be active in publicly demanding evidence from the State as far as this war crime case is concerned, in addition to other war crimes taking place in other Ethnic States.

VI. The Economic Relevance of the Tanai Territory, The Self-determination and War Crimes

Almost 4000 civilians, primarily miners, were blocked by the Myanmar Army in the area of armed conflicts between the Myanmar Army MA and the Kachin Independence Army KIA in Tanai Township during the period from January 28 to February 8, 2018. In so doing, the Myanmar Army committed a series of war crimes, thereby causing serious atrocities of people. In this regard, a brief background story can be observed.

Tanai township's amber and gold mines are located southwest of the town of Tanai. The linear distance between the amber fields and the town of Tanai is approximately 13 Miles or 20 Km. The main route leading out of the mining area heads north out of Nam Kawm Shwe Maw, a former settlement of gold miners that then was almost uninhabited. The Samat Gate is located about one mile north of Nam Kawm Shwe Maw. The civilians were blocked in the area between Nam Kawm Shwe Maw and the Samat Gate.

The Situation of Amber Mining Before Myanmar Army's Offensive Started

The miners worked in that area with the permission and under the control of the KIO. As a form of taxation, the KIO levied 10% of the market value of the amber. Moreover, there is a system of land concession. The miners have to pay 400 USD for a license that permits their activity on 1000 square meters land.⁶⁶ The objective of the Myanmar military leaders is to eradicate or, at least, expel the Regiment No 14 of the KIA operating in this area, exploit the natural resources there, control the route between India and China, passing through Tanai, and also hand over the right to land management to their crony companies, primarily Yuzana Co, owned by U Htay Myint.

The miners clear their plot from trees and make wooden beams and planks that support the mines' tunnels, which run in between 30 to 100 meters underground. They live in tents nearby the mines.

⁶⁶ Hkun Lat, Vrieze P. In Conflict-Hit Northern Myanmar, Miners Dig For Million-Year-Old Amber. Unearth Myanmar Project. <http://unearthmyanmar.com/en/story/conflict-hit-northern-myanmar>. Accessed March 13, 2018



On June 5, 2017, by using helicopter, the MA dropped leaflets over the gold and amber mining sites telling the civilians to leave the area in a way that their forthcoming criminal action could be justified. Such type of war crime is prohibited by Geneva Convention. Additional Protocol II, Art.17 clearly protects displaced civilians and in paragraph 2 states that **civilians shall not be compelled to leave their territory for reasons connected with the conflict.**

U Zaw Win, the NLD MP elected from Tanai township constituency, incorrectly stated on June 6, 2017 by saying, 'It is true that leaflets were dropped. As per the explanation made by the Commander of the northern military command of the Myanmar Army and also reflected in the leaflets, if the status quo continues, the natural resources will ruin much and the government does not receive its revenue. It is correct not only in accordance with law but also from the perspective of the government.'⁶⁷

By mentioning such an abetment statement, U Zaw Win, as a NLD MP, provided political support and afforded legitimacy to Myanmar Army to commit heinous crimes, which would amount to war crimes, against the miners/civilians in Tanai township. From this aspect, U Zaw Win is accountable.

Similar to the case of U Zaw Win, another NLD MP U Lin Lin Oo also submitted proposal at the legislative assembly by justifying that the action needs to be done legally in order to prevent loss of natural resources and waste of state budget.⁶⁸ He is also accountable.

In regard to natural resources, statement and proposal made by U Zaw Win and U Lin Lin Oo are incorrect from the aspect of both 'law' and 'government'. In every country, the Constitution is the Supreme Law of the Land. Under the 2008 Constitution, power to extract and exploit gems, minerals, mines, safety of mine workers, and environmental conservation and restorations are apportioned to the Union, authentically referred to central level, but not Ethnic States.⁶⁹

Even in the case of the Kachin State, under the direct control and management of the government, environmental degradation and natural resources depletion have been seriously occurring in Pa Kant township where gems are being extracted by the government as well as its crony companies. Similar case is also taking place in Hukawng valley, where Yuzana Company owned by U Htay Myint is operating in Tanai township. While Myanmar Army is entrenching its military power one step after another by using the financial resources, primarily gain from the natural resources,⁷⁰ various ethnic nationalities in Kachin State have become poorer and poorer. Similar situation is taking place in many Ethnic States. As such, civil war has been waging on and the ethnic resistance organizations, including the KIO, are struggling for their right to self-determination, including the right to management of their own natural resources.

Unfortunately, rather than attempting to resolve the underlying issues of civil war, U Zaw Win's stupid recommendation of the action of the Myanmar Army has resulted in serious atrocities being suffered by a few thousand civilians.

Preparation and Commencement of Myanmar Army's Offensive against the KIA and Civilians

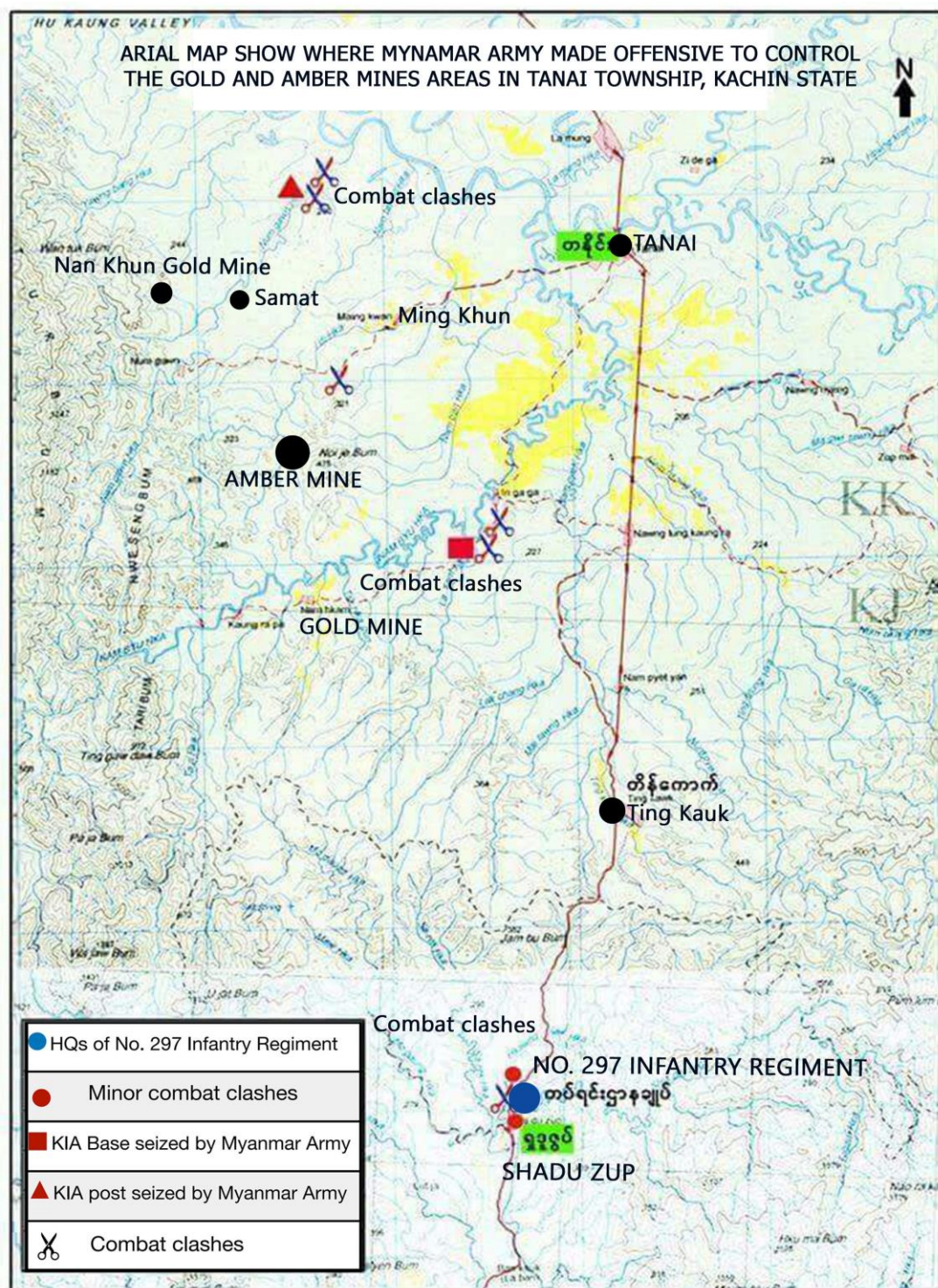
⁶⁷ <https://www.rfa.org/burmese/news/tanine-gold-mine-06062017070544.html>

⁶⁸ <https://www.rfa.org/burmese/news/illegal-gold-policed-parliament-08142017070557.html>

⁶⁹ Item 6, Schedule One, Union Legislative List of the 2008 Constitution

⁷⁰ In accordance with the 2011 Special Fund Law, Commander-in-Chief of the Myanmar Army is authorized to spend special fund without necessity to submit its expenditure for auditing.

The offensive by air and land launched by the MA started in November 2017. Nevertheless, during the first bombardments there weren't any casualties. Only some buildings were damaged or destroyed. In January 2018, 3 divisions of the Myanmar Army advanced from 3 different directions surrounding the amber area. Thus the KIA troops were almost encircled.



On January 26, 2018 the intensification of air strikes and the continuous escalation of the combats and shelling by the Myanmar Army made the evacuation of the civilians absolutely needed and urgent. Most of them were miners from different ethnic groups, such as Myanmar, Arakan, Shan, Lisu, Kachin, and Naga. There were also some local people who were fleeing from the surrounding villages, which had suffered aerial attacks and artillery and mortar shelling, both by the Myanmar Army and the local Lasang Aung militia, formed and controlled by the MA.

The artillery shelling by the MA were very frequent and targeted indiscriminately all kind of objectives, such as small settlements of miners where there wasn't any presence of the KIA. Often their shelling was blindly directed towards not only forest areas but also civilian objectives like buildings and other constructions, with the deliberate purpose to force the civilians to leave the area.

A combined force of Burmese army's 297th Light Infantry Battalion troops, 101st Light Infantry Division troops and troops under Hkanti-based Tactical Command launched offensive.⁷¹

In the afternoon of January 26 an air strike targeted the middle of the amber mining area, namely Pa Yin Maw, primarily occupied by civilians, causing casualties and extended damages. On that day two people died and four got seriously injured. In addition, civilian objectives were destroyed. As such, many civilians left that area.

⁷¹ <http://www.kachinlandnews.com/?p=28170>



Evacuation Plan of the Miners/Civilians from Amber and Gold Mining Area

On January 27, during a meeting with some KIA officers, the civilians were informed that they should leave the area because of the ongoing combats, by alerting that security of the civilians could no longer be guaranteed by the KIA; and, at that time, the remaining number of civilians was 3270 in accordance with the data collected by the religious committee.⁷² The evacuation was led, decided and organized by the said committee. Since that evening, many civilians started to leave Pa Yin Maw and slept one night at Nam Kawm Shwe Maw, about one hour walk from Pa Yin Maw.

On January 28, the civilians gathered in one place to evacuate from Pa Yin Maw. The area of the gathering was targeted by Myanmar Army’s artillery shelling around 3:00 PM, and terrorized the civilians to leave that treasure area immediately. Anyway, while raising white flags, over three thousand civilians moved north on the way to Pawk Wa, a village with a small jetty, which is located at the bank of Tanai stream. From there, by taking boats, the civilians can get back to Tanai town, passing through the Nam Kawm Shwe Maw, the evacuated civilians got to the area near Samat.

Commission of a War Crime by the Myanmar Army at the KIA Tax Gate



crime constitutes a war crime.⁷⁷

The KIA’s tax gate, which is located nearby Pawk Wa, had already been seized by the Myanmar Army, and two KIA soldiers and six other civilians⁷³ – including the two students⁷⁴ who were earning money for the school fees at that gate– were also killed only after they had been captured alive.⁷⁵ Myanmar Army commanders ordered Lisu people militia to kill the KIA soldiers and Kachin civilians⁷⁶ in a way that racial hatred between Kachin and Lisu has been created. It happened in the morning of January 27 one day before over three thousand civilians reached the venue close to that gate. It was a grave breach of Geneva Convention which prohibits killing of prisoners of war; and, such

⁷² Statement made by one of the leaders of the religious committee, the main civilian body representing miners in Pa Yin May area and also statements of other witnesses who personally experienced in this incident.

⁷³ (1) Jum La Ra; (2) Labang Seng Li Awng; (3) Shan Law; (4) Unknown; (5) Nhkum Sut Ring Tu Awng; (6) Mi Tung Sau Ting

⁷⁴ (1) Nhkum Sut Ring Tu Awng; (2) Mi Tung Sau Ting

⁷⁵ The statement of an eye witnesses, interviewed by the LAN’s War Crimes Evidence Collection Group.

⁷⁶ Ditto

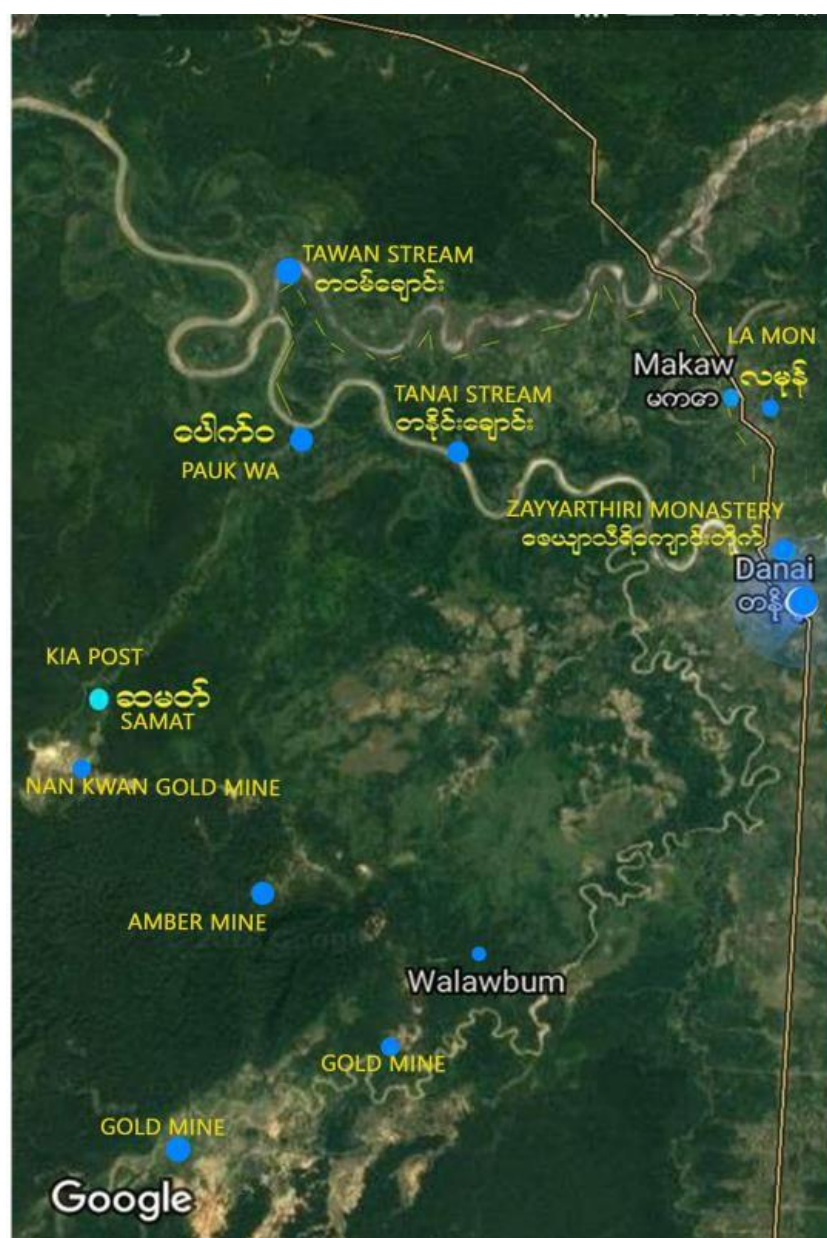
⁷⁷ Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949

Two people preceding the civilians on a motorbike died because of the explosion of an Improvised Explosive Device IED. So the civilian stopped on the place of the explosion and stayed there for the night.

On the next day, January 29, the Myanmar Army, after a negotiation with two representatives⁷⁸ of the civilians, allowed about 700 women and children, and 50 elderly and injured people, to proceed on the road from Samat Gate to Pawk Wa, leading to the town of Tanai. Through these people including a leader of the religious committee, the media and local and national politicians got information and updates about the evolving situation.

The Myanmar Army used Civilians as Human Shields

The place where the civilians were blocked by the Myanmar Army was located between the MA and the KIA combatants and thus could serve as deterrence for counter-attacks by the KIA. This could lead that the civilians were used as human shields by the Myanmar Army.



The place civilians were blocked by Myanmar Army

⁷⁸ U Sin Yon, Naga national, who was the Secretary of the Committee and U Zaw Moe, Myanmar national and a business man.



The civilians were also instructed by the MA commanders to move back and to take a perilous path – on which a number of land mines were planted – that previously served as the demarcation line between the KIA and Myanmar Army controlled areas. That jungle route to reach Tanai is named Mai Hkun path. In spite of being the shortest way to Tanai, because of the armed conflict, the path wasn't used since a long time ago.

A number of civilians knew that on this path there were landmines. Therefore, they were aware that the MA had intention to use the civilians to prevent the KIA's attack and/or to clear the area from the landmines.⁷⁹ However, they had to obey the orders of the Myanmar Army commanders despite the extreme dangerousness of the path and likelihood to step on land mines. Unfortunately, many civilians did not know that the path, directed by Myanmar Army, had been planted by land mines. As such, they would like to face risk by taking Mai Hkun path so that they could get back to Tanai town as soon as possible.



The MA commanders also hoodwinked the civilians that that area had been cleared and there was no KIA troop. Actually, if it was true, the MA was responsible to lead hundreds of civilians by marching in front of them passing through the Mai Hkun path and bringing them up to Tanai town. Unfortunately, it was not the case. They didn't also allow civilians to take regular route from Samak gate to Pawk Wa, and from Pawk Wa to Tanai town by taking boats. They simply forced the civilians to get back and take perilous Mai Hkun path. In so doing, the Myanmar Army fraudulently misled civilians to pass through the mind field. As such, it was quite evident that the MA committed war crimes.

Fortunately, on this path the civilians met some KIA soldiers who told them to go back because they would surely step on the landmines. So the civilians went back to the previous place near the Samak gate. Sure is that, if they could pass the Samat Gate, blocked by the Myanmar Army, there was no land mine at all on the way to Pawk Wa.

Unfortunately, the Myanmar Army troops stationed in the Samat Gate didn't allow the civilians to leave the area by taking the safest street to Pawk Wa. Therefore, the civilians had to stay for 11 days along the road connecting Nam Kawm Shwe Maw and the SamaK Gate. This is the location where the civilians were blocked for the whole time commencing from January 28. The MA allowed only small groups of about 200 people to leave on a daily basis, until the last civilians were released on February 8.⁸⁰ Only at that time, the MA allowed the civilians to take regular street from Samak gate to Pawk Wa.

⁷⁹ Interview of victim witnesses by the WCECG

⁸⁰ Statements of victim witnesses, interviewed and collected by WCECG of LAN:
Soe Thu Aung. All amber miners trapped in Kachin conflict escape. Mizzima. February 8, 2018. <http://www.mizzima.com/news-domestic/all-amber-miners-trapped-kachin-conflict-escape>. Accessed March 13, 2018

Intimidation, Disappearance, Inhumane Treatment and Discrimination by the Myanmar Army



On January 28, as soon as the Myanmar Army saw several hundreds of unarmed civilians, they aimed at them with guns and threatened by shouting, 'Stop where you are and keep silent. This is the war zone. If you don't obey order, you will be shot to death.' Rather than ensuring respect for and protection of civilian population in accordance with Article 46 of the Protocol I, such intimidation contravenes the legal norms of the 4th Geneva Convention.

Some men belonging to the Kachin and Arakan ethnic groups, before leaving the area in which the civilian were blocked, were brought inside the military camp of the Myanmar Army and since then they disappeared.⁸¹

At the same time the Myanmar Army officers tried to identify KIA soldiers among the civilians, and threatened them to disclose their identity. The civilians suspected to be KIA soldiers had to march without clothes, to humiliate and intimidate them. Small groups of 5 civilians at a time were interrogated and mistreated separately.

Also sexual harassment was a common practice by the Myanmar Army soldiers, who used the pretext to search the women to grab and touch them for a long time, in a manner that could not be justified by the activity of frisking.

In addition, while the miners were blocked, the Myanmar Army seized their properties, such as amber, mobile phones, motorbikes, necklace, money and other belongings. This kind of misappropriation, better defined as robbery, is a common practice of the Myanmar Army troops during operations in the ethnic areas and could be clearly named as looting.

The right of any person living in a country at war to give and receive family news lays an obligation on the belligerents not to put any obstacles in the way of correspondence⁸² and communication. By confiscating mobile phones of people by the Myanmar Army, the right of the trapped civilians to make communication with their families was deprived.

⁸¹ Interview of victim witnesses by the WCECG

⁸² Commentary on the Geneva Convention of 12, August 1949; published under the general editorship of Jean S. PICTET . Doctor of Laws Director for General Affairs of the International Committee of the Red Cross: Geneva Convention: Relative to the Protection of Civilian Persons in Time of War



Torture

The trapped civilians didn't have any supply or stock of food and couldn't cook. So they were obliged to consume the food they could find in the surroundings, such as raw banana sprouts. Also drinking water wasn't available and thus the civilians

were facing severe health issues. It is in violation of the Geneva Convention.⁸³

The trapped civilians were often mistreated by the Myanmar Army soldiers which obliged them to stand for hours in front of them without speaking. In addition, they were continuously forced to bend on their legs, as to weaken their physical resistance and inflict harsh suffering. All civilians suffered from day's heat and night's chill seriously as they had to sit on the street under



sunshine at day time and had to sleep on the street ground at night without receiving any humanitarian assistance from the NLD government authorities or MA. Such action of the MA constituted torture.

In international law torture is considered one of the most grievous crimes against humanity. Its prohibition is a peremptory norm since a long time and no state in the world can exempt itself to recognize its gravity and punish the perpetrators. The prohibition of torture is included in all major human rights and humanitarian law declarations, charters and conventions, including the already quoted common article 3, Geneva Conventions.

Actions that are without any doubt a case of torture are constantly repeated by the Myanmar Army. Furthermost the abduction of civilians by Myanmar's military and security forces, who as a consequence disappear or are found dead with clear signs of torture on their corpses, is recurrent.

Accountability of the NLD government and Denial of Humanitarian Access

In response to a question raised by a Myanmar national in Canada on June 9, 2017, State Councillor Aung San Suu Kyi answered that she had not yet received information about sufferings of people and miners, who evacuated from the amber and gold mine areas in Tanai township, and that she would investigate it, including inter alia, who ordered people to leave that area.⁸⁴ It happened in the aftermath of the criminal action of the Myanmar Army commanders who dropped leaflets from a helicopter, threatening civilian miners to leave that area by June 15, 2017.

⁸³ ART. 55. — To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

⁸⁴ <https://www.rfa.org/burmese/news/dassk-canada-06102017071542.html>



Unfortunately, even up to the time that the Myanmar Army had completed committing a series of war crimes in that Tanai township by Feb 8, 2018, the NLD government led by the President U Htin Kyaw and State Councillor Aung San Suu Kyi in both Union and State levels did not take any effective action for immediate evacuation of all civilians from that dangerous location, which had been threatening the right to life, liberty and security of their people nor did they arrange to provide any humanitarian assistance to those victims of war crimes. In this serious incident, the international legal doctrine, the Superior/Command responsibility, must be applied upon the NLD government, led by Aung San Suu Kyi given that the Myanmar military perpetrators, who committed war crimes, have not yet been taken any legal action as of now.

The NLD government of the Kachin State led by Chief Minister Dr. Khet Aung was quite aware of the fact that almost 4,000 civilians were blocked by the MA in that area, at least in accordance with the information sent by their members of the State Legislative Assembly, U Zaw Win and U Lin Lin Oo.

Even if the NLD government authorities could not afford to provide humanitarian assistance by itself, they should facilitate efforts of civil society and religious organizations such as Myo-shar-zin-lun, Peace Coordinating Group, Kachin Baptist Convention and etc. Unfortunately, it was not the case. The Myanmar Army is the major institution which committed these war crimes. In addition, the accountability would bear not only upon the NLD government but also upon the Legislative Assemblies in both Union and State levels. It was because both organs of the State did not take any effective measure to alleviate sufferings of almost 4,000 civilians nor did they take any legal action on the MA as of now. Both State Organs have become the abettor of heinous crimes.

Starting from the last facts described here, the denial of humanitarian access by Myanmar's military, with the complicity of the civilian institutions, was aggravating the sufferings of those trapped civilians. The permanent impeding of humanitarian access by Myanmar's civilian and military authorities has become a constant feature of the conflict in the ethnic areas.

A Brief Legal Analysis from the Aspect of the Geneva Convention

The released civilians had to walk for about 10 Km to reach the Pawk Wa Gate and jetty on the Tanai river, since the Myanmar Army impeded them to use their motorbikes and small lorries. From there they went on by boat till the town of Tanai. This long and difficult walk represented an additional hardship for elderly people and all other civilians already weakened by the long detention.

Only on February 8, after almost 3 weeks of hardship, deprivations and mistreatments, all the civilians trapped in the combats area were able to reach the town of Tanai.

Burma, in addition to the general obligations stemming from the Geneva Conventions Common Article 3, is obliged by Geneva Convention IV, Art. 23, to allow free passage for food and any other necessary supply for the well being of civilians affected by military operations.

On February 2, 2018, the United Nations Office for the Coordination of Humanitarian Affairs, in a report about the safety of civilians in Tanai, Suprabum and Wai Maw townships, stated that humanitarian access to Tanai area had been severely restricted⁸⁵.

⁸⁵ UN OCHA. Myanmar: OCHA Humanitarian Update on the Situation in Kachin State, 2 February 2018. <https://reliefweb.int/report/myanmar/myanmar-ocha-humanitarian-update-situation-kachin-state-2-february-2018>. Accessed March 13, 2018



There were also repeated appeals about this humanitarian crisis like, for example, the statement of the Kachin Alliance based in the USA on January 26 or the one of a grouping of Kachin and national CSOs named Joint Strategy Team on January 28. On February 5 there was a rally in Myitkyina, Kachin State, participated by thousands of citizens calling for the cessation of the hostilities. In addition, the leaders of the Catholic, Baptist and Anglican churches sent a letter to the northern commander of Kachin appealing for help in evacuating civilians from the Tanai area of combats⁸⁶. There wasn't any significant reaction or action by Myanmar's civilian and military authorities, following the appeals of MPs, citizens, and international, national and local organizations.

As an overall, impeding civilians to leave a war zone for almost 3 weeks, without any care for their life conditions and safety, constitutes a grave breach of international law. However, this was only one in between many crimes.

A first legal consideration concerns human rights law which obliges every state, and so his armed forces, to the protection of the right to life of all human beings in whatsoever situation. In addition, the right to be treated humanely for every person

taking no active part in the hostilities is one of the main breaches of the Geneva Conventions observable in this case. This right is the fundament of common Art. 3 of the Geneva conventions about armed conflict not of an international character.

Myanmar is a state party of this conventions and the state institutions cannot ignore their criminal responsibility and allow impunity for the perpetrators. The intentional violation of the two just mentioned principles of human rights and humanitarian law is so blatant and substantial that there could be sufficient reasons for a prosecution and court proceeding against civilian leaders and



military commanders in whatever international or national court, on the base of universal jurisdiction for major war crimes.

Moreover, the way the people trapped in the Tanai conflict were treated by the Myanmar army must surely be considered as a case of torture. The civilians were subjected to "severe pain or suffering" by persons in their "official capacity" with the purpose of obtaining information. The fact that Myanmar is one of the few states that haven't accepted the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (only 27 states haven't ratified or signed the convention) doesn't exempt the military from the compelling respect of the norms, since they are considered compulsory or peremptory norms in international law.

⁸⁶ Zaw J. Civilians trapped as Myanmar military fights Kachin rebels. UCA News. February 5, 2018. <https://www.ucanews.com/news/civilians-trapped-as-myanmar-military-fights-kachin-rebels/81442>. Accessed March 13, 2018



In addition, Geneva Convention IV Art. 27 protects women “against any attack on their honour”. Thus, again, Myanmar is breaching its international law obligations.

Repeated, indiscriminate, intentional aerial attacks and mortar shelling targeting civilians and civil objects are also constantly used by the Myanmar Armed Forces in their military actions, not only in Kachin state, but in all areas interested by the conflict.

The case of intentional attack against civilian is evidently under the jurisdiction of international criminal courts. The main responsible for major war crimes and crimes against humanity in international law is the military commander and its civilian superior person. The direct criminal responsibility for breaches in international humanitarian law concerns the omission to act for prevent and repress war crimes by the highest rank military commander and the superior positions in the government. Moreover, the knowledge, or capacity to know, about the crime by the commander or superior is a sufficient condition for its complete, superior or direct responsibility.

The figure of the above mentioned heinous crimes is extremely high and in the last thirty years it has been constantly indicated in the reports by successive UN Special Rapporteurs and in a number of UN resolutions⁸⁷. The denial of this acts and non-accountability of Myanmar’s military and state institution is aggravating the severity of this crimes. Thus a more incisive action by the UN and the international community is absolutely needed.

A Brief Constitutional Analysis

Since the NLD government primarily led by Aung San Suu Kyi assumed power, superficial but not authentic, of the State, they have never issued any statement prohibiting aggressive military actions being launched by the Myanmar Army against the ethnic resistance organizations and their indigenous peoples in Ethnic States. It is primarily because of the restrictions imposed under the 2008 Constitution. Accordingly, without the support of the Myanmar Army and its Commander-in-Chief, any government, now and in future, cannot stand on its own feet; and as such, the government, even if it is elected by people, has to yield to the will of the Myanmar Army notwithstanding having obvious criminal intention.

When asked by the leaders of the Kachin Baptise Convention (KBC), to take action on the Kawng Kha rape, murder and war crime case, committed by the Myanmar Army against the two Kachin female volunteer teachers, happened on January 19, 2015, Dr. Khet Aung, Chief Minister of the Kachin State, responded by saying that before the NLD took office after winning in elections in 2015, it negotiated with the Myanmar Army commanders and provided agreement that the NLD government will not interfere in the military affairs.⁸⁸ As such, under such a constitutional restraint, any government to be arisen out of the 2008 Constitution now and in future will never assume authentic power and it will end up in entrenching the military dictatorship while denying the emergence of a genuine federal union.

Similar situation is also taking place for the MPs elected in the legislative assemblies under the 2008 Constitution. By observing the case studies of U Zaw Win and U Lin Lin Oo – the NLD MPs – it can be concluded that being MP is nothing but supporting the operation of the Myanmar Army and their commanders – former and incumbent – while abetting their commission of heinous crimes in one way or another.

⁸⁷ A comprehensive list of reports and resolution is available on the UN OHCHR web site. http://ap.ohchr.org/documents/dpage_e.aspx?c=125&su=129. Accessed March 20, 2018

⁸⁸ Statement made by one of the leaders of the KBC



Hence, rather than participating in the forthcoming elections, including those in 2020, under the 2008 Constitution, and attempting to assume superficial power of the government, all ethnic forces should exert effort to produce federalism principles from the perspective of the Ethnic States, on the basis of the popular sovereignty and provincial sovereignty, while laying down foundations for the emergence of independent, impartial and efficient Judiciaries in a way that foundation for the Rule of Law has been laid down.

VII. Superior/Command Responsibility & Chains of Command (for Mong Ko War Crimes)

It will be prudent and relevant to reference the doctrine of superior/command responsibility in regard to the heinous crimes as it is widely referenced as international norms.

In accordance with the doctrine of superior/command responsibility being practiced in international law, it is realized that superior/command responsibility is a form of responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.⁸⁹

National Defense & Security Council (NDSC)

In accordance with the principle of Superior/Command Responsibility, the most responsible command responsibility for these crimes, as the highest authority under the incumbent 2008 constitution in Burma, is the National Defense and Security Council (NDSC) which comprises the following members.⁹⁰

- (a) U Htin Kyaw, the President
- (b) U Myint Swe, Vice-President (1)
- (c) U Henry Van Thio, Vice-President (2)
- (d) U Win Myint, Speaker of the Pyithu Hluttaw
- (e) Mahn Win Khaing Than, Speaker of the Amyotha Hluttaw
- (f) Senior General Min Aung Hlaing, Commander-in-Chief of the Defense Services
- (g) Vice-Senior General Soe Win, Deputy Commander-in-Chief of the Defense Services
- (h) Lieutenant General Sein Win, Minister for Defense
- (i) Daw Aung San Suu Kyi, Minister for Foreign Affairs
- (j) Lieutenant General Kyaw Swe, Minister for Home Affairs

⁸⁹ <http://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility>

⁹⁰ Article 201, Chapter V of Constitution of the Republic of the Union of Myanmar (2008)
http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf



(k) Lieutenant General Ye Aung, Minister for Border Affairs

According to the 2008 constitution, the NDSC – the highest authorized body in Burma – has to take, as an institution, utmost responsibility as the superior, while President U Htin Kyaw – in his three capacities of the Executive Head of the Union, Head of the Union Government and Head of the NDSC – is the top responsible person as an individual.⁹¹ At the same time, Daw Aung San Suu Kyi has to share second most responsibility, as she is not only a member of the said institution as the Minister of Foreign Affairs but also as the State Councillor, who occupies the second highest position in the Union Order (Echelon) after the President.⁹²

Despite the fact that all members of the NDSC have to share, constitutionally and institutionally, superior responsibility in one hand, Senior General Min Aung Hlaing, on the other, as the topmost Commander-in-Chief of the Armed Forces in the country, has to realistically hold liability for all these heinous crimes.⁹³

Neither official announcements of the State organs nor any media reportage appeared so far that there was any NDSC meeting held before and after the major military operations in northern Shan State and Kachin State. - in which the heinous war crimes against civilians was brutally committed by the Myanmar military. What made worst, in terms of superior/command responsibility, is that downright nonintervention of all the highest authorized bodies in the country - NDSC, Parliaments and the Government.

Nevertheless, whether or not the NDSC meeting is called for, the utmost responsible body for all those heinous war crimes is the NDSC under the 2008 constitution and with the reference to the doctrine of superior/command responsibility, so are the all NDSC members, most relevantly the highest ranked - U Htin Kyaw, Daw Aung San Suu Kyi, Senior General Min Aung Hlaing and Vice-Senior General Soe Win.

Office of the Commander-in-Chief of the Defense Services

According to 2008 Constitution, the second most responsible institution, in its practical duty and functions, for these war crimes is Myanmar Army, (Tatmadaw, in its own term). By its established chain of command, the Office of the Command-in-Chief of Defense Services (OCCDS) is the highest command and control.

In accordance with the doctrine of superior/command responsibility, President U Htin Kyaw and State Councilor Daw Aung San Suu Kyi are the superiors, while Senior General Min Aung Hlaing and Deputy Senior General Soe Win are the subordinates in the NDCS; simultaneously, while Senior General Min Aung Hlaing, Deputy Senior General Soe Win,

⁹¹ Article 199, 200, 201, Chapter V of Constitution of the Republic of the Union of Myanmar (2008) http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf

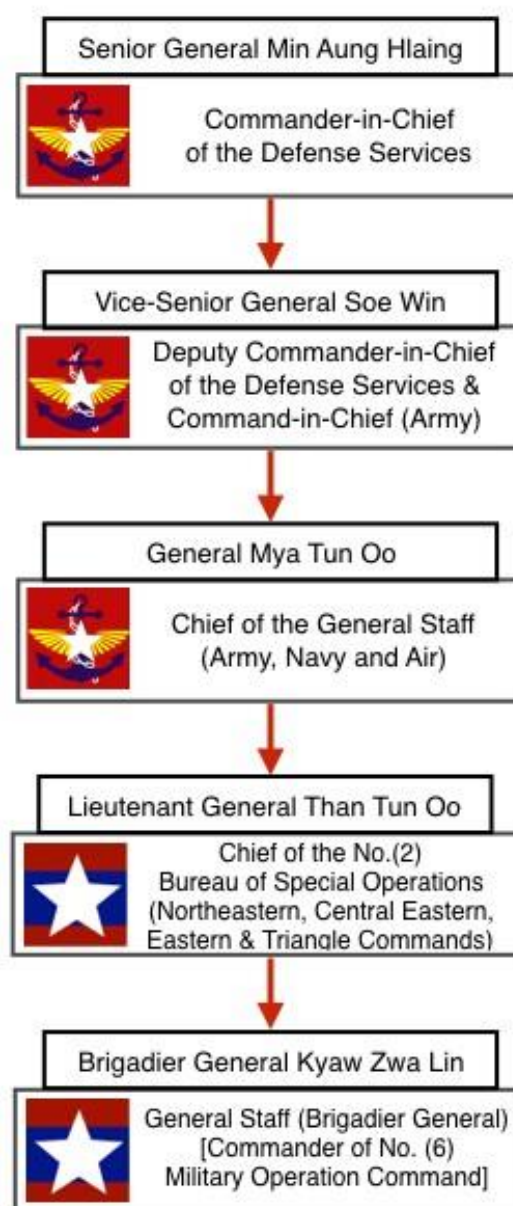
⁹² Order No. 32/2016, Office of the President of the Union of Myanmar - 3rd June 2016; Gazette of the Republic of the Union of Myanmar - 8th July 2016

⁹³ Article 338, Chapter VII of Constitution of the Republic of the Union of Myanmar (2008) http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf



General Mya Tun Oo⁹⁴, Lieutenant General Than Tun Oo⁹⁵ and Brigadier Kyaw Zwa Lin⁹⁶ (orderly top to down as shown in Figure 1) are the superiors in the OCCDS, Major General Phone Myat ⁹⁷is the subordinate.

Mong Ko Figure. 1
Office of the Commander-in-Chief of Defense Services



⁹⁴ General Mya Tun Oo, Chief of the General Staff (Army, Navy and Air)

⁹⁵ Lieutenant General Than Tun Oo, Chief of the No. (2) Bureau of Special Operations (BSO) who oversaw all of the military operations under North Eastern Command, Central Eastern Command, Eastern and Triangle Region Command.

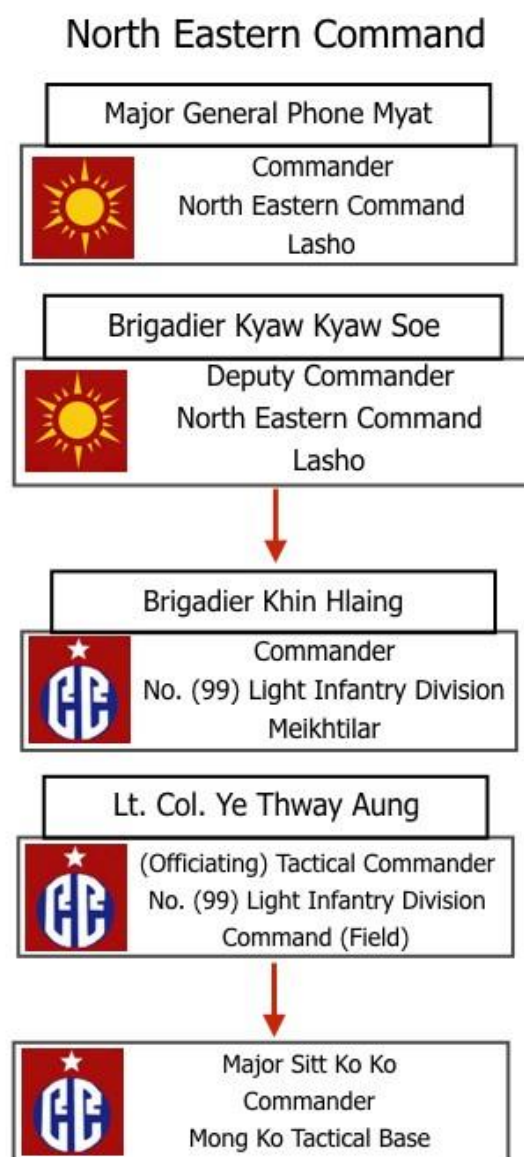
⁹⁶ Brigadier General Kyaw Zwa Lin (BC/25074)(DSA-35), General Staff (Brigadier General) Office of the Commander-in-Chief (Army) and Commander, No. (6) Military Operational Command (MOC) until he was promoted to Major General rank as the Commander of Central Command on January 2, 2018.

⁹⁷ Major General Phone Myat, Commander, North Eastern Command who took command in August, 2015 until he was substituted with Brigadier Khin Hlaing (former Commander of No. (99) Light Infantry Division) in May 2017.



Similarly, Major General Phone Myat and Brigadier General Kyaw Kyaw Soe ⁹⁸ are responsible as the superiors in command at the North Eastern Command, while Brigadier General Khin Hlaing ⁹⁹, Lt. Colonel Ye Thway Aung¹⁰⁰ and Major Sitt Ko Ko ¹⁰¹ as subordinates; and so on. (orderly top to down as shown in Figure.2)

Mong Ko Figure. 2



⁹⁸ Brigadier General Kyaw Kyaw Soe, Deputy Commander, North Eastern Command, Lashio

⁹⁹ Brigadier General Khin Hlaing, Commander, No. (99) Light Infantry Division in the time of Mong Ko battles and later promoted as Major General and posted as Commander of North Eastern Command in May, 2017.

¹⁰⁰ Lieutenant Colonel Ye Thway Aung, Officiating Tactical Commander of No. (99) Light Infantry Division in the time of Mong Ko battles and then he was promoted to full Colonel rank as the Tactical Commander of No. (99) Light Infantry Division. He got injured during the Mong Ko battles and was awarded with Gallantry Medal (သုရဲကောင်း နတ်တမ်းဝင် တံဆိပ်) for his performance in Mong Ko battles. He is now believed to have transferred to the General Administration Department, Ministry of Interior as Director.

¹⁰¹ Major Sitt Ko Ko, Field Commander of Mong Ko Tactical Base hilltop during the Mong Ko battles and the most responsible field commander who committed the heinous war crimes including cruelly using civilians as Human Shields.



VIII. Concluding Analysis and Recommendations

Concluding Analysis

1. The Myanmar Army leaders, unwittingly, have practiced chauvinism and injected extreme nationalism into the everyday life of the general population by all means including utilizing social media. Victimizing the Rohingyas in Rakhine State, the military has fueled extreme nationalism while diverting attention from human rights issues, including war crimes, taking place in Ethnic States. Furthermore, the Myanmar military has been attempting to portray itself as the only institution capable of safeguarding the country and justifying all their actions, including grave human rights abuses, as necessary to this end.
2. The ethnic armed revolutionary organizations and ethnic political parties have not yet raised sufficient questions on human rights nor have they exerted adequate efforts to integrate ethnic rights with human rights. For example, in regard to human rights, no dialogue was established in the entire so-called peace seeking process nor is there any clause at all about how previous human rights violations would be dealt with in the Nationwide Ceasefire Agreement (NCA), which the leaders of the Myanmar Army, led by Commander-in-Chief Min Aung Hlaing, have utilized as a peace document.
3. "The first duty of the Government is to afford protection to its citizens."¹⁰² Protection of life, liberty and property of the people has been the primary responsibility of any government across the world since the emergence of ancient human society. MPs, who were elected by the people, should have raised serious questions with the executive authority. Unfortunately, under the rigid restrictions of the 2008 Constitution, no action has been taken by both branches of the State in regard to war crimes.
4. On behalf of the State, similar to the executive and legislative branches, the Judiciary has the obligation to take effective action against perpetrators of heinous crimes. Under such a scenario wherein both branches have remained silent, the Judiciary should have taken the initiative by applying Judicial Activism.¹⁰³ However, instead of protecting the victims and punishing perpetrators, the judicial branch has punished those who voluntarily helped the victims.
5. Burma has been a signatory to the Geneva Convention since 1992.¹⁰⁴ As such, the legislative body, if it wants to prove that international law is respected, has a responsibility to produce a Military Act in line with the Geneva Convention, at least to protect civilians during non-international armed conflicts. However, this has not yet been the case.
6. In regard to war crimes committed by the Myanmar Army, there is no provision at all in the 1959 Army Act, which is the effective law in Burma. As such, the senior army officials have no authority to investigate and take action against their subordinates by applying section 176 of Army Regulations or their military code of conduct. The incumbent Military Tribunal, which exists in accordance with Article 293 (b) and 319 of the 2008 Constitution of Myanmar, does not have any jurisdiction to adjudicate the heinous crime cases mentioned above. As such, the regime must seek the assistance of the UN Fact Finding Mission if they want to prove that they have fulfilled their duty to prevent and punish those crimes.

¹⁰² <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3172&context=dli>

¹⁰³ Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions."

¹⁰⁴ <http://globaljusticecenter.net/documents/BindingObligations.pdf>



7. The nexus between the status of human rights and termination of civil war needs to be realized. So long as civil war continues unabated, violations of human rights – which amount to international heinous crimes – can never be deterred. Unfortunately, under the current so-called peace seeking process, centered on the Nationwide Ceasefire Agreement NCA, and exploited by the Myanmar military leaders, genuine peace will never be achieved. By using international financial support, Myanmar military leaders, led by Commander-in-Chief Min Aung Hlaing, will continue convening the 21 Century Panglong Conference and associated sham political dialogues, already framed under the NCA, which will end up strengthening the operation of the 2008 Constitution, and accelerate the extraction and exploitation of natural resources owned by the Ethnic States.

Recommendations

- (1) In order to end impunity, with the underpinning of the Rule of Law, 'human rights' should be at the center of all attempts for the achievement of genuine peace, including those for the emergence of a new democratic Federal Union of Burma;
- (2) So long as foreign and national companies ignore the rights of the Ethnic States as well as those of the indigenous peoples residing therein, a wide public campaign – national and international – against their investments in the Ethnic States should be carried out; and, economic sanctions on Burma be applied;
- (3) United and coordinated efforts must be exerted for the emergence of a democratic federal Constitution along with Constitutions of the Ethnic States based on federalism principles drawn up from the perspectives of the Ethnic States, in which popular sovereignty and provincial sovereignty are practiced; these efforts should be facilitated and supported by the international community;
- (4) The military dictatorship is systematically embedded in the 2008 Constitution, which grants blanket amnesty. As such, under this Constitution, heinous crimes – war crimes, genocides and crimes against humanity – are currently taking place. The 1983 Constitution of South Africa, in which Apartheid was systematically applied, was declared by the UN Security Council as null and void in accordance with its Resolution No. 554. Similar action should be taken in relation to Burma by the UN Security Council;
- (5) In order to take effective legal action against the Myanmar Army perpetrators who have committed heinous crimes, as mentioned above, the UN Fact Finding Mission (UN FFM) should consider providing recommendations to the UN Security Council to transfer the situation of Burma to the International Criminal Court (ICC) or to form a new International Criminal Tribunal for Burma (ICTB);
- (6) To overcome the deadlock of the so-called peace process taking place under the incumbent Nationwide Ceasefire Agreement, the role of a Third Party, possibly formed by government representatives from China, Japan, Indonesia, Switzerland and Canada, should be demanded and facilitated;
- (7) In terms of institutional reform, inter alia, the emergence of Judiciaries – which are independent, impartial and efficient – and of a Federal Army to be formed with the participation of the Ethnic Resistance Armies should be prioritized, and security sector reform should also be done for the Myanmar Army;



- (8) Along with the independence of Karenni State, the legality of the Panglong Accord, executed on February 12, 1947, shall be formally recognized, reactivated and enforced; and, if this is not the case, the Ethnic States shall have the right to declare dissolution of the Union, which arose out of the said Accord; and,
- (9) In addition to the media, ethnic women's organizations and CSOs which have been active in human rights, other organizations – international as well as national -- focusing on human rights, must express their ethical and moral stand by condemning the Aung San Suu Kyi government, which is accountable under the practice of international law, namely, 'Superior/Command Responsibility', for their silence on the heinous crimes taking place in Ethnic States, including against the Rohingyas in Rakhine State.

