

POLICY MEMORANDUM:

Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military

March 2014

IHRC

INTERNATIONAL HUMAN RIGHTS CLINIC

HUMAN RIGHTS PROGRAM AT HARVARD LAW SCHOOL



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

TABLE OF CONTENTS

Preface.....	ii
Summary and Key Recommendations.....	1
I. Introduction and Background	6
A. Internal Armed Conflict and Reform in Myanmar.....	6
B. Methodology	7
C. Legal Framework	8
D. Analytical Framework	10
II. Indiscriminate Attacks and Wilful Killings of Civilians in Myanmar	12
A. Indiscriminate Attacks and Wilful Killings under Previous Regimes	13
B. Indiscriminate Attacks and Wilful Killings under the Thein Sein Government	19
III. Causes of Attacks on Civilians at Three Levels of Military Authority	26
A. Operational-Policy Level	27
B. Tactical Level	31
C. Enlisted Soldier Level	33
IV. Recommendations for Reform.....	38
A. Recommended Framework for Reform.....	38
B. Recommendations to Specific Actors	40

PREFACE

The International Human Rights Clinic at Harvard Law School (the Clinic) has worked on issues relating to Myanmar for almost ten years. Although the Clinic's work has historically involved the documentation of human rights violations committed by the Myanmar military, this memorandum focuses on the need to address underlying institutional problems within the military through a practical, concerted, and sustained program of reform. We hope that this document will support ongoing reform efforts and contribute to long-term security for civilian populations throughout the country.

This memorandum grew out of a separate, ongoing project initiated by the Clinic shortly before the inauguration of the Thein Sein government. At that time, the Clinic began to investigate the actions of the Myanmar Army during a 2005–2008 military offensive in the eastern part of the country. Our goal was to compile the most detailed and authoritative study to date of the implementation of a military counterinsurgency campaign in Myanmar. Over the past three years, we have undertaken eleven field missions to Myanmar and the Thailand-Myanmar border, and have compiled more than 1,000 pages of witness statements from parties with first-hand knowledge of the military's policies and practices, including former soldiers who served in the Myanmar Army.

During the course of the investigation, remarkable and unprecedented changes began to reshape the political landscape in Myanmar. Democratic reforms and peace talks with non-state armed groups proceeded at a pace that few—including the Clinic—thought possible. At the same time, new opportunities emerged to engage with the Myanmar government and military on issues relating to democratization, rule of law, and human rights. Our optimism, however, was tempered by continued reports of serious human rights violations and attacks on civilians. We were troubled, for example, by the acute civilian impact of armed conflict in Kachin State and violence in Rakhine State. Moreover, we were concerned about the continued insecurity of civilian populations displaced by decades of war. Many individuals with whom we spoke did not feel safe returning to their homes, and feared that the peace process would fail and civilians would again be targeted en masse. For many civilians, peace dividends remained elusive.

With these opportunities and concerns in mind, we began to explore new avenues to promote human rights in the context of armed conflict. As a team, we discussed how, practically, to contribute to the institutional development of the Myanmar military and address civilian targeting. We considered the role of accountability in preventing the unlawful use of force by soldiers and examined how positive incentives for military personnel could promote civilian protection. We explored the role that training plays in solidifying reforms. We talked about what could be accomplished immediately and what would take more time, given the complex and rapidly evolving political situation in the country. This memorandum is born of those conversations.

International Human Rights Clinic at Harvard Law School
*Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the
Myanmar Military*

This memorandum draws from the findings of our ongoing investigation and addresses the specific military policies and practices that have led to indiscriminate attacks and wilful killings of civilians in Myanmar. It appears that these policies and practices continue to be implemented today. Much of the analysis and many of the recommendations provided in the pages that follow likely apply to contexts not discussed in this memorandum. First, although this document focuses only on indiscriminate attacks and wilful killings of civilians, there are other forms of abuse—such as torture, forced labor, and sexual violence—that deserve similar attention. Second, this memorandum is limited by the scope of our investigation and therefore focuses only on the policies and practices of the Myanmar military. However, non-state armed groups must also take steps to prevent civilian harm, and their actions should be scrutinized as well. Finally, while this memorandum addresses the situation in conflict zones, much of the analysis could apply to the official use of force in other settings and to security sector reform more generally. We encourage further thought and dialogue on these issues, all of which deserve specific consideration in their own right. In this spirit, we remain committed to engaging with all those who seek to achieve the shared goal of protecting and promoting human rights during this critical period of Myanmar’s history.

International Human Rights Clinic
Harvard Law School
March 2014

SUMMARY AND KEY RECOMMENDATIONS

Recent democratic reforms and progress toward ending armed conflict in Myanmar have led to cautious optimism about the future of the country. Moreover, within the Myanmar military there appears to be a growing desire for modernization and professionalization. These developments present new opportunities to reform the institutions and policies that have historically undermined the freedom, security, and wellbeing of the people of Myanmar. However, serious challenges persist. In particular, the Myanmar military continues to prioritize military objectives over civilian protection, including through policies that sanction the direct targeting of civilians. Until military policies and practices are reformed, populations remain at serious risk wherever military force is employed—whether in ethnic minority areas to combat insurgencies or in the streets of Yangon to suppress future protests. This memorandum by the International Human Rights Clinic at Harvard Law School (the Clinic) describes the Myanmar military’s longstanding practice of indiscriminately attacking and willfully killing civilians, identifies the diverse factors that have contributed to such attacks, and offers recommendations for reform. The protection of civilians in Myanmar will require a sustained effort over many years to reverse the singular prioritization of military objectives and to address the underlying institutional causes of civilian targeting that exist at all levels of military authority.

For decades, the Myanmar military has engaged in indiscriminate attacks and wilful killings of civilians within its own borders. These actions, which are clear violations of international humanitarian law, have caused the death of thousands of civilians and have been a major factor in the massive displacement in the country. Throughout Myanmar’s history, government forces have routinely attacked civilian populations as part of centrally-planned counterinsurgency offensives. The military has targeted civilians through “shoot-on-sight” incidents, extrajudicial executions, indiscriminate shelling, and the purposeful use of landmines to inflict civilian casualties. The civilian impact of these military offensives is well documented by the Clinic and other human rights organizations, and has been a major concern of governments and the United Nations for decades.

Since the inauguration of the Thein Sein administration in March 2011, the government has concluded a series of ceasefire agreements with ethnic armed groups, which has reduced conflict in many parts of the country and led to increased security for civilians. Nevertheless, in areas of ongoing conflict, such as Kachin State and northern Shan State, communities continue to report attacks that are consistent with historical patterns of civilian targeting. These events suggest that improvements in civilian security in ceasefire regions are the result of a reduction in hostilities rather than the reform of problematic policies and practices. Moreover, individuals living in ceasefire areas are skeptical about

the durability of peace and fear a return to active conflict and large-scale civilian targeting.

Indiscriminate attacks and wilful killings of civilians have largely been the result of the Myanmar military's institutional prioritization of military objectives at the expense of civilian protection. Although this has been most apparent in military policies that sanction the targeting of civilians in areas controlled by opposition armed groups, problems exist throughout the military hierarchy. As a result, officers and enlisted soldiers alike have been primed to pursue military goals and satisfy superiors' expectations without regard for civilian impact.

This memorandum offers suggestions for reform based on an analysis of the factors that cause civilian targeting at three levels of military authority: (1) the operational-policy level, at which military policies are developed and authorized; (2) the tactical level, at which officers direct subordinates during engagements in the field; and (3) the enlisted soldier level, at which low-level soldiers on the front lines exercise personal discretion in executing missions.

At the operational-policy level, military counterinsurgency policies, an ineffective and unaccountable military justice system, and a distorted incentive structure have contributed to attacks on civilians. A central aspect of the Myanmar military's counterinsurgency strategy has been the labeling of geographic regions with color-designations—black, brown, and white—according to the extent of government control. “Black areas” are territories over which the Myanmar government exercises little or no control, “brown areas” are areas in which government control is contested, and “white areas” are those in which government control is strong. Soldiers have been governed by different rules of engagement based on the designation of the territory in which they are operating. Critically, soldiers have often been instructed that all individuals, including civilians, present in black areas are to be considered “the enemy” and legitimate targets of attack. This practice constitutes a *per se* violation of the principle of distinction, a fundamental tenet of international humanitarian law which requires that combatants distinguish between civilian and military targets. Myanmar's military justice system, which lacks civilian oversight, has consistently failed to hold military personnel responsible for abuses of civilians, leading to an atmosphere of impunity throughout the military's ranks. Moreover, military leadership has rewarded improper conduct by routinely promoting senior commanders who have overseen large military offensives in which civilians were targeted en masse.

At the tactical level, military field officers have often explicitly instructed their subordinates to attack civilians, or have given such vague or broad orders that soldiers are led to believe that they are required or authorized to attack civilians. Given this ambiguity and the reluctance of soldiers to seek clarifications from superior officers, these orders have frequently been interpreted to the detriment of civilians. Moreover, after civilians have been attacked, field officers have routinely failed to report, investigate, or punish their subordinates for causing

civilian harm.

Finally, at the enlisted soldier level, various factors have made it more likely that low-level military personnel will harm civilians when exercising their personal discretion during missions. First, the Myanmar military's longstanding practice of prioritizing military objectives over civilian protection has created an institutional culture that insufficiently values civilian life, especially in ethnic areas. This culture has been reinforced by a strong Burman nationalist sentiment within the military and the privately-held prejudices of many soldiers against ethnic minority groups. Second, the military's basic training has failed to prepare soldiers for the complexities and difficulties of counterinsurgency operations, and has neglected to instill in soldiers an understanding of their obligations towards civilians under international humanitarian law. Lastly, widespread expectations of impunity for military personnel who abuse civilians have conditioned soldiers to shoot first and ask questions later.

Undoubtedly, the challenges facing Myanmar's military forces during counterinsurgency campaigns in ethnic minority areas are numerous and significant. Inexperienced soldiers often operate under fear and great stress against ethnic armed groups that employ guerilla warfare tactics. At times unfamiliar terrain and the absence of clearly defined battle lines may make it hard to differentiate legitimate and illegitimate targets of attack. Moreover, non-state armed groups in Myanmar might, at times, wear civilian clothes or otherwise make it difficult to distinguish between themselves and civilians. These challenges, however, do not absolve the Myanmar military of its obligations under international humanitarian law or justify inaction on the problems identified in this memorandum.

Preventing indiscriminate attacks and wilful killings of civilians in Myanmar will require a paradigm shift within the military that overturns longstanding practices and deep-seated norms. To this end, the Clinic recommends a framework for reform incorporating two factors that motivate soldiers: *accountability* to discourage improper or unlawful behavior and *positive incentives* to reward desirable conduct. Holding military personnel accountable for unlawful action is an important part of any reform effort and will cause soldiers to refrain from actions which harm civilians. However, to achieve the kind of transformation envisioned by this memorandum, soldiers will also have to be motivated to pursue constructive behaviors. Therefore, positive incentives should reward conduct that is lawful and respectful of civilians. For example, decisions about promotion, compensation, access to training, and other benefits could be tied to the performance of units and individual soldiers in terms of civilian protection. This memorandum describes mechanisms and procedures—such as the systematic audit of military units—that could support these kind of incentive schemes. Proper training of soldiers is also a necessary component of reform but will likely be of little benefit unless linked to a more comprehensive program of reform. Ultimately, without addressing both accountability and positive incentives, reform efforts will be severely hampered.

In addition to this broad framework for reform, the Clinic offers specific recommendations to the government of Myanmar and decision-makers at the three levels of military authority, including the following:¹

To the Government of Myanmar:

- Publicly affirm that all units and personnel of the Myanmar Armed Forces must respect international humanitarian law, including by immediately refraining from indiscriminate attacks and wilful killings of civilians and at all times distinguishing between civilians and combatants.
- Amend the 2008 Constitution to allow for independent civilian oversight of the military justice system, including appellate review of courts-martial proceedings by civilian judges.
- Accede to the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).

To Operational-Policy Level Military Officers:

- Actively promote an institutional culture that values civilian protection and respects ethnic diversity.
- Repeal and publicly renounce all policies and practices that prescribe or permit soldiers to indiscriminately attack and wilfully kill civilians, including policies providing for different rules of engagement in “black areas.”
- Train all soldiers on their obligations under international humanitarian law and relevant domestic law.
- Systematically audit the performance of combat units in terms of minimizing civilian casualties.
- Tie promotion, pay increases, access to training, military honors, veterans’ benefits and other incentives to demonstrable action to protect civilians.
- Develop procedures for civilians and military personnel to report violations of international humanitarian law and relevant domestic law to appropriate military authorities.
- Reform the military justice system to ensure that all violations of international humanitarian law and relevant domestic law are investigated and prosecuted.

To Tactical Level Military Personnel:

- Give orders to subordinates that are clear, precise, and lawful under international humanitarian law and relevant domestic law.

¹ A full set of recommendations is included in Section IV.

International Human Rights Clinic at Harvard Law School
Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military

- Report violations of international humanitarian law and relevant domestic law and cooperate with appropriate authorities to investigate such violations.
- Expressly and routinely warn subordinates that violations of international humanitarian law and relevant domestic law must be reported, and that all such reports will be investigated and, if appropriate, prosecuted.

To Enlisted Soldiers:

- Interpret all orders in favor of compliance with international humanitarian law and relevant domestic law, and refuse to comply with unlawful orders.
- Report violations of international humanitarian law and relevant domestic law by fellow soldiers or commanding officers directly to the appropriate military authorities.
- Show respect and exercise restraint, without ethnic bias or prejudice, in interactions with civilian populations.

I. INTRODUCTION AND BACKGROUND

Recent events in Myanmar provide reason to be hopeful about the country's future. Unprecedented democratic reforms and progress in peace negotiations with ethnic armed groups indicate the emergence of a new class of reformers in the Myanmar government willing to break with the autocratic approach of past regimes. Within the Myanmar military, as well, there appears to be an increased desire for modernization and professionalization. These changes present new opportunities to reform the institutions and policies that have historically undermined the freedom, security, and well-being of the people of Myanmar.

Despite these developments, the enduring power and influence of the Myanmar military, and its continued willingness to direct violence against civilians, represent major obstacles to progress. As described in this memorandum, the Myanmar military likely continues to implement policies and practices that result in indiscriminate attacks and wilful killings of civilians. Until these policies and practices are reformed, civilians will be at risk whenever and wherever military force is deployed—whether in the context of armed conflict, communal unrest, or urban protests. The unlawful use of force in these settings not only jeopardizes civilian life, but also undermines public confidence in the government and military at a critical moment in Myanmar's democratic transition.

This memorandum presents a multifaceted approach to military reform that addresses the root causes of civilian targeting at all levels of military authority. Implementing the recommendations set forth in this document would solidify the changes underway in Myanmar and help the country turn the page to a new chapter in its history.

A. Internal Armed Conflict and Reform in Myanmar

Since Myanmar gained independence from the United Kingdom in 1948, armed conflict has persisted between the government and non-state armed groups affiliated with either ethnic minority populations or ideological movements. Although conflict has at times been tempered by ceasefire agreements, nationwide peace has yet to be achieved. Moreover, human rights organizations have consistently alleged grave abuses of civilians by Myanmar military personnel operating in ethnic areas, including killings, torture, rape, forced displacement, and forced labor.

After decades of autocratic military rule, Myanmar inaugurated a new quasi-civilian government under President Thein Sein in March 2011, raising hopes of democratic reforms and nationwide peace. In the past three years, major steps forward have included the release of more than 1,000 political prisoners, the registration of a broad range of political parties, the emergence of parliamentary

debate, the passage and amendment of key legislation, the reduction of media censorship, and the opening of political space for civil society activity. Additionally, the Thein Sein government has made significant progress in ending decades of conflict by negotiating ceasefire agreements with more than a dozen non-state armed groups. Although these efforts have resulted in decreased violence against civilians in ceasefire areas, armed conflict resumed in the northern part of the country after the collapse of a seventeen-year-old ceasefire agreement between the government and the Kachin Independence Organization (KIO) in June 2011. Since then, there have been frequent reports of grave abuses committed by Myanmar military personnel in Kachin State and northern Shan State.

B. Methodology

The analysis and recommendations in this memorandum are based, in part, on the findings of an investigation by the International Human Rights Clinic at Harvard Law School (the Clinic) into an offensive by the Myanmar military in Kayah State and eastern Bago Region between 2005 and 2008. The offensive targeted the Karen National Union (KNU), its armed wing, the Karen National Liberation Army (KNLA), and the Karen civilian population that resides in the region. The Clinic did not attempt to document all aspects of the offensive, but rather focused on the conduct of specific Myanmar military units within a limited geographic and temporal scope.

As part of the investigation, the Clinic undertook eleven field missions to Myanmar and along the Thailand-Myanmar border, where students and staff conducted more than 150 in-depth interviews and compiled more than 1,000 pages of witness statements from parties possessing first-hand knowledge of the military's policies and practices. Interviewees included former soldiers, civilian victims, porters, and other individuals who had personal contact with military personnel during the offensive. The Clinic solicited expert statements from four professionals with knowledge relevant to the offensive,² and reviewed hundreds of reports by third-party sources, including human rights organizations—such as the Karen Human Rights Group—and the UN Special Rapporteur on the situation of human rights in Myanmar. The Clinic has also discussed the investigation's findings with former soldiers and civil society leaders in Myanmar.

In addition to its investigation in eastern Myanmar, the Clinic has conducted significant desk research on Myanmar military history and practices, the current military conflict in Kachin State and northern Shan State, and best practices in civilian-military relations, among other issues.

² The four experts include a specialist on the Myanmar military, an international criminal prosecutor who has researched the offensive, and two leaders of non-governmental organizations that operate in eastern Myanmar.

This memorandum focuses specifically on military policies and practices that give rise to indiscriminate attacks and wilful killings of civilians. Although the Clinic documented other categories of military abuse—including forced labor, forced relocation, and the destruction of civilian property—during its investigation in eastern Myanmar, these abuses are not directly addressed in this memorandum. This purposefully narrow focus allows the Clinic to analyze a discrete set of military policies and practices that imperil civilian populations in the country and offer concrete and specific recommendations for reform. Further consideration of the policies and practices that lead to other forms of military abuse is merited.

C. Legal Framework

This memorandum’s analysis of the Myanmar military’s indiscriminate attacks and wilful killings of civilians is informed by international humanitarian law. Common Article 3 of the 1949 Geneva Conventions, to which Myanmar is a party, and customary international humanitarian law govern non-international armed conflict in Myanmar.³ Myanmar is not a party to the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).

The principle of distinction is one of the fundamental tenets of international humanitarian law and applies in the context of both international and non-international armed conflicts. This principle mandates that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants . . . and accordingly shall direct their operations only against military objects.”⁴

³ The government’s conflicts with the KNU, the KIO, and other non-state armed groups qualify as non-international armed conflicts under international humanitarian law, because the intensity of the conflicts and the organizational capacity of the parties meet the standard established by *Tadic*. See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tadic*, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case IT-94-1, (2 Oct. 1995), para. 70.

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), adopted 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 Dec. 1978, art. 48; see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), adopted 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 Dec. 1978, art. 13. The principle of distinction applies to the conflict in Myanmar as customary international humanitarian law. See, e.g., International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law* (Cambridge, UK: Cambridge University Press, 2009), Rule 1, “The Principle of Distinction between Civilians and Combatants,” <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian->

Indiscriminate attacks violate the principle of distinction and are prohibited in international and non-international armed conflicts.⁵ Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required . . . ; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁶

Wilful killings of civilians likewise violate the principle of distinction and are prohibited in international and non-international armed conflict.⁷ When committed in the context of a non-international armed conflict, the wilful killing of civilians is termed “murder.”⁸ This memorandum uses the term “wilful killings” in the interest of clarity and to avoid confusion with international and domestic criminal law definitions of murder.

Forms of conduct that violate international humanitarian law, including indiscriminate attacks and wilful killings, are also violations of Myanmar

law-i-icrc-eng.pdf.

⁵ AP I, art. 51(4). This prohibition applies to non-international armed conflict as customary international law. *See, e.g., ICRC, Customary International Humanitarian Law*, Rule 11, “Indiscriminate Attacks.”

⁶ AP I, art. 51(4).

⁷ Civilians are protected from attack “unless and for such time as they take a direct part in hostilities.” AP I, art. 48; AP II, art. 13(3). To constitute direct participation in hostilities, “(1) the act [of a civilian] must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).” In non-international armed conflict, all persons who are not members of the armed forces of the government or an organized non-state group are civilians. Members of the armed forces of organized non-state groups are those individuals whose continuous function it is to take a direct part in hostilities (continuous combat function). ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

⁸ Four Geneva Conventions of 12 August 1949, adopted 12 June 1949, 75 U.N.T.S. 287, entered into force 21 October 1950, Common Article 3; AP II, art. 4(2). *See ICRC, Customary International Humanitarian Law*, Rule 89, “Violence to Life.”

domestic law in some cases. In particular, soldiers who have participated in indiscriminate attacks or wilful killings could be prosecuted under the Defence Services Act.⁹

D. Analytical Framework

This memorandum analyzes the policies and practices of the Myanmar military¹⁰ at three levels of authority: the operational-policy level, the tactical level, and the enlisted soldier level.¹¹ For the purposes of this memorandum, the operational-policy level is defined as the level at which senior officers in the Myanmar military develop and authorize policies and practices regulating the use of force in campaigns and operations. The tactical level is defined as the level at which commissioned and non-commissioned officers in the field direct and command their units in battles and engagements. The enlisted soldier level is defined as the level at which individual soldiers in the field exercise personal discretion in conducting missions and carrying out other assigned tasks. These levels do not describe formal divisions within the Myanmar military, nor do they correspond with official military ranks. Rather they represent an analytical tool to describe the interrelated roles that soldiers play in facilitating indiscriminate attacks and wilful killings of civilians.

* * *

⁹ The Defence Services Act of 1959, art. 71 (Myan.). The Defence Services Act incorporates civil law, including the Myanmar Penal Code.

¹⁰ The Myanmar Armed Forces comprises the Army, Navy, and Air Force. The findings and recommendations in this memorandum relate most directly to the Myanmar Army but much of the analysis also applies to the Navy and Air Force. Therefore, this memorandum uses the term “military” to refer to all three branches of the Armed Forces. Although much of the analysis contained in this memorandum may be relevant to other security sector institutions—such as the Border Guard Forces, the Myanmar Police Force, and state intelligence bodies—and to non-state armed groups, they are not the focus of this document.

¹¹ This analytical framework draws from, but does not seek to replicate, the three “levels of war” that guide modern military theory: the strategic level, the operational level, and the tactical level. *See, e.g.*, Milan N. Vego, *Joint Operational Warfare: Theory and Practice* (Washington, DC: Government Printing Office, 2007), II-17. The U.S. Department of Defense defines the “strategic level of war” as “the level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives.” The “operational level of war” is defined as “the level of war at which campaigns and operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas.” The “tactical level of war” is defined as “the level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces.” Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02, 8 Nov. 2010 (as amended through 15 Oct. 2013), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

International Human Rights Clinic at Harvard Law School
*Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the
Myanmar Military*

Section II of this memorandum describes a historical pattern of indiscriminate attacks and wilful killings of civilians that appears to be continuing under the current Thein Sein government. Ongoing attacks raise serious concerns about the efficacy of the government's current program of reform to address institutional causes of civilian targeting within the military. Section III analyzes the overlapping causes of indiscriminate attacks and wilful killings at three levels of military authority and highlights the need for a comprehensive reform process that targets key problems throughout the military hierarchy. Finally, Section IV provides a framework for promoting a paradigm shift within the Myanmar military that employs both positive incentives for civilian protection and accountability for abuse. This section concludes by recommending specific actions to address indiscriminate attacks and wilful killings of civilians in Myanmar.

II. INDISCRIMINATE ATTACKS AND WILFUL KILLINGS OF CIVILIANS IN MYANMAR

This section describes a pattern of indiscriminate attacks and wilful killings of civilians by the Myanmar military that has unfolded over many decades and appears to continue under the Thein Sein government. These attacks have caused the death of thousands of individuals¹² and have contributed to the present-day displacement of more than 500,000 civilians in eastern Myanmar alone.¹³ Although indiscriminate attacks and wilful killings of civilians have abated in many parts of the country after the signing of ceasefire agreements, the security situation for civilians in Kachin State and northern Shan State has deteriorated significantly since the collapse of a long-term truce in 2011. Additionally, individuals living in ceasefire areas are skeptical about the durability of peace and fear a return to active conflict and large scale civilian targeting.

The detailed description of attacks on civilians that follows is included in this memorandum to highlight a grave and concerning pattern of military behavior. Civilian targeting in Myanmar has affected victims and communities for decades. Moreover, indiscriminate attacks and wilful killings threaten the peace process and democratic progress in the country. The fact that these abuses have continued under the current government suggests that the first wave of reform in the country has failed to address fundamental institutional problems within the Myanmar military.

¹² Civilian deaths related to armed conflict in Myanmar likely number in the tens of thousands or more, although comprehensive figures are not available. *See, e.g.*, Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (London and New Jersey: Zed Books Ltd., 1991), pp. 100–01 (citing KIO claims of 33,336 civilian deaths at the hands of government forces during the years 1961–1986, and stating “a figure of about 10,000 deaths a year nationwide from the insurgencies over the last four decades is probably fairly accurate.”); Shan Human Rights Foundation (SHRF), “Dispossessed: A Report on Forced Relocation and Extrajudicial Killings in Shan State, Burma,” Apr. 1998, <http://www.shanland.org/oldversion/dispossessed.htm> (citing 664 killings in relocation areas in 1997); Amnesty International, “Burma: Atrocities in the Shan State,” AI Index: ASA 16/05/98, 16 Apr. 1998, <http://www.hrsolidarity.net/mainfile.php/1998vol08no07/1571/> (describing 300 killings during a one month period in 1997).

¹³ The Border Consortium, “Poverty, Displacement and Local Governance in South East Burma/Myanmar,” Nov. 2013, p. 18, <http://www.tbcc.org/idps/report-2013-idp-en.pdf> (citing 400,000 IDPs in southeast Myanmar, 140,000 in Rakhine State, and 100,000 in Kachin State, and 128,000 refugees in camps in Thailand).

A. Indiscriminate Attacks and Wilful Killings under Previous Regimes

Civilians in conflict zones across Myanmar have been vulnerable to indiscriminate attacks and wilful killings by the military for decades. Various commentators and academics have noted that “free-fire zones” have existed in ethnic minority areas since the late-1960s.¹⁴ In the three decades prior to the inauguration of the Thein Sein government, international organizations and domestic human rights groups documented widespread attacks on civilians in Myanmar.¹⁵ For example, in the late 1980s, Amnesty International documented severe human rights violations, including “unlawful and deliberate killings” against civilians of Karen, Karenni, Mon, Kachin, and Shan ethnicity.¹⁶ In 1998, the Shan Human Rights Foundation published a report alleging 664 extrajudicial killings by the Myanmar Army in a single year, which included shootings of unarmed civilians as well as mass executions. The report, referencing forced displacement by the government, stated that “the regime’s troops . . . systematically [killed] villagers caught outside the relocation sites in a program to deter others from going back to their original villages.”¹⁷ This report was corroborated by another from Amnesty International, which described a massive military campaign in which 300,000 civilians were

¹⁴ Smith, *Burma: Insurgency and the Politics of Ethnicity*, pp. 260–261; Ashley South, Transnational Institute, *Burma’s Longest Civil War: Anatomy of the Karen Conflict*, March 2011, p. 12, <http://www.ashleysouth.co.uk/files/TNI-BurmasLongestWar.pdf>.

¹⁵ See, e.g., ICRC, “Myanmar: ICRC Denounces Major and Repeated Violations of International Humanitarian Law,” News Release 82/07, 29 June 2007, <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/myanmar-news-290607.htm>; Amnesty International, “Burma: Atrocities in the Shan State,” (citing “reliable reports” of 300 killings “in a series of massacres” in Shan State during a one month period in 1997); Project Maje, “A Swamp Full of Lilies: Human Rights Violations Committed by Units/Personnel of Burma’s Army, 1992-1993,” Feb. 1994, <http://www.projectmaje.org/pdf/lilies.pdf> (detailing human rights violations by specific Myanmar military units and personnel throughout the country); Chin Human Rights Organization, “Burmese Soldiers Killed Two Children, Injured Six Civilians in Random Shooting,” *Rhododendron News*, Vol. VIII, No. VI, 14 Nov. 2005, <http://www.chro.ca/index.php/publications/rhododendron/64-rhododendron-2005/139-rhododendron-news-volume-viii-no-vi-november-december>.

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

¹⁷ SHRF, “Dispossessed: a report on forced relocation and extrajudicial killings in Shan State, Burma,” Apr. 1998, <http://www.shanland.org/oldversion/dispossessed.htm>.

displaced and “hundreds [were] killed when they attempted to return to their farms.”¹⁸

These reports caused concern within the international community. The U.S. Department of State’s annual Human Rights Report regularly referenced extrajudicial killings and indiscriminate attacks on civilian populations committed by the Myanmar military.¹⁹ Additionally, the UN Special Rapporteurs on Myanmar and on Extrajudicial Killings repeatedly drew attention to the plight of civilians in areas of conflict. For example, in 2006, Paulo Sérgio Pinheiro, UN Special Rapporteur on Myanmar, reported to the UN General Assembly, “Among the most tragic features of the military campaign in ethnic areas is the disproportionate effect on civilian populations . . . the killing, terrorizing or displacement of civilians is often part of a deliberate strategy.”²⁰

During its investigation into the 2005–2008 offensive in Kayin State and eastern Bago Region, the Clinic collected evidence relating to fifty incidents involving indiscriminate attacks or wilful killings of civilians by Myanmar military personnel.²¹ The Clinic documented at least thirty civilian deaths as a result of these attacks, which were carried out through the use of small arms, mortars, and landmines deployed to purposefully cause civilian casualties.²² Given the limited geographic and temporal scope of its investigation, the Clinic believes that these incidents represent only a small fraction of those that occurred within the context of the offensive in eastern Myanmar.

¹⁸Amnesty International, “Myanmar: Exodus from Shan State,” AI Index: 16/11/00, July 2000, p. 1, <http://www.amnesty.org/en/library/asset/ASA16/011/2000/en/dbcff799-deb1-11dd-8e92-1571ae6babe0/asa160112000en.pdf>.

¹⁹ See, e.g., U.S. Department of State, Bureau of Democracy, Human Rights and Labor, “Country Reports on Human Rights Practices – 2000: Burma,” 23 Feb. 2001, <http://www.state.gov/j/drl/rls/hrrpt/2000/eap/index.cfm?docid=678#> (citing “credible reports that army soldiers shot and killed at least 73 unarmed ethnic Shan villagers in several repeated incidents in Kun-Hing township, Shan State”).

²⁰ UN General Assembly, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” A/61/369, 21 Sept. 2006, para. 47.

²¹ International Human Rights Clinic at Harvard Law School (Clinic) Database, Incident Nos. 10, 72 (74 likely related to same incident), 215, 217, 218, 222, 242, 247, 248, 250, 252, 265, 266, 267, 270, 281, 283, 284, 289, 290, 291, 293, 295, 298, 300, 302, 303, 315, 316, 319, 323, 324, 325, 326, 327, 332, 337, 343, 344, 345, 348, 353, 357, 360, 363, 364, 370, 371, 375, and 377. Although the Clinic’s investigation focused on events that occurred in Kayin State and eastern Bago Region during the 2005–2008 offensive, interviewees often identified events from other time periods and locations. As a result, citations in this memorandum at times reference events that are not within the geographic and temporal scope of the Clinic’s investigation.

²² Clinic Database, Interview Nos. 1, 4, 8, 12, 26, 31, 33, 35, 47, 49, 51, 52, 57, 58, 61, 76, 80, 82, 84, 86, 90, 92, 97, 99, 100, 105, 107, 109, 114, 118, 120, 132, 133, 136, 139, 142, 146, 147, and 151.

None of the information collected by the Clinic suggests that there was a legitimate military objective related to any of the documented attacks. Rather, experts indicated that during the offensive Myanmar Army units largely avoided confrontations with the KNLA and instead pursued civilian targets.²³ The Clinic's findings are highly consistent with descriptions provided by other groups that monitored the offensive as it unfolded.²⁴ Moreover, they demonstrate a continuity in the policies and practices of the Myanmar military from previous decades.

Shoot-on-Sight Incidents

Many incidents documented by the Clinic involved Myanmar Army infantry soldiers opening fire on civilians with small arms, including both automatic and semi-automatic weapons.²⁵ These events, often referred to as “shoot-on-sight” incidents, occurred in a variety of settings and contexts, although they

²³ Clinic, Expert Declaration, [EXPERT 2 – NAME REDACTED], para. 90; *see also*, Amnesty International, “Myanmar: Crimes Against Humanity in Eastern Myanmar,” AI Index: 16/011/2008, 5 June 2008, <http://www.amnesty.org/en/library/asset/ASA16/011/2008/en/72d2e8c2-b9ce-4afb-91c6-ba3391ed41e5/asa160112008en.pdf> (“It is far from clear, however, that the current offensive is being fought in the counter-insurgency context at all, as civilians have been the offensive’s primary targets – rather than just collateral damage – while the KNLA has often been overtly avoided by the *tatmadaw*.”).

²⁴ *See, e.g.*, ICRC, “Myanmar: ICRC Denounces Major and Repeated Violations of International Humanitarian Law,” News Release 82/07, 29 June 2007, <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/myanmar-news-290607.htm>; Amnesty International, *Myanmar: Crimes Against Humanity in Eastern Myanmar*, (identifying more than 25 killings of Karen civilians by the Myanmar Army between July 2005 and July 2007); Karen Human Rights Group (KHRG), “Without Respite: Renewed Attacks on Villages and Internal Displacement in Toungoo District,” 13 June 2006; KHRG, “One Year On: Continuing Abuses in Toungoo District,” 17 Nov. 2006; Free Burma Rangers (FBR), “A Campaign of Brutality: Report and Analysis of Burma Army Offensive and Ongoing Attacks Against the People of Northern Karen State, Eastern Burma,” April 2008, <http://www.freeburmarangers.org/download/older/Displaced%20Childhoods%202010%20WV2.pdf>. Burma Issues, “Shoot on Sight: The Ongoing SPDC Offensive Against Villagers in Northern Karen State,” (Dec. 2006), <http://www.nd-burma.org/hr-reports/member-report/item/7-shoot-on-sight-the-ongoing-spdc-offensive-against-villagers-in-northern-karen-state.html>.

²⁵ Clinic Database, Incident Nos. 10, 217, 218, 222, 242, 266, 267, 281, 298, 302, 303, 323, 326, 327, and 353; Clinic Database, Interview Nos. 1, 11, 14, 16, 17, 21, 23, 26, 27, 30, 33, 35, 36, 43, 44, 46, 47, 58, 61, 68, 70, 71, 81, 88, 93, 101, 104, 106, 113, 114, 118, 129, 139, 141, 146, 147, 149, 154, 155, and 162; *see also*, Interview No. 98 (former soldier describing that soldiers from his battalion killed 10 civilians, on average, per week).

predominated in military-defined “black areas” presumed to be under the control of the KNU.²⁶

Many shoot-on-sight incidents documented by the Clinic occurred in the context of attacks on villages by the Myanmar Army. Interviewees described being fired upon while they fled with their families to established hide sites. Villagers often carried baskets of supplies that had been prepared in anticipation of being attacked. In some cases, villagers were alerted to the military’s approach by other villagers, KNLA soldiers, or by hearing distant gunfire.²⁷ In other cases, villagers were caught unaware and fled only after Myanmar Army soldiers arrived at the village and opened fire.²⁸

At times Myanmar Army soldiers pursued villagers to hide sites after the villagers fled from their villages.²⁹ Many shoot-on-sight incidents also occurred in rice fields, orchards, or plantations.³⁰ In these situations, villagers were often fired upon without warning while engaged in agricultural tasks. Other shoot-on-sight incidents occurred while villagers were traveling by foot outside of villages.³¹ In one incident documented by both the Clinic and the Free Burma Rangers, soldiers opened fire on a group of unarmed civilians from behind logs at a distance of ten to fifteen yards.³² From their position, the soldiers would have been able to see the group approaching uphill through a clearing before opening fire. During the attack, a man and his seventy-year-old mother—whom he was carrying on his back—were killed, and a nine-year-old girl was shot through the abdomen but survived.

Many of the victims of shoot-on-sight incidents documented by the Clinic were women,³³ children,³⁴ or elderly persons.³⁵ At times, interviewees mentioned the presence of KNLA soldiers in the vicinity of attacks, but no interviewees mentioned KNLA soldiers being physically present at the time of a shoot-on-sight incident, even when specifically asked by the Clinic.³⁶

²⁶ See Section III for a discussion of the military policies that provided for the color-coded designation of areas based on the extent of government control and stipulated varying rules of engagement for each designation.

²⁷ Clinic Database, Interview Nos. 14, 26, 33, 37, 39, 43, 50, 59, 70, 78, 81, 84, 87, 89, 93, 110, 114, 115, 122, 124, 135, 141, 148, 149, 154, and 155.

²⁸ Clinic Database, Interview Nos. 16, 23, 27, 30, 81, 90, 98, 101, 113, and 114.

²⁹ Clinic Database, Interview Nos. 14, 40, 59, and 129.

³⁰ Clinic Database, Interview Nos. 14, 44, 47, 58, 71, 101, 114, 118, 129, and 139.

³¹ Clinic Database, Interview Nos. 16, 21, 35, 43, 44, 70, 93, 104, 106, 114, 146, 149, and 155.

³² Clinic Database, Interview No. 90; FBR, *A Campaign of Brutality*, pp. 8–9.

³³ Clinic Database, Interview Nos. 16, 28, 46, 58, 90, 114, 118, 139, and 155.

³⁴ Clinic Database, Interview Nos. 16, 58, 59, 90, and 114.

³⁵ Clinic Database, Interview Nos. 36 and 90.

³⁶ Clinic Database, Interview Nos. 10, 14, 30, 37, 40, 41, 43, 49, 51, 84, 88, 129, 148, and 155.

In many of the cases documented by the Clinic, it is clear that Myanmar Army personnel fired on civilians with the intent to cause casualties. However, it is not clear that all documented incidents were purposeful attempts to kill civilians. Rather, in some instances in which interviewees describe being fired upon, it is likely that the shots were fired into the air or in the general direction of a village without aiming at particular individuals.³⁷ It is clear that, had Myanmar Army personnel sought to maximize civilian casualties, in many circumstances they could have planned and executed attacks in a manner that would have ensured a far greater death toll.

Extrajudicial Executions and Other Killings

In addition to shoot-on-sight incidents, the Clinic documented executions and other killings by the Myanmar Army in situations in which the military exercised some degree of control over the victims.³⁸ The Clinic recorded the execution of several civilians captured in black areas.³⁹ In other areas where military forces more regularly interacted with civilian populations (“brown areas” as described in Section III.A), soldiers executed civilians for a variety of reasons, including violating curfews or restrictions on movement and being suspected of having ties to the KNLA.⁴⁰ Other civilians were killed in retaliation after Myanmar Army soldiers stepped on landmines believed to have been planted by the KNLA.⁴¹ Civilians were often killed while being forced to carry supplies for the military.⁴² The Clinic, Human Rights Watch, the Karen Human Rights Group, and others also documented the killing of convict porters who were taken from Myanmar’s prisons and forced to carry military supplies in combat zones, including northern Kayin State.⁴³

³⁷ See, e.g., Clinic Database, Interview Nos. 16, 23, 27, 28, and 30.

³⁸ Clinic Database, Interview Nos. 1, 4, 6, 8, 12, 15, 28, 33, 35, 46, 49, 61, 67, 83, 91, 93, 98, 109, 114, 116, 118, 133, 146, 150, 151, 154, and 162.

³⁹ Clinic Database, Interview Nos. 1, 6, 8, 15, 28, 35, 49, 67, 83, 93, 98, 114, 118, 146, 150, and 154.

⁴⁰ Clinic Database, Interview Nos. 12, 33, 46, 61, 109, 133, 146, and 151.

⁴¹ Clinic Database, Interview Nos. 116 and 146.

⁴² Clinic Database, Interview Nos. 4, 6, 8, 33, 93, 98, 116, and 146.

⁴³ Clinic Database, Interview Nos. 105, 120, 129, 137, 139, and 146; Human Rights Watch (HRW) and KHRG, “Dead Men Walking: Convict Porters on the Front Lines in Eastern Burma,” July 2011, http://www.hrw.org/sites/default/files/reports/burma0711_OnlineVersion.pdf; KHRG, “From Prison to Front Line: Analysis of Convict Porter Testimony 2009-2011,” 13 July 2011, <http://www.khr.org/2011/07/prison-front-line-analysis-convict-porter-testimony-2009-%E2%80%93-2011>; KHRG, “Less than Human: Convict Porters in the 2005 – 2006 Northern Karen State Offensive,” 22 Aug. 2006, <http://www.burmalink.org/wp-content/uploads/2013/12/KHRG-2006.-Less-than-Human-Convict-Porters-in-the-2005-%E2%80%93-2006-Northern-Karen-State-Offensive.pdf>.

Indiscriminate Shelling

Karen villagers interviewed by the Clinic described the shelling of civilian locations in eastern Myanmar.⁴⁴ Army units targeted villages,⁴⁵ agricultural fields and plantations,⁴⁶ and hide sites of internally displaced persons (IDPs),⁴⁷ among other locations. Several interviewees, speaking from firsthand experience of being shelled, expressed the opinion that Army units targeted them after spotting smoke from cooking fires.⁴⁸ At times, multiple mortars were fired at a civilian target in succession,⁴⁹ and sometimes shelling would continue for several consecutive days.⁵⁰ In no cases did the Clinic document the presence of KNLA soldiers in the immediate vicinity of a civilian location that was shelled.

Offensive Use of Landmines against Civilians

Myanmar is not a party to the 1997 Mine Ban Treaty and is one of the few countries to use anti-personnel landmines in its own territory.⁵¹ During the offensive in eastern Myanmar and at other times, the Myanmar Army used landmines as offensive weapons against civilians. The Clinic spoke with many Karen civilians who stated that the Myanmar Army placed landmines in villages and agricultural fields.⁵² There was not an apparent military objective in any of these instances. The precise locations in which the military placed landmines demonstrate a clear intent to inflict civilian casualties or deter the return of villagers to their homes and fields. For example, one interviewee, upon returning to his village after it was attacked by the military, was blinded by a landmine that had been placed near the cooking stove connected to his home.⁵³ Additionally, Myanmar Army soldiers frequently forced villagers to walk in front of them as human minesweepers.⁵⁴

⁴⁴ Clinic Database, Incident Nos. 10, 12, 14, 81, 82, 83, 84, 86, 142, 143, 145, 147, 149, 150, 186, 227, 244, 247, 284, 289, 290, 303, 344, and 375; Interview Nos. 7, 28, 34, 36, 52, 65, 68, 77, 78, 80, 87, 90, 112, 114, 128, 133, 140, 153, and 155.

⁴⁵ Clinic Database, Interview Nos. 7, 28, 36, 52, 65, 68, 77, 78, 80, 90, 114, 128, 133, 140, 153, and 155.

⁴⁶ Clinic Database, Interview Nos. 36 and 114.

⁴⁷ Clinic Database, Interview Nos. 28, 90, and 112.

⁴⁸ Clinic Database, Interview Nos. 90 and 112; *see also* Clinic Database, Interview No. 36 (interviewee alleging that the military fired mortars after spotting smoke from the burning of agricultural fields).

⁴⁹ Clinic Database, Interview Nos. 28, 34, 36, 52, 65, 77, 90, 114, 133, 149, and 155.

⁵⁰ Clinic Database, Interview Nos. 36 and 149.

⁵¹ "Landmines in Myanmar: Politically Explosive," *The Economist*, 13 July 2013, <http://www.economist.com/news/asia/21581775-failure-clear-landmines-casts-doubt-myanmars-peace-processes-politically-explosive>.

⁵² Clinic Database, Interview Nos. 15, 21, 27, 28, 30, 48, 62, 63, 67, 69, 75, 85, 86, 87, 120, 121, 122, 124, 128, 136, 138, 149, and 158.

⁵³ Clinic Database, Interview No. 27.

⁵⁴ Clinic Database, Interview Nos. 62, 85, 103, 105, 125, and 156.

B. Indiscriminate Attacks and Wilful Killings under the Thein Sein Government

The security situation for civilians in many parts of Myanmar has improved considerably under the Thein Sein government, which has reached ceasefire agreements with many ethnic armed groups. However, progress is uneven, and there have been consistent reports that the military has continued to indiscriminately attack and wilfully kill civilians in non-ceasefire regions. For instance, attacks on civilians in Kayin State and eastern Bago Region have fallen dramatically since the military and the KNU signed a preliminary ceasefire agreement in January 2012. By contrast, reports of such attacks in Kachin State and northern Shan State have increased since the collapse of a seventeen-year-old truce between the KIO and the government in June 2011. This pattern of violence suggests that the underlying cause of improvements in civilian security in ceasefire areas is the decrease in armed conflict rather than reform of the military's priorities, policies, and practices.

Indiscriminate Attacks and Wilful Killings in Ceasefire Areas

In the past three years, there has been a marked decline in indiscriminate attacks and wilful killings of civilians in ceasefire regions. For instance, after the government and the KNU signed a preliminary ceasefire agreement in January 2012, indiscriminate attacks and wilful killings in Kayin State and eastern Bago Region decreased dramatically, with only sporadic reports of post-ceasefire violence against civilians.⁵⁵ Villagers from Kayin State interviewed by the Clinic in January 2013 described significant improvements in personal security and freedom of movement.⁵⁶ For most of 2013, there were very few reports of

⁵⁵ See, e.g., KHRG, "Steps Towards Peace: Local Participation in the Karen Ceasefire Process," 7 Nov. 2012, <http://www.khr.org/2012/11/steps-towards-peace-local-participation-karen-ceasefire-process> ("KHRG has not recorded a military attack on a village during 2012, but there have nonetheless been sporadic incidents of indiscriminate fire and of villagers being shot-on-sight."); FBR, "Burma Army Shoots at Civilians in Ceasefire Areas," 26 Aug. 2012, <http://www.freeburmarangers.org/2012/08/27/fbr-report-burma-army-shoots-at-civilians-in-ceasefire-areas/> (documenting an incident in June 2012 in which soldiers from Light Infantry Division 66 shot at civilians at Wa Baw Day); FBR, "Strong Military Presence Remains in Karen State, While Burma Army Continues with Attacks, Resupplies and Increased Troops," 29 May 2012, <http://www.freeburmarangers.org/2012/05/29/strong-military-presence-remains-in-karen-state-while-burma-army-continues-with-attacks-resupplies-and-increased-troops-2/> (documenting an incident in April 2012 in which soldiers from Light Infantry Battalion 593 shot at civilians in Maw Krae).

⁵⁶ Clinic Database, Interview Nos. 166, 169, 170, 177, 178, and 179.

indiscriminate attacks or wilful killings of civilians in Kayin State. Other areas subject to ceasefire agreements have also experienced significant declines in attacks on civilians.

Despite these positive developments, reports of attacks in ceasefire areas continue to raise serious concerns. For instance, even though the government signed ceasefires with the Shan State Army-South and the Shan State Army-North in 2012, the military has continued offensive operations in Shan State, where there have been frequent reports of soldiers intentionally shooting at civilians and shelling civilian areas.⁵⁷ In December 2013 and January 2014, Myanmar Army units based in northern Kayin State allegedly shelled nearby villages and rice fields where villagers were working and shot at civilians trying to cross military-controlled roads.⁵⁸ In January 2014, the Clinic spoke with human rights researchers operating in the region who believe the initial restraint

⁵⁷ See, e.g., SHRF, “Burmese Government Troops Use Villagers as Human Shields After Attacks Against Ceasefire Group in Central Shan State,” 25 Oct. 2013, http://www.shanhumanrights.org/index.php?option=com_content&view=article&id=391; SHRF, “Human Rights Abuses by Burma Army During Conflict in Northern Shan State During September 2013,” 27 Sept. 2013, http://www.shanhumanrights.org/index.php?option=com_content&view=article&id=390; SHRF, “Summary of Human Rights Violations Committed by Burma Army Troops During Military Offensive in Tang Yan, Shan State, from 14-15 April 2013,” http://www.shanhumanrights.org/images/stories/Action_Update/Files/sum-of-hrs-abuses-14-15%20april%202013_final.pdf (documenting the shelling of civilian areas in Shan State by Light Infantry Divisions 322, 291, 523 and 326, and Infantry Battalion 33); SHRF, “Thein Sein Government Must Be Held Accountable for Fresh Burma Army Atrocities in Shan State,” 22 Apr. 2013, http://www.shanhumanrights.org/images/stories/Action_Update/Files/shrf-statement-april%2022%202013%20eng_final.pdf (accusing the military of deliberately targeting civilians in several villages in Tangyan); “Shan Rebels-Burma Army Clash, Thousands Flee,” *Shan Herald*, 8 Apr. 2013, http://www.english.panglong.org/index.php?option=com_content&view=article&id=5344 (reporting on soldiers shelling civilian areas, “knowingly” shooting civilians, and beating civilians to death in Tangyan).

⁵⁸ FBR, “Burma Army Fires Upon Villagers in Karen State,” 16 Jan. 2014, <http://www.freeburmarangers.org/2014/01/16/multi-ethnic-teams-complete-relief-missions-in-northern-and-western-karen-state/> (describing the Myanmar Army’s seven day shelling of villagers working in their rice fields in Ye Mu Plaw between 2 and 9 December 2013, the Army’s shelling of villagers near Plako on 18 December, and the Army’s shooting at villagers near Paw Mu Der Village as they attempted to cross the Kyauk Kyi-Hsaw Hta road on 27 December 2013); “Burma Army Violates Ceasefire,” *Karen News*, 14 Jan. 2014, <http://karennews.org/2014/01/burma-army-violates-ceasefire.html/> (describing the shelling of Boe Plaw village on 7 January 2014); “Burma Army Shelled Karen Villages: Aid Group,” *The Irrawaddy*, 17 Jan. 2014, <http://www.irrawaddy.org/latest-news/burma-army-shelled-karen-villages-aid-group.html>.

demonstrated by military personnel after the signing of the preliminary ceasefire agreement may be giving way to a return to prior practices.⁵⁹

Most individuals who spoke with the Clinic attributed the decline in attacks on civilians in Kayin State and eastern Bago Region to the ceasefire rather than any change in military policy.⁶⁰ Specifically, villagers believed that decreased military patrols and local arrangements regarding the division of territory between the Myanmar Army and KNLA forces had reduced the instances in which the use of force against civilians might arise.⁶¹

Many of the underlying causes of armed conflict in Myanmar remain extant, and local communities are skeptical that ceasefires will hold. Many villagers believe that ongoing violence against civilians in non-ceasefire regions belies the conclusion that the military has reformed its priorities, policies, and practices.⁶² For example, villagers in Karen areas, who are aware of the ongoing attacks against civilians in Kachin State, recall that armed conflict in Myanmar has historically been cyclical.⁶³ Several years ago, when violence in Kayin State was at its peak, Kachin State remained peaceful; now Kayin State is relatively undisturbed, while civilians in Kachin State are being attacked by the military.⁶⁴ Therefore, so long as the military indiscriminately attacks and wilfully kills civilians in non-ceasefire regions, villagers in ceasefire regions will continue to doubt the military's intentions and worry for their own security.

⁵⁹ Clinic confidential conversation with human rights monitors, January 2014. Although they did not occur in the context of armed conflict, alleged shootings and killings of Rohingya Muslims by Myanmar Army soldiers in October 2012—as reported by Human Rights Watch—constitute violations of domestic and international law, and are directly relevant to the analysis and recommendations contained in this memorandum. See HRW, “All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State” 22 Apr. 2013, pp. 53–56, http://www.hrw.org/sites/default/files/reports/burma0413webwcover_0.pdf.

⁶⁰ Clinic Database, Interview Nos. 170, 175, 179, and 180.

⁶¹ Clinic Database, Interview Nos. 168, 169, 170, 171, 172, 174, and 179.

⁶² KHRG, “Steps Towards Peace: Local Participation in the Karen Ceasefire Process,” 7 Nov. 2012, <http://www.khrg.org/2012/11/steps-towards-peace-local-participation-karen-ceasefire-process> (“Villagers raise specific concerns about a lack of comprehensive information available publicly and the lack of clear rules that all parties are following. Underlying these concerns is a fundamental lack of trust that this ceasefire is authentic and has the potential to hold where others have failed.”).

⁶³ Clinic Database, Interview Nos. 168, 178, and 179; see also Naw Noreen, “Fresh Fighting in Northeast Burma Raises Concern Among Ceasefire Groups,” *DVB*, 12 Feb. 2014, <http://www.dvb.no/news/fresh-fighting-in-northeast-burma-sees-concern-among-ceasefire-groups-burma-myanmar/37154>.

⁶⁴ See generally The Transnational Institute, “The Kachin Crisis: Peace Must Prevail,” Mar. 2013, <http://www.tni.org/sites/www.tni.org/files/download/bpb10.pdf>.

Indiscriminate Attacks and Wilful Killings in Non-Ceasefire Areas

While the situation for civilians in ceasefire regions has improved under the Thein Sein government, reported violence against civilians in conflict areas of Kachin State and northern Shan State has increased dramatically.⁶⁵ Since the seventeen-year-old ceasefire between the government and the KIO collapsed in June 2011, ongoing military operations have contributed to a humanitarian crisis in which an estimated 100,000 civilians have been displaced.⁶⁶ The conflict between the Myanmar military and the KIA is relatively more conventional than the guerilla warfare that characterized the fighting in Kayin State and eastern Bago Region, and it is likely that civilians in Kachin State are less often the direct object of military attacks. Nevertheless, the Myanmar military appears to have used many of the same unlawful practices in Kachin State and northern Shan State that it had previously employed in eastern Myanmar, including indiscriminately attacking villages while civilians are present.

Major reports from organizations such as Human Rights Watch, Physicians for Human Rights, and the Kachin Women's Association of Thailand have implicated Myanmar military personnel in extrajudicial executions and attacks on villages and IDP hide sites.⁶⁷ According to a forthcoming report on the Kachin

⁶⁵ *Id.*

⁶⁶ UN Office for the Coordination of Humanitarian Affairs, "Myanmar: Internal Displacement Snapshot – Kachin and Northern Shan States" 30 Nov. 2013, <http://reliefweb.int/report/myanmar/myanmar-internal-displacement-snapshot-kachin-and-northern-shan-states-november-2013>.

⁶⁷ *See, e.g.*, Kachin Women's Association Thailand (KWAT), "State Terror in the Kachin Hills: Burma Army Attacks Against Civilians in Northern Burma," Feb. 2013, p. 4, http://www.kachinwomen.com/images/stories/publication/state_terror.pdf; ("From September 2012 to February 2013, KWAT has documented the killing and injury of 26 civilians, including women, children and the elderly, in six separate Burmese artillery attacks in four areas. The repeated authorization of artillery fire into areas populated by civilians, as well as deliberate torching of villages and IDP shelters, represent serious breaches of international humanitarian law . . ."); Christian Solidarity World Wide, "Visit to Burma and Kachin Ethnic Group on the China-Burma Border," Feb. 2012, <http://dynamic.csw.org.uk/article.asp?t=report&id=151> (citing "firsthand accounts of extrajudicial killings of unarmed civilians, torture, forced labour and the destruction of homes, churches and villages, and . . . rape."); HRW, "Untold Miseries: Wartime Abuses and Forced Displacement in Kachin State," 4 Mar. 2012, p. 7, http://www.hrw.org/sites/default/files/reports/burma0312ForUpload_1.pdf ("Troops have deliberately and indiscriminately fired on Kachin civilians with small arms and mortars."); Partners Relief & Development, "Crimes in Northern Burma," Nov. 2011, http://www.burmacampaign.org.uk/images/uploads/Crimes_in_Northern_Burma.pdf (documenting the Myanmar Army's alleged torture and extrajudicial execution of two civilians, and the alleged killing of three civilians by indiscriminate shelling, in Nam Lim Pa in October 2011); Physicians for Human Rights, "Under Siege in Kachin State,

conflict by Fortify Rights, “Throughout the conflict, Myanmar military personnel have attacked civilians, including by indiscriminately firing into villages, knowingly shooting at and killing civilian targets, and committing torture and forced labor.”⁶⁸ These allegations are supported by numerous reports from local media sources and other organizations about attacks on Kachin civilians in Kachin State and northern Shan State.⁶⁹ The UN Special Rapporteur on Myanmar, the UN General Assembly, and the UN Human Rights Council have repeatedly expressed concern over reports of the military directing violence at Kachin civilians.⁷⁰

Reports from Kachin State and northern Shan State demonstrate that at times the military has intentionally attacked civilians, including in situations where there was no plausible KIA military target in the vicinity.⁷¹ For example, according to reports, on 6 December 2011, soldiers opened fire on thirty-four displaced villagers from Hka Pra village who had sought refuge in a nearby forest. Two women and two children were killed in the attack.⁷² On 16 November 2013, the Myanmar Army entered Nam Lim Pa village where villagers say military personnel tortured and killed seven civilians, including a mentally disabled man.⁷³ One Kachin refugee, whose village was shelled by the military

Burma,” Nov. 2011, p. 3, https://s3.amazonaws.com/PHR_Reports/Burma-KachinRpt-full-11-30-2011.pdf (“Between June and September 2011 . . . fired indiscriminately into villages [and] threatened villages with attacks . . .”).

⁶⁸ Fortify Rights, forthcoming report on human rights violations associated with the conflict in Kachin State and northern Shan State.

⁶⁹ See *Democratic Voice of Burma*, www.dvb.no; *Free Burma Rangers*, www.freeburmarangers.org; *The Irrawaddy*, www.irrawaddy.org; *Kachin Land News*, www.kachinlandnews.org; *Kachin News*, www.kachinnews.org; *Kachin Women’s Association of Thailand*; www.kachinwomen.com; *Network for Human Rights Documentation – Burma*, www.nd-burma.org.

⁷⁰ See UN Human Rights Council, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” Tomas Ojea Quintana, A/HRC/22/58, 17 Apr. 2013; UN Human Rights Council, “The Situation of Human Rights in Myanmar,” A/HRC/19/L.30, 20 Mar. 2012; UN Human Rights Council, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” A/HRC/22/58, 7 Mar. 2012; UN General Assembly, “The Situation of Human Rights in Myanmar,” A/C.3/66/L.55/Rev.1, 16 Nov. 2011; UN General Assembly, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” Tomás Ojea Quintana, A/66/365, 16 Sept. 2011, para. 31.

⁷¹ See generally HRW, *Untold Miseries*.

⁷² KWAT, “Ongoing Impunity: Continued Burma Army Atrocities Against the Kachin People,” June 2012, pp. 8–9, http://www.kachinwomen.com/images/stories/publication/ongoing_iimpunity%20.pdf.

⁷³ FBR, “Burma Army Attacks Kachin Villages, Capturing 18 Villagers; Bodies of Torture Victims Discovered,” 1 Feb. 2014, <http://www.freeburmarangers.org/2014/02/01/burma-army-attacks-kachin-villages-capturing-18-villagers-bodies-of-torture-victims-discovered>; Nyein Nyein, “Graves

three times, told Human Rights Watch, “[The Myanmar soldiers] said we villagers are KIA, and that the KIA are villagers, and that’s why they shot at us . . . ‘We’ll shoot everyone, young or old, man or women [*sic*]’ they said.”⁷⁴

In other cases, Myanmar military personnel shelled and attacked areas where civilian populations were concentrated. Reports about these attacks raise serious concerns that the military failed to take reasonable precautions to minimize civilian casualties. On 13 September 2012, a thirteen-year-old schoolgirl was killed and eight of her classmates were injured when a Myanmar Army mortar, presumably intended for KIA troops in the area, landed near a school in the Mawwanyi quarter outside of Hpakan.⁷⁵ In another incident on 14 January 2013, three civilians were killed in Laiza after the military fired several 105 mm howitzer shells in the vicinity of the KIA’s military command center.⁷⁶ More recently, Myanmar Army units were accused of shelling villages and “firing guns into houses indiscriminately” in Palaung areas of northern Shan State, where the military is fighting the Ta’ang National Liberation Army (TNLA)—an armed group that, like the KIA, has not reached a ceasefire agreement with the Myanmar government.⁷⁷

Many reports of civilian casualties resulting from Myanmar military attacks in Kachin State and northern Shan State do not include descriptions of the broader context of those attacks. For this reason, it is difficult to determine if documented incidents constitute violations of international humanitarian law. While the Clinic has not conducted its own field research in Kachin State or northern Shan State, it is possible that at least some of the reported events were connected to lawful military operations directed at the KIA. Nevertheless, the volume of reports of civilian casualties in Kachin State and northern Shan State raise serious concerns that the military has continued to indiscriminately attack and wilfully kill civilians under the Thein Sein government.

Found Near Abandoned IDP Camps in Kachin State,” *The Irrawaddy*, 17 Jan. 2014, <http://www.irrawaddy.org/burma/graves-found-near-abandoned-idp-camps-kachin-state.html>; FBR, “Burma Army Captures, Kills and Tortures Villagers in Kachin State, Forcing Over 2,000 to Flee,” 19 Nov. 2013, <http://www.freeburmarangers.org/2013/11/19/burma-army-captures-villagers-in-kachin-state-torturing-two-men-and-causing-over-2000-villagers-flee>.

⁷⁴ HRW, *Untold Miseries*, p. 39.

⁷⁵ KWAT, *State Terror in the Kachin Hills*, p. 4; see also Paul Vrieze, “Kachin Shelling Killed 9 Civilians Since September: Rights Group,” *The Irrawaddy*, 28 Feb. 2014, http://www.irrawaddy.org/z_kachin/kachin-shelling-killed-9-civilians-since-september-rights-group.html.

⁷⁶ HRW, “Halt Indiscriminate Attacks in Kachin State,” 17 Jan. 2013, <http://www.hrw.org/news/2013/01/17/burma-halt-indiscriminate-attacks-kachin-state>.

⁷⁷ Palaung Women’s Organization, “PWO Condemns Burma Army Shelling of Village, Killing Headman and Injuring Two Women,” 3 Mar. 2014, <http://www.burmacampaign.org.uk/index.php/news-and-reports/news-stories-pf/pwo-condemns-burma-army-shelling-of-village-killing-headman>.

International Human Rights Clinic at Harvard Law School
*Policy Memorandum: Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the
Myanmar Military*

Indiscriminate attacks and wilful killings of civilians anywhere in Myanmar cast doubt on the durability of peace and efficacy of reform efforts. These attacks raise concerns not only for communities in areas of active conflict, but also for those in ceasefire areas, where individuals worry that they too will be targeted in the near future. Absent a genuine commitment by the military to reform counterinsurgency policies and practices, civilians in both ceasefire and non-ceasefire regions will continue to fear for their long-term security.

III. CAUSES OF ATTACKS ON CIVILIANS AT THREE LEVELS OF MILITARY AUTHORITY

Indiscriminate attacks and wilful killings of civilians in Myanmar have resulted from a military system that has prioritized the accomplishment of military objectives over civilian protection, including through policies that sanction the direct targeting of civilians. The military has maintained this system of priorities by rewarding soldiers that accomplish military goals—such as “clearing” territory or taking villages “from the enemy”—without regard to the means utilized. Further, the military has failed to hold officers or enlisted soldiers accountable for their roles in perpetrating attacks against civilians. A comprehensive reform effort is needed to recalibrate the military’s institutional priorities and to address persistent problems throughout the military chain of command.

The Clinic concludes that indiscriminate attacks and wilful killings of civilians in Myanmar have several overlapping causes at three levels of military authority: the operational-policy level, the tactical level, and the enlisted soldier level. The Clinic defines the three levels as follows:

- *Operational-policy level*: the level at which senior officers in the Myanmar military develop and authorize policies and practices regulating the use of force in campaigns and operations.
- *Tactical level*: the level at which commissioned and non-commissioned officers direct and command their units in engagements in the field.
- *Enlisted soldier level*: the level at which enlisted soldiers in the field exercise personal discretion in conducting missions and carrying out other assigned tasks.

Undoubtedly, the challenges facing Myanmar military forces during counterinsurgency campaigns in ethnic minority areas are numerous and significant. Distinguishing between combatants and civilians in the context of guerilla warfare can be extremely difficult. Unfamiliar terrain and the absence of clearly defined battle lines may make it hard to clearly differentiate between legitimate and illegitimate targets of attack. These difficulties are exacerbated by the tactics of non-state armed groups in Myanmar, which at times may include unlawful conduct. In some cases, these armed groups may operate out of villages or other areas frequented by civilians. Members of opposition armed groups may sometimes fail to wear uniforms or try to confound the military’s efforts to distinguish them from civilians. Overcoming these challenges and complying with international humanitarian law in such circumstances are tasks that have vexed even the world’s most sophisticated and professional militaries. Nevertheless, these difficulties do not absolve the Myanmar military of its obligations under international humanitarian law nor do they justify inaction on the problems identified in this section.

A. Operational-Policy Level

At the operational-policy level, Myanmar military leaders have formulated a set of counterinsurgency policies that have resulted in indiscriminate attacks and wilful killings of civilians. The harmful effects of these policies have been compounded by the military's institutional failure to hold perpetrators accountable for abuse and properly incentivize civilian protection.

Military Counterinsurgency Policies

Historically, a central aspect of the Myanmar military's counterinsurgency policies has been the categorization of geographic areas by color—black, brown, and white—according to the extent of government control over the region. “Black areas” are territories in which the Myanmar government exercises little or no control, “brown areas” are areas in which government control is contested, and “white areas” are those in which government control is strong.⁷⁸ Although the borders between territories are precise and tied to geographic markers, the designations are not static. Instead the military moves boundaries and modifies the color-code designations based on its objectives and the geographic positioning of enemy forces.

The military applies different rules of engagement for soldiers and units depending on the color-designation of the territory in which they are operating. In practice, this means that whether a civilian is considered a potential target of attack depends on what color the military has designated the territory in which that civilian is found.

Indiscriminate attacks and wilful killings of civilians have predominated in black areas due to the unique policies and practices that accompany the black area designation. The central feature of military conduct in black areas has been the categorical rejection of the principle of distinction. Soldiers have been routinely instructed that all non-Myanmar-military personnel present within black areas are “enemies” who may be targeted regardless of other factors that may suggest that they are civilians not directly participating in hostilities, such as age, gender, proximity to opposition forces, and whether the individual is carrying weapons.⁷⁹ The effect of these policies has most clearly been exhibited in the numerous shoot-on-sight incidents in black areas documented by the Clinic and others. In addition, the rejection of the principle of distinction in black areas has manifested itself in mortar attacks on villages and the placing of landmines in locations that indicate a clear intent to cause civilian casualties. Other violations of international law beyond the scope of this memorandum—such as the

⁷⁸ Maung Aung Myoe, *Building the Tatmadaw: Myanmar Armed Forces Since 1948* (Singapore: Institute of Southeast Asian Studies, 2009), pp. 31–32; Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 84.

⁷⁹ Clinic Database, Interview Nos. 68, 98, 125, and 157; Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 89, 96–97.

widespread destruction of civilian property and sexual violence—have also been facilitated by black area designations and differential rules of engagement.

Former military personnel interviewed by the Clinic explicitly mentioned the military's color-coding system and described the orders they were operating under during missions in black areas.⁸⁰ Soldiers who operated in black areas reported that the military declared these areas to be “no man's land”⁸¹ and authorized soldiers to presume that anyone present was the enemy, including civilians.⁸² As one interviewee explained, “All of the people who stayed in the [black] area, they all are [the] enemy . . . Even if they are not soldiers, they are enemies.”⁸³ Another former soldier explained, “In the front lines, whenever you enter the village . . . and you see anyone, no matter who [they] are, you have to kill them . . . all the Karen people you have to kill.”⁸⁴ Moreover, the widespread knowledge of color-coding by military personnel who served in various geographic areas indicates that the policy has been executed at a national level.

The color-designation of territories and the corresponding differential patterns of military conduct were also common knowledge among civilians from eastern Myanmar.⁸⁵ Many villagers had precise knowledge of the borders between black

⁸⁰ Former soldiers who served before the offensive in eastern Myanmar sometimes referred to the areas where the military had the least control as “red” rather than “black” areas, but the shoot-on-sight policy and other patterns of military behavior were the same.

⁸¹ In Burmese the designation is “*lu ma she ya nay mye*”, which literally translate to “the area where no one should be/live.” Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 97.

⁸² Clinic Database, Interview Nos. 68, 98, and 125.

⁸³ Clinic Database, Interview No. 68; *see also* Interview No. 98 (“Where the Karen people are contacting the KNU they are our enemy and we shoot and burn. We knew we could shoot because the place belonged to the KNU.”), Interview No. 125 (“Our orders would come on a letter, and the letter would say, ‘You have to go to Karen state, the people there are your enemies.’”), and Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 89 (citing interviews with former Myanmar military officers).

⁸⁴ Clinic Database, Interview No. 98 (“In the front lines, whenever you enter the village or cross the village and you see anyone, no matter who you are, you have to kill them. Don't feel pity for them, whoever it is. Before you had to shoot only your KNU, but after that you had to shoot anyone, it did not matter who you were. . . . It is the same since the beginning: all the Karen people you have to kill. If you do not want to you still have to.”).

⁸⁵ *See, e.g.*, Clinic Database, Interview Nos. 106 (“The village chief said that if you go out there [to the black area], you can get no document from the government and SPDC can shoot you and the village chief can't take any responsibility for what would happens to you.”), Interview No. 129 (“The black area, according to the military, is the area where everyone is their enemy. Every time the military came to the black area, they killed everyone. I learned about the black area from other people.”); *see also*,

and brown areas and could clearly articulate how they would be treated by soldiers in either area.⁸⁶ As one villager explained to the Clinic, “Whomever the Myanmar military found in the black area, they wanted to kill them. We were all Karen, the same ethnic group as the KNU, and the Myanmar military did not want there to be any Karen left in the black area.”⁸⁷ Another villager said, “I was a young child when I first heard [the term black area] . . . Villagers do not want to face the military in a black area. The military will arrest people and kill the people they catch.”⁸⁸

The use of geographic delineation, color-codification, and corresponding differential rules of engagement is referenced in leaked military documents and described by former soldiers in interviews with the Clinic and military experts.⁸⁹ This evidence demonstrates that these policies were in place for several decades and continued to be implemented through at least the conclusion of the 2005–2008 offensive in eastern Myanmar. The current status of these policies is unclear. The Clinic has not independently investigated recent military activity in Kachin State, nor has it viewed documents confirming that the black area designation is still being explicitly referenced and actively used. However, reports of civilian targeting in Kachin State and elsewhere suggest a strong likelihood that these policies continue to be implemented in conflict areas.

The military’s color designations and differential rules of engagement have been part of a larger set of counterinsurgency policies designed to deny ethnic armed groups assistance from civilian support bases. Military documents outline “clearing” and “scorching the earth” operations and prescribe the destruction of “any humans, equipment, systems and functions that support enemies.”⁹⁰ This body of military policy and practice represents the modern incarnation of the “Four Cuts” doctrine, which aimed to deny ethnic armed groups access to food, financial support, intelligence, and recruits by driving the civilian population from conflict areas. This well-documented doctrine was developed by senior military officials in the late 1960s and was listed in Ministry of Defence documents as recently as 2008.⁹¹

To date, the Myanmar military has not formally renounced its counterinsurgency policies, introduced new initiatives to ensure civilian

Clinic Database, Interview Nos. 51, 52, 61, 62, 69, 81, 100, 103, 106, 111, 112, 115, 118, 119, 120, 121, 128, 139, 145, and 146.

⁸⁶ Clinic Database, Interview Nos. 51, 52, 62, 69, 103, 106, 115, 118, 119, and 146.

⁸⁷ Clinic Database, Interview No. 118.

⁸⁸ Clinic Database, Interview No. 115.

⁸⁹ Clinic Database, Interview Nos. 68, 98, and 125; Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 84.

⁹⁰ Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 99–101; *see also*, Maung Aung Myoe, *Building the Tatmadaw*, p. 27

⁹¹ Maung Aung Myoe, *Building the Tatmadaw*, pp. 25–26, Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 81.

protection, or taken steps to distance itself from the legacy of the Four Cuts doctrine.⁹²

Military Justice and Incentive Structure

The Myanmar Constitution establishes courts-martial to adjudicate cases relating to military personnel.⁹³ It also specifies that “[i]n the adjudication of Military justice . . . the decision of the Commander-in-Chief of the Defence Services is final and conclusive,” thereby precluding civilian oversight of cases involving military personnel.⁹⁴ Although the Defence Services Act provides courts-martial the opportunity to investigate and punish soldiers for a broad spectrum of offences,⁹⁵ officers are given wide discretion to dismiss or decline to investigate complaints of misconduct by subordinates.⁹⁶ It appears that very few cases are pursued against soldiers for the mistreatment of civilians. The Myanmar government stated that from 1990 to 2010 action was taken against 210 military personnel related to rape or murder charges—a very small number given the size of the Myanmar military and volume of reports of abuses.⁹⁷

The failure of the Myanmar military to hold its soldiers accountable for attacking civilians is due, in part, to a system that rewards unlawful behavior. Senior military officers who have overseen large military offensives that involved widespread civilian targeting have never been prosecuted for their role in violations of international humanitarian law. Rather, these commanders have routinely been promoted to prominent posts after overseeing these offensives.⁹⁸ The Clinic’s interviews with former soldiers indicate that this approach of prioritizing the delivery of assigned objectives without regard for civilian collateral damage permeates all levels of the military hierarchy.⁹⁹ The failure to appropriately incentivize lawful conduct is compounded by the military’s inadequate response to allegations of abuses. Such reports have most often been met with outright denial and demonization of those making the allegations,

⁹² In the unlikely event that the military has promulgated internal reforms and policies ending these practices, the military should publish documents indicative of such reforms.

⁹³ Constitution of the Union of Myanmar, 2008, arts. 293 and 319.

⁹⁴ Constitution of the Union of Myanmar, 2008, art. 343.

⁹⁵ The Defence Service Act of 1959, arts. 31–72 (Myan.).

⁹⁶ Ministry of Defence, *The Defence Services Rules*, art. 21(2).

⁹⁷ UN General Assembly, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” Tomás Ojea Quintana, A/65/368, 15 Sept. 2010, Annex, para. 9.

⁹⁸ Mary P. Callahan, *Making Enemies: War and State Building in Burma* (Ithaca: Cornell University Press, 2003), p. 210; Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 130.

⁹⁹ Clinic Database, Interview No. 98; *see also* Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 119.

rather than by the initiation of good faith investigations into the conduct of military personnel.¹⁰⁰

In order to effectively protect civilians from indiscriminate attacks and wilful killings, the military must formally renounce and repeal policies that lead to the targeting of civilians, including those policies that give rise to the delineation of geographic territories and differential rules of engagement. Additionally, the existing incentive structure in the military must be reversed; rather than rewarding officers who accomplish mission objectives by unlawful means, advancement through military ranks must be tied to demonstrable action to ensure civilians are not targeted. Credible allegations of misconduct should be promptly investigated and prosecuted when appropriate. This should be complimented by systematic audits of combat units' performance in minimizing civilian casualties, which should inform promotion and disciplinary decisions within the military.

B. Tactical Level

At the second level of military authority—the tactical level—field officers have often explicitly or implicitly ordered their subordinates to target civilians, resulting in indiscriminate attacks and wilful killings. Field officers have also failed to hold soldiers under their command accountable for attacks on civilians.

Explicit and Implicit Orders

In interviews, former soldiers described how military officers at times gave explicit orders to enlisted soldiers to attack or kill civilians.¹⁰¹ One former soldier

¹⁰⁰ Brad Adams, “Myanmar Army Continues to Live in Denial over Abuses,” *Bangkok Post*, 9 May 2013, <http://www.bangkokpost.com/opinion/opinion/349103/>; see also EiEi Toe Lwin, “The Army Doesn’t Need to Change,” *Myanmar Times*, 11 November 2013, <http://www.mmmtimes.com/index.php/in-depth/8762-the-army-doesn-t-need-to-change.html>.

¹⁰¹ See e.g., Clinic Database, Interview No. 98 (“If it is an animal or a human you have to shoot it, but the paddy fields or the houses you have to destroy. . . . If we see villagers to the east then we shoot. When we travel, sometimes the situation is too bad and the KNU shoots a lot, then we shoot without waiting for an order. . . . Most of the time when we entered the village we saw people and they ran away and we shot at them. In a week maybe ten people we shot and they died.”) and Interview No. 156 (“Captain [NAME REDACTED] of [UNIT REDACTED] said we could shoot anyone within 80 Ket at night. It did not matter if the person was carrying a weapon. . . . If the watchman didn’t shoot someone closer than 80 Ket and the person gave trouble, the watchman would be punished. Also, even if the watchman just heard a sound, he could shoot. In Burmese, the command was ‘Nyat Pan Pyit Kwae Mu,’ which means ‘right to shoot at night.’”); see also Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 89 (citing interviews with former Myanmar military officers).

that the Clinic interviewed stated, “[W]e were told by the [officer] that if we saw any Karen people that we would have to kill them.”¹⁰² Another former soldier, who defected after being injured, explained, “The order is if you go to the village and you see someone, whoever it is, whether it is KNU or a villager, you kill them.”¹⁰³

Sometimes the orders to enlisted soldiers were not explicit mandates to kill civilians, but provided such wide discretion that the effect was the same—soldiers wilfully killed civilians or attacked them indiscriminately. For example, a former soldier reported that one of his commanding officers “gave the order that whoever you see you shoot and if it is a woman you can rape Of course the order does not come like ‘rape people’ but they say those areas are bad people so do whatever you want.”¹⁰⁴

Vague and overly broad orders were also communicated to soldiers through euphemisms. Orders that former military personnel described to the Clinic sometimes used innocuous phrasing, but they were understood or interpreted to mean that soldiers can—or must—target civilians. One soldier described his commander giving euphemistic orders such as, “I don’t want to hear there is a hole in the bucket, I want water, just bring it.”¹⁰⁵ The problem of vague or overly broad instructions is compounded by the fact that low-ranking soldiers are fearful of asking officers to elaborate or clarify an order.¹⁰⁶

Because Myanmar military policies and culture generally disregard the protection of civilians, soldiers follow officers’ explicit orders to attack civilians without question. If an officer’s vague or euphemistic instructions leave room for interpretation by poorly trained subordinates, a wide range of responses—some in violation of international humanitarian law—will ensue. This should be particularly foreseeable given that Myanmar soldiers have historically achieved their goals through unlawful practices, including the wilful killing of civilians.

Failure to Investigate and Punish

Even when officers do not give explicit or implicit orders to commit indiscriminate attacks and wilful killings of civilians, they contribute to such

¹⁰² Clinic Database, Interview No. 157.

¹⁰³ Clinic Database, Interview No. 98. For more examples of explicit orders to kill civilians, see, e.g., Interview No. 68 (“They are all enemy. That means you can shoot someone. We are allowed to shoot if we saw someone in this area. Our officer told us this, when we attend the meeting. Not only could we shoot. We could do everything to the people in that area. We can kill, and if we see the women or the girls we can make sexual relations with them. [. . .] It [the policy] had a name, it was something like [A Pya Chin Moe]. It means kill all the people in the area.”).

¹⁰⁴ Clinic Database, Interview No. 98.

¹⁰⁵ Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 119.

¹⁰⁶ Clinic Expert Declaration, [EXPERT 1 – NAME REDACTED], para. 119.

attacks by failing to address violations of international humanitarian law by their subordinates.

Former soldiers who spoke with the Clinic described commanders' inaction in relation to the mistreatment of civilians. One former soldier stated, "When you go to the village nobody will say what you do, so you can do whatever. The soldiers know whatever you do, the [battalion commander] won't say anything . . ." ¹⁰⁷ According to another former soldier, perpetrators were only held responsible if victims reported the abuse to the media:

If the Burma Army soldier did something in the [black] area, like kill someone or rape a woman or burn a house, if the information does not become public, they don't do anything. But if the media knows it and says this soldier or this unit did something, then they do something to the commander or the soldier.¹⁰⁸

To adequately protect civilians in conflict settings, the Myanmar military must reform the way that field-level commanders give instructions and discipline subordinates. Even if problematic policies are repealed or reformed, in order for the reforms to be effective in protecting civilians, commanding officers must issue orders that are lawful and explicit. Additionally, they should act to hold subordinates responsible for unlawful actions by reporting alleged misconduct to the appropriate military authorities and cooperating in good faith with subsequent investigations.

C. Enlisted Soldier Level

At the third level of military authority—the enlisted soldier level—low-level soldiers involved in counterinsurgency operations make decisions to initiate, or participate in, conduct that harms civilians, including indiscriminate attacks and wilful killings. Various factors influence the decision-making process of enlisted soldiers in the field. These include the institutional culture of the Myanmar military, the minimal training received by enlisted soldiers, and the expectation of impunity resulting from the military's routine failure to hold military perpetrators accountable. Each of these factors has influences the decisions made by enlisted soldiers, including the split-second decisions made when they encounter frightening or unfamiliar situations during field operations.

¹⁰⁷ Clinic Database, Interview No. 98.

¹⁰⁸ Clinic Database, Interview No. 68 ("In my unit . . . [a soldier] entered [a] village and he saw two girls and raped them. The media got some information about this because the girls who were raped sent the information to the media. I heard about what happened in the radio. Then [the soldier] was put in prison for 20 years. [The soldier's] battalion also burned a village, but there was not much information in the media, so nobody knew about it.").

Military Culture

A soldier's decision to attack civilians during field operations may be influenced by an institutional culture that normalizes civilian targeting and fails to adequately value human life. As described above, civilians and former soldiers alike attested to the military's conflation of civilians and armed groups affiliated with the same ethnicity.¹⁰⁹ This lack of distinction, repeated in various forms since the promulgation of the Four Cuts doctrine in the late 1960s, has become ingrained in the military's culture and ethos. Harmful values and norms associated with this culture are often internalized by soldiers, who may act without consideration for civilian life.

Further, Myanmar military culture embraces a strong Burman nationalist sentiment, which sees the military as the bulwark against the forces—often in the form of ethnic minority interests—that seek to destroy the nation. Many commentators have connected this trend to a historic emphasis on military conquest and nation building.¹¹⁰ Prominent Myanmar historian Thant Myint U wrote about military leaders in the recent past:

[The military] saw themselves in a long line of national unifiers and saw their task as unfinished . . . And in their imagination, there remained the challenge of nation-building, of creating and promoting a new Myanmar identity, based on Buddhism and what was perceived as correct and traditional Burmese culture . . .¹¹¹

¹⁰⁹ See, e.g., Clinic Database, Interview No. 118 (“In the black area, we were mixed with KNU, and the military did not differentiate between KNU and the Karen people. Whoever the Burmese military found in the black area, they wanted to kill them. We were all Karen, the same ethnic group as the KNU, and the Burmese military did not want there to be any Karen left in the black area. The Burmese military knew we were all the same people Karen, and considered us all to be their enemy. The Burmese wanted to kill all the Karen. Their enemy should have just been the KNU but the military did not care. The military wanted to kill all the Karen.”) and Interview No. 76 (“The enemy of the army was the KNU. They thought the Karen was their enemy, and they would destroy all of them. I am not KNU, I did not carry a weapon, but we are the nation of the Karen people.”).

¹¹⁰ See, e.g., Sai Latt, “Colonialism and Ethnic Conflict in Burma,” *Shan Herald*, 17 Apr. 2013, http://www.shanland.org/index.php?option=com_content&view=article&id=5363:colonialism-and-ethnic-conflict-in-burma; Andrew Selth, Griffith Asia Institute, “Burma's Security Forces: Performing, Reforming or Transforming,” Nov. 2013, http://www.griffith.edu.au/__data/assets/pdf_file/0011/559127/Regional-Outlook-Paper-45-Selth.pdf (military personnel “see themselves as patriots charged with an historical responsibility to protect the country and ‘safeguard’ the new constitution”).

¹¹¹ Thant Myint U, *The River of Lost Footsteps: A Personal History of Burma* (New York: Farrar, Straus and Giroux, 2006) pp. 340–341 (“When the men in uniform looked to the past, they saw a country that tended to fall apart into little pieces and that always needed

The strength of this sentiment within the military may contribute to enlisted soldiers' failure to properly value or empathize with civilians who share the ethnicity of non-state armed groups. According to one former soldier, "The ethnic groups in Myanmar were our enemies. There are the Kachin, Shan, Arakan, Karen, Kayah, Chin . . . because these groups do not obey the ruling system, they are the enemy."¹¹²

Many soldiers in the Myanmar military may hold personal biases against individuals from ethnic minority groups. Karen individuals who spoke with the Clinic recall being targeted with racial or derogatory language from soldiers.¹¹³ Personal prejudices reinforce the military's institutional disregard for civilian life and Burman nationalist impulses to the detriment of civilian populations in counterinsurgency areas.

Insufficient Training

The minimal training received by enlisted soldiers also contributes to their decisions to initiate, or participate in, indiscriminate attacks and wilful killings of civilians. There is little publicly available information regarding the Myanmar military's training programs. Newly enlisted soldiers are typically trained at one of a number of basic military training camps scattered throughout the country.¹¹⁴ Basic training lasts approximately four-and-a-half months, although it is not clear that all enlisted soldiers receive training of the same duration.¹¹⁵

Although it is likely that the training given to enlisted soldiers is highly variable, reports suggest that enlisted soldiers have historically received little or no training on humanitarian law or human rights law.¹¹⁶ Former soldiers who spoke

to be melded together by force . . . These were men, for the most part, who knew no other life, had joined the armed forces as teenagers and never left, had fought in the mountains and forests for years, killing and seeing their fellow soldiers killed, living entirely apart from the rest of Burmese society. They had created a sort of military fantasy world, where everything was about making enemies and making war and everyone else had a supporting role, like camp followers in a Mongol horde.").

¹¹² Clinic Database, Interview No. 90 ("When we were on the front lines, we would try to find the enemy. If we found the enemy, fighting would break out. The KNU was the enemy. The ethnic groups in Myanmar were our enemies. . .").

¹¹³ Clinic Database, Interview Nos. 47, 69, 121, 125, and 150.

¹¹⁴ HRW, *My Gun Was As Tall As Me: Child Soldiers in Burma* (New York: HRW, 2002), p. 58, <http://www.hrw.org/reports/2002/10/16/my-gun-was-tall-me>.

¹¹⁵ Hilary Whiteman, "The Fight to Free Myanmar's Child Soldiers," *CNN*, 1 Nov. 2013, <http://edition.cnn.com/2013/10/15/world/asia/myanmar-burma-child-soldiers/index.html>; HRW, *My Gun Was As Tall As Me*, p. 58.

¹¹⁶ HRW, *My Gun Was As Tall As Me*, pp. 58–59. Some child soldiers who spoke with Human Rights Watch in 2002 recall being taught to "not be at odds with civilians," but, historically, civilian protection has clearly not been a primary focus of training.

with the Clinic said that they were not trained on how to protect civilians or distinguish between civilians and combatants. They were unanimous in recalling that their training focused primarily on conditioning, weapons operation, and “obeying orders.” As one former soldier explained, “It is very difficult to know whether someone is the enemy or not. [During the training,] we were not told how to know the difference between enemies and civilians Our main training was only shooting, display, and fighting.”¹¹⁷

Although there are indications that the Myanmar military has introduced new training programs in recent years—or revised existing programs—the content of these changes is unclear, as is the degree to which they address the concerns raised above.¹¹⁸

The consequences of inadequate training are particularly acute given the difficult and unfamiliar circumstances in which soldiers are frequently placed. According to a former soldier:

The [military personnel] who stay in towns do not die, but in the front line it is like a play game where you have to be prepared to die . . . The KNU are very clever, they use guerrilla techniques, only seven or sometimes four in a group. But we have to go together in a big group and we die.¹¹⁹

The fear and trauma that low-level soldiers face in such situations can contribute to poor decisions and negative impacts on civilian populations.

Moreover, Myanmar military personnel are insufficiently trained to deal with the policies and practices of non-state armed groups, which at times may constitute violations of international humanitarian law. For example, the Clinic’s consultations with local actors and experts suggest that soldiers from ethnic armed groups may not always wear uniforms or proactively take steps to distinguish themselves from civilian populations. Moreover, many ethnic armed groups use ambushes and guerilla tactics as their primary form of attacks. Allegations of summary executions of captured Myanmar Army soldiers by ethnic armies are widespread.¹²⁰ These factors, combined with a military training structure that insufficiently prepares soldiers to deal with the fears and

¹¹⁷ Clinic Database, Interview No. 90; *see also*, Interview No. 98 (“The training is all about fighting—basic training. We were taught how to use different weapons. We were taught about landmines and guns [If we] have education we get complete training, but I was not from town and we could not read or write, so we only got harsh, practical training”).

¹¹⁸ Selth, *Burma’s Security Forces*.

¹¹⁹ Clinic Database, Interview No. 98.

¹²⁰ HRW, “Burma: Q&A on an International Commission of Inquiry,” 24 Mar. 2011, http://www.hrw.org/sites/default/files/related_material/Burma_CoI%20QA_March%202011.pdf.

uncertainties they face in the field, may prime low-level soldiers for unlawful action during counterinsurgency operations.

Impunity of Direct Perpetrators

As described in Sections III.A and III.B, unlawful actions by soldiers in the Myanmar military have too seldom been investigated and punished. This systematic failure to hold soldiers accountable for unlawful actions has been characteristic of the Myanmar military for decades, and has developed into an entrenched institutional norm. Enlisted soldiers involved in counterinsurgency operations make decisions within this context, where impunity is expected and accountability is rare. This can lead to grave consequences for civilians, especially when soldiers are young, fearful, ill-trained, and influenced by a military culture that inadequately values civilian life.

In order to adequately protect civilians from indiscriminate attacks and wilful killings, reforms must be made to ensure that enlisted soldiers are positively influenced by the military's institutional culture, training regime, and disciplinary system. The military should seek to develop an institutional ethos that highly values civilian life, respects diversity, and encourages professionalism and restraint in all interactions with civilians. Training programs should not only inform enlisted soldiers of their obligations under international humanitarian law and domestic law, but also prepare them to handle unfamiliar and potentially frightening situations in the field. This must involve rigorous situational training which, through repetition, builds habits and instincts that ensure lawful conduct. Additionally, the military should ensure that enlisted soldiers operate under the expectation that they will be held responsible for all actions that harm civilians.

IV. RECOMMENDATIONS FOR REFORM

This section provides recommendations to address those factors that lead to indiscriminate attacks and wilful killings of civilians in Myanmar. First, the Clinic lays out an overarching framework for promoting institutional change within the military that employs accountability and positive incentives to influence decision-makers throughout the military chain of command. Second, within that framework, the Clinic provides specific recommendations to the Myanmar government and to military personnel at the operational-policy, tactical, and enlisted soldier levels of military authority.

A. Recommended Framework for Reform

The problems that give rise to indiscriminate attacks and wilful killings of civilians by the Myanmar military are longstanding and firmly entrenched within the military's institutional culture. A successful reform effort must achieve a paradigm shift within the military that overturns historic practices and deep-seated norms. To promote this fundamental change, policy-makers must address two factors which motivate soldiers: *accountability* to discourage improper or unlawful action and *positive incentives* to reward desirable behaviors. While proper training of soldiers is also necessary, it will be of little benefit unless linked to a more comprehensive program of reform. Ultimately, failure to adequately address either accountability or positive incentives will severely hamper reform efforts.

Holding soldiers accountable for unlawful actions is an indispensable component of reform and an obligation under international humanitarian law. Government officials and senior military commanders must commit to implementing policies that promote accountability. Additionally, field commanders and enlisted soldiers must be willing and able to report abuses to the appropriate authorities.

Providing positive incentives for lawful behavior is likewise a necessary component of reform. As discussed in this memorandum, the military has historically prioritized military goals over civilian protection and has rewarded soldiers primarily for the accomplishment of military objectives. For example, the performance of field commanders engaged in counterinsurgency operations may be judged largely by whether areas are "cleared of enemies." Instead of this arrangement, evaluation and incentive structures should be based both on the accomplishment of military objectives and on the protection of civilian populations. A successful reform program must ensure that the latter criterion is embedded into military promotion schemes and reward systems.

The grave human impact of abusive actions by Myanmar military personnel has led many commentators and human rights organizations to focus advocacy

efforts on accountability for those responsible for violations of international law. For this reason, the role of positive incentives in fostering lawful and constructive behaviors has not received the concerted policy attention that it deserves. Utilizing accountability and positive incentives in tandem will maximize the impact of reform efforts.

For example, as recommended in Section IV.B, the military should systematically audit the conduct of combat units in terms of civilian protection. Commanders whose units have been implicated in abusive actions toward civilians, as well as soldiers who have participated in such actions, should be subject to disciplinary action, benefits reduction, discharge, or, if appropriate, prosecution. Commanders whose units perform well in audits and soldiers who refrain from unlawful behaviors should be rewarded with promotions, training opportunities, and other benefits. Of course, this system can only be successful if the process of evaluation is robust and independent, implemented in good faith by senior military officers, and responsive to the concerns of local communities. If carefully designed and implemented, an audit system would both deter unlawful conduct and incentivize civilian protection for soldiers at all levels of military authority.

To maximize the impact of audit mechanisms and other systems of evaluation, military policy-makers should emphasize “clean records” for units and soldiers as a key criterion of success. A unit or soldier would maintain a clean record by avoiding any unlawful or inappropriate actions affecting civilians. Officers who command “clean units” should receive preference for promotion and appointment to prominent posts, and enlisted soldiers who maintain clean records should be given greater access to training and advancement. Emphasizing clean records as a professional goal for soldiers could provide a significant incentive for lawful action and help displace the current singular prioritization of military objectives.

The long-term impact of pairing accountability with positive incentives could be significant. Soldiers who actively promote civilian protection would tend to rise within the military chain of command, while soldiers who engage in unlawful or inappropriate behavior would be barred from advancement. Over time, the military’s central command would be increasingly populated by those officers with clean records, thereby promoting positive values such as respect for civilians and increasing professionalism.

In addition, this memorandum identifies insufficient and improper training as a threat to civilian protection in Myanmar. In both the short term and long term, training is a key component of professionalization and reform efforts, and there is little doubt that more and better training is needed for soldiers at all levels of the military. However, it is also clear that, while training is necessary, it alone is not sufficient to achieve the paradigm shift envisioned by this memorandum. Training that is divorced from more fundamental structural change is likely to have little or no effect on civilian protection. Even if soldiers more fully

understand their obligations under international law, they will likely continue to act in ways that harm civilians so long as they are motivated to pursue military objectives at any cost and act within a context of widespread impunity.¹²¹ A holistic reform program, which addresses problems through the appropriate combination of accountability and positive incentives, is needed.

B. Recommendations to Specific Actors

In addition to the framework for reform recommended above, the Clinic offers the following specific recommendations to the government of Myanmar and soldiers at the three levels of military authority.

To the Government of Myanmar:

- Prioritize civilian protection as a core component of ongoing military reform efforts, including by establishing an independent commission to study comprehensive military reform needs.
- Acknowledge past violations of international humanitarian law and the harm caused to civilians by indiscriminate attacks and wilful killings.
- Publicly affirm that all units and personnel of the Myanmar Armed Forces must respect international humanitarian law, including by immediately refraining from indiscriminate attacks and wilful killings of civilians and at all times distinguishing between civilians and combatants.
- Amend the 2008 Constitution to allow for independent civilian oversight of the military justice system, including appellate review of court-martial proceedings by civilian judges.
- Accede to the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).
- Accede to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

¹²¹ Premature or overly expansive support for training by international actors could potentially be counterproductive. Significant increases in support could provide legitimacy to the military before it has demonstrated a track record of preventing civilian harm. In other words, third parties should not support training for political or symbolic reasons and should only back training efforts that are tied to fundamental institutional reforms addressing both accountability and positive incentives.

- Accede to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict.

To Operational-Policy Level Military Officers:

- **Reform those counterinsurgency policies that expressly authorize or implicitly sanction disregard for international humanitarian law—especially the principle of distinction—by:**
 - publicly renouncing all official policies and informal practices that require or permit soldiers to indiscriminately attack and wilfully kill civilians and commit other violations of international humanitarian law and relevant domestic law;
 - publicly renouncing the official policies and informal practices that lead to the labeling of geographic areas as white, brown, and black and authorize the targeting of civilians in black areas;
 - publicly affirming that all policies must conform with international humanitarian law and relevant domestic law; and
 - publicly adopting uniform rules of engagement that comply with international standards and best practices—such as those prescribed by the *San Remo Rules of Engagement Handbook*¹²²—for all soldiers in counterinsurgency operations.
- **Ensure that all members of the military are made aware of their obligations under international humanitarian law and relevant domestic law and are able to satisfy those obligations in practice, by:**
 - training all new soldiers and officers on their obligations under international humanitarian law and relevant domestic law, and best practices in civilian-military relations;
 - mandating that all current soldiers and officers complete pre-deployment trainings as well as yearly trainings on their obligations under international humanitarian law and relevant domestic law;

¹²² International Institute of Humanitarian Law (IIHL), *Rules of Engagement Handbook* (San Remo: IIHL, 2009), <http://www.usnwc.edu/getattachment/7bodof70-bbo7-48f2-afoa-7474e92dobbo/San-Remo-ROE-Handbook>. The IIHL is a non-governmental organization that seeks to promote international humanitarian law including by training civilians and military personnel. The IIHL developed the San Remo Rules of Engagement Handbook, which provides guidance on the development of rules of engagement.

- incorporating situational training, which prepares soldiers to comply with obligations while subject to the stresses of combat operations, into all phases of military training; and
 - linking promotion and deployment to the successful completion of an examination that tests soldiers' understanding of their obligations under international humanitarian law and relevant domestic law.
- **Regularly and transparently evaluate the performance of military units and personnel in terms of civilian protection and provide positive incentives for lawful action by soldiers at all levels of military decision-making, by:**
 - systematically auditing the performance of combat units in terms of minimizing civilian harm;
 - establishing a civilian casualty mitigation unit within the military to:
 - collect reports from military units of all incidents involving civilian harm, including unlawful harm and lawful "collateral" harm,
 - investigate and track all such incidents,
 - compile and publish annual reports on the number of civilian casualties caused by the military, and
 - offer recommendations to senior military officers and civilian policy-makers on reducing civilian harm caused by the military;
 - revising criteria for promotion or appointment to prominent postings to reward "clean records" and demonstrable action to protect civilians during military operations;
 - tying pay increases, access to training, military honors, veterans' benefits, and other incentives to "clean records" and demonstrable action to protect civilians during military operations; and
 - disqualifying from promotion or appointment to prominent postings military personnel responsible for violations of international humanitarian law or relevant domestic law, either directly or in a command capacity.
- **Hold officers and soldiers who violate international humanitarian law or relevant domestic law accountable, by:**
 - developing comprehensive, clear, and transparent nationwide procedures for civilians to report a potential violation of international humanitarian law or relevant domestic law by military personnel directly to the appropriate military authorities, under the oversight of an effective and impartial civilian commission;

- regularly publicizing information on the nationwide reporting procedures to the public, in partnership with local civil society groups;
 - developing comprehensive, clear, and transparent internal procedures for military personnel to report a potential violation of international humanitarian law or relevant domestic law by other military personnel to the appropriate military authorities;
 - developing procedural safeguards to protect civilians and military whistleblowers who report potential violations by other military personnel;
 - disseminating information on these internal reporting procedures to soldiers at all levels of the military hierarchy;
 - mandating an official, good faith investigation—and where appropriate prosecution—of any member of the military alleged to have committed violations of international humanitarian law or relevant domestic law;
 - reforming the military justice system to ensure that any member of the military who violates international humanitarian law or relevant domestic law is prosecuted in accordance with international standards; and
 - regularly publishing information on the investigation and prosecution of soldiers who have been accused of committing crimes against civilians.
- **Promote an institutional culture that values civilian protection at all levels of military decision-making, by:**
 - enacting and implementing a new policy that requires the military to publicly acknowledge violations of international and relevant domestic law that result in harm to civilians;
 - establishing a government-funded program through which civilian victims, including victims of lawful “collateral” harm, and their families can seek financial compensation or amends;
 - formalizing a clear and transparent mechanism through which civil society and community leaders can regularly meet with senior military leaders to directly raise grievances and concerns; and
 - emphasizing the importance of ethnic diversity to the country’s identity and to the military’s mission, including by disciplining soldiers and officers for any displays of ethnic bias or prejudice in the performance of their official duties and by rewarding soldiers who demonstrate respect for different ethnic groups.

To Tactical Level Military Officers:

- **Ensure that orders and commands to subordinates are lawful under international humanitarian law and relevant domestic law, by:**
 - eliminating orders that expressly require, authorize, or sanction violations of international humanitarian law and relevant domestic law;
 - eliminating the use of euphemistic orders that lead subordinates to believe that they have been ordered to violate international humanitarian law or relevant domestic law;
 - minimizing, to the greatest extent possible, the use of vague or broad orders that permit a dangerous degree of discretion by subordinates;
 - expressly and routinely reminding subordinates that all orders should be interpreted with a presumption in favor of compliance with international humanitarian law and relevant domestic law;
 - expressly and routinely warning subordinates that violations of international humanitarian law and relevant domestic law must be reported, that all such reports will be investigated, and that offending soldiers will be prosecuted; and
 - operating with the understanding that, under the doctrine of command responsibility, officers can be held individually responsible for violations of international humanitarian law committed by soldiers under their command.

- **Report violations of international humanitarian law and relevant domestic law and cooperate with appropriate authorities to investigate such violations, by:**
 - collecting detailed incident reports from subordinates following any operation in which civilians are harmed, unlawfully or lawfully and forwarding those reports to the civilian casualty mitigation unit;
 - encouraging subordinates to report any violations of international humanitarian law or domestic law by their colleagues directly to their commanding officers, and ensuring subordinates receive whistleblower protection;
 - encouraging local civilians to report any violations of international humanitarian law or domestic law directly to military authorities through the nationwide reporting system; and
 - cooperating in good faith with the investigation of subordinates alleged to have committed violations of international humanitarian law or relevant domestic law.

To Enlisted Soldiers:

- Interpret orders from commanding officers with a presumption in favor of compliance with international humanitarian law and relevant domestic law, particularly if they are unclear or allow for discretion.
- Refuse to comply with orders from commanding officers that expressly require, authorize, or sanction violations of international humanitarian law and relevant domestic law.
- Operate with the understanding that soldiers will be held individually accountable for violations of international humanitarian law and relevant domestic law, even when following orders.
- Report violations of international humanitarian law and relevant domestic law by fellow soldiers or commanding officers directly to the appropriate military authorities.
- Cooperate in good faith with the investigation of soldiers at all levels of military authority alleged to have committed violations of international humanitarian law or relevant domestic law.
- Show respect and exercise restraint, without ethnic bias or prejudice, in interactions with the local civilian population.