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## **Myanmar's Human Rights and Humanitarian Violations in Kachin State and its Duty to Investigate, Prosecute, and Provide Victims with Remedies**

### **1. Conflict and Human Rights Violations in Kachin State**

Kachin state, Myanmar (Burma), is currently involved in a civil war between the Myanmar military (Tatmadaw) and Kachin Indendence Army (KIA), in which serious human rights violations are occurring, predominantly by the Tatmadaw against civilians of Kachin and north Shan states.

The Kachin conflict originally began in 1962, but a ceasefire held from 1994 until it was broken in 2011.<sup>1</sup> Since then, the Tatmadaw has conducted major military operations in Kachin state, and sometimes northern Shan state, which continues to the present. Since the second Kachin conflict began, thousands have been killed, over 100,000 civilians have been displaced, and there have been widespread and illegal use of systematic rape, extrajudicial killings, torture, forced labor, land takings, landmines, child soldiers, and other human rights violations as described below. While violations have been alleged from both the KIA and Tatmadaw forces,<sup>2</sup> Tatmadaw alleged violations are significantly more serious and widespread.

From August 31 to September 3, Myanmar held a major peace conference with many ethnic armies.<sup>3</sup> However KIA representatives did not sign any peace agreement, explaining that more discussion is needed before they will sign a deal.<sup>4</sup> While the conferences are planned to continue every six

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<sup>1</sup> The Irrawaddy, "A Chronology of the Kachin Conflict", 20 Nov. 2014, <http://www.irrawaddy.com/multimedia-burma/chronology-kachin-conflict.html>.

<sup>2</sup> The most major reported IHRL and IHL issues with the KIA are the recruitment of child soldiers, <https://childrenandarmedconflict.un.org/countries-caac/myanmar/>, also practiced by the Tatmadaw and prohibited by Art 1 of the CRC Op Prot on the Involvement of Children in Armed Conflict, and use of landmines which indiscriminately harm civilians, restricted by the customary IHL rule that "particular care must be taken to minimize [landmines'] indiscriminate effects", [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule81](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule81). (Cf. a Tatmadaw representative's admission in September 2016 of continuing landmine production and use. <http://burmamineban.demilitarization.net/?p=706>) There were no reports of use of torture by the KIA.

<sup>3</sup> AFP, "Myanmar peace summit ends with long road ahead", 3 Sept 2016, <http://www.channelnewsasia.com/news/asiapacific/myanmar-peace-summit-ends-with-long-road-ahead/3097582.html>.

<sup>4</sup> Id.

months until agreement is reached, the Kachin conflict is continuing and can be expected to continue for some time.<sup>5</sup>

## **2. Human Rights and Humanitarian Violations in Kachin State**

This section describes violations by the Myanmar military against Kachin civilians in the conflict under international human rights law (IHRL)<sup>6</sup> and international humanitarian law (IHL)<sup>7</sup> followed by Myanmar's duties under both IHL and IHRL to investigate violations, prosecute alleged violators, and to provide effective remedies to victims.

### **A. Rape and Sexual Violence**

The Women's League of Burma has documented more than 100 rapes of women and girls largely in Kachin state in 2014, where rape is used as a weapon by the Tatmadaw.<sup>8</sup> Some women are coerced into "sexual slavery" by the Tatmadaw to be kept with a unit for soldiers' use.<sup>9</sup> UN Secretary General Ban Ki-moon, in the March 2015 report "Conflict-Related Sexual Violence" to the UN Security Council, called on the government of Myanmar to "fully investigate and respond

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<sup>5</sup> Fighting is still being reported as of 10 Oct. 2016. <http://karennews.org/2016/10/burma-army-uses-jets-against-kachin-and-wounded-kia-soldiers-claim-government-forces-using-chemicals-in-attacks.html/>

<sup>6</sup> Myanmar is a member of the following IHRL conventions ([http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN)), Convention on the Rights of the Child Optional Protocol on Child Soldiers (CRC Op. Prot. 2, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>), and subject to customary duties articulated by the Universal Declaration of Human Rights (UDHR, <http://www.un.org/en/universal-declaration-human-rights/>) and principles articulated by expert bodies such as the Office of the High Commission of Human Rights (OHCHR).

<sup>7</sup> Myanmar is a member of the Geneva Conventions (<https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>) and subject to customary IHL, articulated by the International Commission of the Red Cross's (ICRC) Database of Customary IHL (Database, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/Home>), which among other things extends Geneva Convention duties to non-international conflicts like the Kachin internal conflict. Thus, the Myanmar military is subject to the customary IHL versions of the Geneva Convention duties listed in this report for its conduct in the Kachin internal conflict.

<sup>8</sup> Katya Cengel, "Rape is a Weapon in Burma's Kachin State, but the Women of Kachin are Fighting Back", Time, 11 Feb 2014, <http://time.com/6429/burma-rape-in-kachin/>. David Brunnstrom, "Myanmar still using rape as a weapon of war: women's group", Reuters, 14 Jan 2014, <http://www.reuters.com/article/us-myanmar-military-rape-idUSBREA0D1I020140114>.

<sup>9</sup> Kachin Women's Association Thailand, "The Burmese Army Must Immediately Release Four Women Held as Sex Slaves Near Kachin-China Border," 4 Nov 2011, <http://www.kachinwomen.com/advocacy/press-release/37-press-release/88-urgent-appeal-from-kwat.html>.

to current and historical human rights violations and abuses, including crimes of sexual violence.”<sup>10</sup> However, no effective action has been taken.

Rape and sexual violence is an IHL war crime via Geneva Convention Common Article 3(a), (c), and a crime against humanity to the extent it systematically targets Kachin women.<sup>11</sup> For IHRL, rape and sexual violence are violations of UDHR Article 5 right to freedom from inhuman or degrading treatment. Under CEDAW, Myanmar also has a duty to implement measures to end the practice of rape and sexual violence against women.<sup>12</sup>

## **B. Extrajudicial Killings**

Extrajudicial killings of civilians by Myanmar soldiers, who have not been prosecuted, has been a common occurrence in the Kachin conflict, including the killing of a first-year computer university student Gum Seng Aung, shot by soldiers in Myitkyina, Kachin State in June of 2016;<sup>13</sup> the gangrape and murder case of two Kachin volunteer teachers in Kaung Khra, Shan State in 2014;<sup>14</sup> and the shooting death of 14-year-old student Ja Seng Ing by a group of soldiers in Hpakant, Kachin State, as well as the prosecution of her father for complaining about the incident to Myanmar’s human rights commission.<sup>15</sup> The military provides unconvincing explanations to excuse such killings and almost never punishes soldiers for the killings, which prevents justice and fails to deter further killings as soldiers act with impunity.<sup>16</sup>

Extrajudicial killings of civilians are a clear war crime under IHL under Geneva Convention Common Article 3(a) and (d),<sup>17</sup> and in IHRL under UDHR Article 3 right to life.

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<sup>10</sup> UNSC, “Conflict-related sexual violence”, S/2015/203, 23 Mar. 2015, [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_203.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf).

<sup>11</sup> Geneva Conventions, Common Art. 3, <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>. ICRC, CIHL Database, “Rule 93. Rape and Other forms of Sexual Violence”, [https://ihl-databases.icrc.org/customary-ihl/eng/print/v1\\_rul\\_rule93](https://ihl-databases.icrc.org/customary-ihl/eng/print/v1_rul_rule93). Rape and Sexual violence as a crime against humanity are discussed in the ICRC Casebook chapters on Crimes and Sexual Violence:

[https://casebook.icrc.org/casebook/doc/book-chapter/criminal-repression-book-chapter.htm#i\\_d](https://casebook.icrc.org/casebook/doc/book-chapter/criminal-repression-book-chapter.htm#i_d),

<https://casebook.icrc.org/casebook/doc/case-study/women-and-sexual-violence.htm>.

<sup>12</sup> CEDAW, supra n. 6, Article 2, 3. Violence, including sexual violence, is discrimination under CEDAW via CEDAW General Recommendation 19,

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

<sup>13</sup> Wa Lone, “Student killed by soldier in Kachin State”, Myanmar Times, 22 June 2016,

<http://www.mmtimes.com/index.php/national-news/20973-student-killed-by-soldier-in-kachin-state.html>.

<sup>14</sup> Nyein Nyein, Lawi Weng, “2 Kachin Teachers Found Dead in Shan State”, The Irrawaddy, 20 Jan 2015,

<http://www.irrawaddy.com/burma/2-kachin-teachers-found-dead-shan-state.html>.

<sup>15</sup> Todd Pitman, Esther Htusan, “No justice for Myanmar father accusing army of killing child”, AP, 2 Nov 2015, [http://www.salon.com/2015/11/03/no\\_justice\\_for\\_myanmar\\_father\\_accusing\\_army\\_of\\_killing\\_child/](http://www.salon.com/2015/11/03/no_justice_for_myanmar_father_accusing_army_of_killing_child/).

<sup>16</sup> Only one case can be found of the Tatmadaw ever admitting and prosecuting soldiers for murder for reasons of political calculation, the exception that proves the rule of impunity. Wa Lone, “In rare move, Myanmar military admits soldiers killed five villagers”, Reuters, 20 Jul 2016, <http://www.reuters.com/article/us-myanmar-military-massacre-idUSKCN10016W>.

<sup>17</sup> Geneva Convention, Common Art 3. ICRC, CIHL Database, “Rule 89. Violence to Life”, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule89](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule89).

### C. Forced Labor

Kachin civilians are subject to forced labor by Tatmadaw soldiers for tasks such as being porters to carry heavy weapons and food supplies, human minesweepers, guides in conflict areas, and sexual slaves for soldiers, for long periods of time.<sup>18</sup> In one example, the army detained a farmer for over two weeks, torturing him and forcing him to guide them through combat areas in Mansi Township, Kachin state.<sup>19</sup> Forced laborers are routinely subjected to severe physical abuse by soldiers, and one former porter reported that the only ways out of forced labor is either escape or death.<sup>20</sup>

The Fourth Geneva Convention, Articles 40 and 51, prohibits forced labor of civilians in work “directly related to the conduct of military operations,” making the Tatmadaw’s conduct a clear war crime.<sup>21</sup> Under IHRL, Myanmar is prohibited from practicing forced labor under the Forced Labor Convention.<sup>22</sup> The exception for “compulsory military service” does not apply to these cases because the labor is not a purely military character and the harsh activities and treatment do not fall within the scope of the exception.<sup>23</sup>

### D. Land and Property Confiscations from Villagers

Tatmadaw forces regularly pillage, destroy, and confiscate property from Kachin villages without consent or compensation, such as food, supplies, money, and most significantly large areas of land. Due to the high displacement by conflict, over 100,000 people, there are reports of significant land seizures of farmland and other lands by the army, leaving displaced peoples landless and without recourse to demand return of their land.<sup>24</sup> According to one activist, “Land confiscations in Kachin have been so rampant there is little vacant land left.”<sup>25</sup>

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<sup>18</sup> Physicians for Human Rights, “Under Siege in Kachin State, Burma, Sept 2011, <http://physiciansforhumanrights.org/library/reports/under-siege-in-kachin-state-burma.html>; Human Rights Watch, “Untold Miseries: Wartime Abuses and Forced Displacement in Burma’s Kachin State”, 20 Mar. 2012, <https://www.hrw.org/report/2012/03/20/untold-miseries/wartime-abuses-and-forced-displacement-burmas-kachin-state>. Fortify Rights, “I Thought They Would Kill Me: Ending Wartime Torture in Northern Myanmar”, 9 June 2014, [http://www.fortifyrights.org/downloads/Fortify%20Rights\\_Myanmar\\_9\\_June\\_2014.pdf](http://www.fortifyrights.org/downloads/Fortify%20Rights_Myanmar_9_June_2014.pdf).

<sup>19</sup> Fortify Rights, *id.*, p. 15.

<sup>20</sup> *Id.*, p. 33.

<sup>21</sup> ICRC, CIHL Database, “Rule 95. Forced Labor”, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule95](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule95); Fourth Geneva Convention, *supra* n. 7, Arts. 40, 51, 95. In the limited non-military cases it is allowed, the payment of a wage is required. Third Geneva Convention, *supra* n. 7, Art. 49 further prohibits forced labor of prisoners of war.

<sup>22</sup> Convention concerning Forced or Compulsory Labour, 29 Jun 1930, Article 2(a) (Myanmar is a member). [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312174](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312174).

<sup>23</sup> Cf. International Commission of Jurists, “Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR”, Principles 15-18, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

<sup>24</sup> Thin Lei Win, “Land grabs rampant in conflict-ridden Kachin State”, Democratic Voice of Burma, 23 Feb 2016, <http://reliefweb.int/report/myanmar/land-grabs-rampant-conflict-ridden-kachin-state>.

<sup>25</sup> *Id.*

The Myanmar government has pledged a program to return and give restitution for land takings under the National Land Use Policy (NLUP) of Myanmar, adopted in January 2016.<sup>26</sup> The parliament member in charge of the effort, Sein Win, has promised to solve all cases within one year, although he estimates the number of cases are in the hundreds of thousands.<sup>27</sup> There are significant problems with the program including capacity limitations; the fact that land may be divided and sold many times; and documents are often incomplete, lost or destroyed.<sup>28</sup> Further, there are concerns that the military may not respect the government's efforts and continue the practice and impede land returns and restitution.<sup>29</sup>

Confiscations, seizures, or destruction of civilian property and land (even government owned)<sup>30</sup> are prohibited in IHL under Geneva Convention I, Article 50, Geneva Convention II, Art. 51, and Geneva Convention IV Arts. 53 and 147 rules of usufruct, which prohibit them when not justified by military necessity.<sup>31</sup>

Under IHRL, UDHR Art. 17(2) prohibits the arbitrary deprivation of private or joint property from persons,<sup>32</sup> and the taking of displaced persons' property is specifically prohibited by Principle 2(1) of the "UN Principles on Housing and Property Restitution for Refugees and Displaced Persons" (Pinheiro Principles).<sup>33</sup> Section V of the Pinheiro Principles further provides that states should establish procedures, institutions, and mechanisms to enforce land and property restitution claims, and support and implement them in a fair, non-discriminatory, timely, and effective way in practice.<sup>34</sup>

## **E. Torture, Physical Abuse, and Inhuman Treatment**

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<sup>26</sup> Jenny Franco, "The right to land at crossroads in Myanmar", 5 Jul. 2016, Transnational Institute, <https://www.tni.org/en/article/the-right-to-land-at-crossroads-in-myanmar>.

<sup>27</sup> A. Belford, Hnin Yadana Zaw, A. Slodkowski, "Suu Kyi tackles military land grabs in test of new Myanmar government", 3 Aug. 2016, Reuters, <http://www.businessinsider.com/r-suu-kyi-tackles-military-land-grabs-in-test-of-new-myanmar-government-2016-8>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> All land in Myanmar is government owned. UNHCR, "Questions and Answers on Land Issues in Myanmar", [www.data.unhcr.org/thailand/download.php?id=297](http://www.data.unhcr.org/thailand/download.php?id=297). That said, civilian residents' use of land may be said to be private-like in its function for the purposes of the IHL and IHRL rights against arbitrary takings described here. Private land takings are absolutely prohibited. Public land takings require military necessity.

<sup>31</sup> ICRC, CIHL Database, "Rule 51. Public and Private Property in Occupied Territory", [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule51](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule51); ICRC, CIHL Database, "Practice Relating to Rule 50. Destruction and Seizure of Property of an Adversary", [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter16\\_rule50](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter16_rule50).

<sup>32</sup> As mentioned in Note 25, civilians' use of land in Myanmar may arguably be understood as private-like in its function for the purposes of the Art. 17(2) right against arbitrary taking.

<sup>33</sup> Paulo Sergio Pinheiro, "Principles on housing and property restitution for refugees and displaced persons" (Pinheiro Principles), E/CN.4/Sub.2/2005/17, 28 June 2005, Principle 2(1), <http://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>. Note the Pinheiro Principles apply to government-granted land.

<sup>34</sup> *Id.*, Principles 12(1)-12(6).

The Tatmadaw and military intelligence conducts systematic physical abuse and torture against local Kachin villagers to collect information about the local area and KIA forces, coerce in order to seize property or force labor, intimidate, punish, and discriminate.<sup>35</sup> Reported torture tactics included beatings, sexual assaults, and burnings, as well as inhuman and degrading treatment such as victims being told to strip, dig their own graves, or lick their own blood from the ground after beatings.<sup>36</sup> One group gathered evidence for at least 60 instances of torture of Kachin civilians from 2011-2014.<sup>37</sup>

Cruel treatment and torture are explicitly prohibited in IHL as war crimes by Geneva Convention Common Article 3(a).<sup>38</sup> Torture is customarily defined in IHL by the International Criminal Court provides definition of “severe physical or mental pain or suffering” for “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind,”<sup>39</sup> which the Myanmar military’s conduct easily meets.

Under IHRL, UDHR Article 5 prohibits torture under the customary Convention Against Torture (CAT) definition, Article 1, which substantially mirrors the ICC definition as it applies to the Myanmar military.<sup>40</sup>

## **F. Blocking International Aid to Internally Displaced Persons (IDPs) and Refugees**

The conflict in Kachin and northern Shan states have displaced nearly 100,000 civilians to refugee and IDP camps in Kachin State, Shan State, and the border areas of China.<sup>41</sup> While IDPs in government-controlled areas have access to UN conveyed and international aid, those in remote areas—such as Sumprabum Township, KIA-controlled areas, and along the China border—do not have access to humanitarian aid, although they have the direst needs for assistance. This is because

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<sup>35</sup> Andrew Kaspar, Yen Snaing, “Burmese Army Accused of Torture as Kachin Conflict Enters Fourth Year”, The Irrawaddy, 9 Jun 2014, <http://www.irrawaddy.com/multimedia-burma/burmese-army-accused-torture-kachin-conflict-enters-fourth-year.html>; Paul Vrieze, “Govt Forces Detain, Torture Kachin Civilians: Rights Group”, The Irrawaddy, 19 Feb. 2013, <http://www.irrawaddy.com/burma/govt-forces-detain-torture-kachin-civilians-rights-group.html>. Cf. Fortify Rights, *supra* n. 18.

<sup>36</sup> Fortify Rights, *id.*, p. 52.

<sup>37</sup> *Id.*, p. 23.

<sup>38</sup> ICRC, CIHL Database, “Rule 90. Torture and Cruel, Inhuman or Degrading Treatment”, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule90](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90).

<sup>39</sup> Elements of Crimes for the ICC, Definition of torture as a war crime, Rome Statute of the ICC, ISBN No. 92-9227-227-6, 18 July 1998, Article 8(2)(a)(ii) and (c)(i). Unlike the definition in IHRL, defined by Convention Against Torture, 10 Dec. 1984, <http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx>, Article 1, torture as a war crime under IHL does not need to be conducted by a public official, so may apply to possible commissions by non-state KIA soldiers as well.

<sup>40</sup> In the Kachin case, there is no substantive difference between definitions as there have not been reports of torture against KIA forces, a non-state group to which CAT’s definition would not apply.

<sup>41</sup> Internal Displacement Monitoring Center, “Myanmar IDP Figure Analysis”, Mar. 2015, <http://www.internal-displacement.org/south-and-south-east-asia/myanmar/figures-analysis>.

the government of Myanmar blocks international aid for IDPs on security grounds.<sup>42</sup> Only a small number of UN convoys can reach KIA-controlled areas.<sup>43</sup>

The duty to provide access to humanitarian aid is a direct IHL obligation under Geneva Convention IV, Art. 23.<sup>44</sup> To the extent the aid may be systematically being withheld specifically to Kachin civilians *as Kachin* for the purpose of their destruction, the conduct constitutes a crime against humanity.<sup>45</sup> Under IHRL, the obligation to provide humanitarian assistance is part of the obligation to fulfill persons' right to life and freedom from inhuman treatment, UDHR Articles 3 and 5.<sup>46</sup>

### 3. Duties to Investigate, Prosecute, and Give Remedies under IHL and IHRL

As described above, the IHL and IHRL violations occurring in the conflict in Kachin state by the Tatmadaw constitute war crimes and serious human rights violations against Kachin civilian victims.

The major duty of the government of Myanmar vis-à-vis these violations, under both IHL and IHRL, is to investigate allegations of violations against victims and prosecute suspects if justified by evidence,<sup>47</sup> and to provide effective remedies to victims.<sup>48</sup>

Under these duties, remedies should be adequate, effective, prompt, and appropriate, and include restitution, reparation and compensation, satisfaction—such as ending the violations, a public

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<sup>42</sup> Thomas Kean, Bill O'Toole, "Government blocks UN aid to Kachin IDPs", Myanmar Times, 09 Feb 2015, <http://www.mmtimes.com/index.php/national-news/13040-government-blocks-un-aid-to-kachin-idps.html>.

<sup>43</sup> IRIN News, "Aid access still limited in displaced in Myanmar's Kachin State", 5 Apr 2013, <http://www.irinnews.org/feature/2013/04/05/aid-access-still-limited-displaced-myanmar%E2%80%99s-kachin-state>.

<sup>44</sup> Fourth Geneva Convention, supra n. 7, Article 23. ICRC, CIHL Database, "Rule 55. Access for Humanitarian Relief to Civilians in Need", [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule55](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule55); ICRC 20th Conference, Vienna, 1965, Res. 28. Ruth Stoffels, "Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps", 86 IRRC 855, 2004, 515 ff, [https://www.icrc.org/eng/assets/files/other/irrc\\_855\\_stoffels.pdf](https://www.icrc.org/eng/assets/files/other/irrc_855_stoffels.pdf).

<sup>45</sup> Stoffels, id., p. 518.

<sup>46</sup> Id., pp. 517 ff.

<sup>47</sup> IHL: First Geneva Convention, supra n. 7, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146. ICRC, CIHL Database, "Rule 158. Prosecution of War Crimes", [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule158](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158).

IHRL: OHCHR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL (Right to Remedy Principles), U.N. Doc. E/CN. 4/2005/L. 48, UNGA Res. 60/147, 16 Dec. 2005, Arts. 3(b), 4, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>48</sup> IHL: ICRC, CIHL Database, "Rule 150. Reparation", [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter42\\_rule150](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule150) (duty for reparations for loss); Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law", 85 IRRC 851, p 497, Sept 2003, [https://www.icrc.org/eng/assets/files/other/irrc\\_851\\_zegveld.pdf](https://www.icrc.org/eng/assets/files/other/irrc_851_zegveld.pdf) (citing ILC, Draft Articles on State Responsibility, Supplement No. 10 (A/56/10), chp.IV.E.1, Nov 2001, Article 33(2).)

IHRL: Right to Remedy Principles, Id, Arts. 1, 2(a)-(c), 3(b), 4, 8, 11, 19-22, 23. The right to remedy is supported as customary IHRL by Articles 2(3) ICCPR; 13–14 CAT; 13 ECHR; 25 ACHR; 7(1)(a) ACHPR, which require States to provide domestic remedies redressing human rights violations.

acknowledgement or apology, and a guarantee of non-repetition by implementing measures—and providing victims access to justice and information. The UN “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL” further specifies the guarantee of non-repetition by calling for effective civilian control of military and security, ensuring the military abides by international standards, strengthening the judiciary, training military and security forces, observance of codes of conduct, promoting prevention and monitoring mechanisms, and legal reforms.<sup>49</sup>

#### *Regarding Immunity and Myanmar’s Constitution*

Myanmar’s constitution Section 445 gives immunity from any “proceeding”, such as prosecution, to “any member of the Government, in respect of any act done in the execution of their respective duties.”<sup>50</sup> The clause has been applied by the military to all members of the military, soldiers and officers, for any actions including criminal conduct. However, both IHL and IHRL have the general principle that legality in domestic law does not excuse violations of international law.<sup>51</sup> Thus, persons who violate serious IHL and IHRL duties are still responsible in international law regardless of domestic immunity, and the duties of investigation, prosecution, and remedies remain in effect.

#### **4. Recommendations**

Human Rights Now, a Tokyo-based international human rights NGO, expresses concern about the government of Myanmar’s serious violations of international humanitarian and human rights law by the military’s abuses against civilians in the conflict in Kachin state, and offers the following recommendations:

- Immediately cease all violations against Kachin civilians of Myanmar’s IHL and IHRL duties as described in this report, including rape and sexual violence; extrajudicial killings; forced labor; confiscations of land and property; torture, physical abuse, and inhuman treatment; and the blocking of humanitarian aid.
- Establish measures to ensure that all alleged crimes and violations of IHL and IHRL are investigated and suspects timely prosecuted by a fair judicial process when justified by evidence.
- Establish measures to ensure that all Kachin civilian victims of crimes and violations of IHL and IHRL are provided with timely, adequate, and effective remedies including, as

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<sup>49</sup> Id., Art. 23.

<sup>50</sup> Myanmar Constitution (2008), Sec. 445, [http://www.burmalibrary.org/docs5/Myanmar\\_Constitution-2008-en.pdf](http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf) (English translation).

<sup>51</sup> Vienna Convention Law of Treaties, 1155 UNTS 331, 27 Jan 1980, Art. 26 (stating a state may not invoke its internal law to justify failure to perform a treaty obligation. Myanmar is a member); ILC, *supra*, n. 48, Art 3.



appropriate, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition through military training and specific preventative measures.

- Recognize that the immunity of soldiers under 2008 Constitution Section 445 does not have legal power to excuse Myanmar's duties under IHL and IHRL to investigate and prosecute serious violations of IHL and IHRL duties and provide victims with remedies, and establish measures to implement these obligations in domestic law, including amendment of Section 445 to bring it in conformity with Myanmar's international duties.
- Provide the UN and national and international humanitarian agencies with free access to all areas of Kachin and Shan states to provide humanitarian aid to displaced persons, and establish measures to provide and facilitate the movement of humanitarian aid to displaced civilians.
- Ratify core international human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol.