

**FACTUAL AND LEGAL BASIS FOR PROSECUTION OF MINISTER
OF HOME AFFAIRS AND MINISTER FOR IMMIGRATION AND
POPULATION, LT.-GEN. KO KO PURSUANT THE SWISS
CRIMINAL CODE AND THE CONVENTION AGAINST TORTURE**

November 2015



About the Organizations

Created in 2005, the **Global Justice Center** (GJC) works to achieve sustainable justice, peace and security by building a global rule of law based on gender equality and universally enforced international human rights laws. Adhering to principles over politics, GJC fills a critical niche in the human rights field by serving as an unwavering voice calling for the enforcement of international legal obligations to uphold fundamental human rights. GJC works by combining advocacy with service, forging legal precedents in venues which have the greatest potential for global impact, such as the United Nations Security Council, while empowering strategic partners – including governments, women leaders, and civil society – with international law expertise and tools to embed human rights and gender equality. Based in New York City, GJC focuses on situations that present the greatest opportunity for systemic change, such as conflict and post-conflict situations and transitional democracies. Specifically, GJC’s legal projects challenge systemic discrimination in the enforcement of international law, while shaping international law to ensure gender equality. In doing so, GJC seeks to advance the integrity of our global legal system, forge new rights for women and girls, and have a direct positive impact on the rights and lives of persons who suffer from egregious human rights violations.

Created in 2012, **Justice Trust** is a human rights advocacy organization that works closely with local lawyers and activists to support communicates fighting for justice. As part of its Myanmar program, Justice Trust publishes important policy reports on important current events. These reports have two main goals: to advance the rule of law at the domestic level by exposing violations and promoting policy reform, and to address misperceptions at the international level by presenting local knowledge of these events.

I. INTRODUCTION

1. This Swiss criminal complaint against Lieutenant-General (“Lt.-Gen.”) Ko Ko, Myanmar’s¹ Minister of Home Affairs and Minister for Immigration and Population, was prepared in connection with his leadership of Myanmar’s committee to its Universal Periodic Review (“UPR”) at the United Nations Human Rights Council (“HRC”) in Geneva on November 6, 2015.²
2. According to this indictment, Lt.-Gen. Ko Ko bears command responsibility for war crimes, crimes against humanity, and torture committed by his subordinates that he failed to prevent or punish. Under the principle of universal jurisdiction, which is incorporated into Swiss law, Lt.-Gen. Ko Ko can be tried in a Swiss court for these international crimes.
3. For purposes of this trip to Geneva, Lt.-Gen. Ko Ko enjoys immunity under the 1946 Convention on Privileges and Immunities of the United Nations. However, the indictment can be used as the basis for additional indictments should he travel outside of Myanmar for other purposes when immunity may not apply.
4. Evidence against Lt.-Gen. Ko Ko has been available for years, but the Government of Myanmar has ignored his complicity in war crimes; instead, he has been rewarded with appointments as Minister of Home Affairs and Minister for Immigration and Population, and was selected to head Myanmar’s UPR committee. As Minister of Home Affairs, he has exercised authority over police forces that have repeatedly used excessive force and violence against peaceful protesters, continuing a pattern of disregard for human rights.
5. Since the transition to a quasi-civilian government in 2011, Myanmar has declared its commitment to establishing democracy, respecting human rights, and adhering to the rule of law. However, true progress is impossible while those responsible for heinous crimes remain in power, sheltered from accountability.
6. Because the civilian government can’t – or won’t – take action, the international community must ensure that justice is served by holding Lt.-Gen. Ko Ko accountable under international law.

II. FACTUAL BACKGROUND

A. Lieutenant General Ko Ko

7. Ko Ko, an active-duty Lieutenant General in the Myanmar Army, currently serves as both the Minister of Home Affairs and the Minister of Immigration and Population.
8. Between 2003 and 2008, Ko Ko was a Major General in the Myanmar Army and served as Commander of the Southern Regional Military Command (“Southern Command”).³ As the Commander of Southern Command, Ko Ko was the military officer responsible for the execution and oversight of the military offensive in eastern Myanmar described in paragraphs 12

through 54 below (“Military Offensive”). Under his command, this Military Offensive featured multiple commissions of various war crimes and crimes against humanity (as alleged herein). Many of the facts supporting this indictment with respect to the Military Offensive are drawn from the Legal Memorandum on War Crimes and Crimes against Humanity in Eastern Myanmar by the International Human Rights Clinic at Harvard Law School (“Harvard Clinic”).

9. Despite being responsible for a litany of international crimes, Ko Ko was appointed the Minister of Home Affairs on March 30, 2011 by President Thein Sein.⁴ In this capacity, Ko Ko directs and administers Myanmar’s Police and other departments. In November 2012, Ko Ko oversaw the Myanmar Police’s illegal use of white phosphorous in response to protests at the Letpadaung copper mine described in paragraphs 55 through 87 below.
10. On August 14, 2015, Ko Ko was appointed the Minister of Immigration and Population by President Thein Sein—again being given a broader portfolio and more responsibility despite having committed international crimes.⁵
11. In early 2015 and with the Government of Myanmar’s full knowledge of Ko Ko’s previous crimes, Ko Ko was chosen to lead the committee for Myanmar’s UPR at the HRC.

B. Military Offensive in Eastern Myanmar Featured War Crimes and Crimes Against Humanity

1. ***The Military Offensive in Eastern Myanmar Between 2005 and 2008 is Part of a Conflict Between the Government’s Military and Ethnic Armed Groups that Has Lasted Over 70 Years and Has Featured Numerous International Crimes***

12. The Military Offensive described herein is part of a decades long and ongoing conflict between the Government of Myanmar and political rebel groups.⁶ During the conflict, the military cracked down on ethnic insurgency forces and targeted ethnic people and their political and military organizations. Allegations of human rights abuses against ethnic communities at the hands of the military abounded.⁷ These abuses, including killings, rapes, forced labor, forced relocation, extortion, land and food requisitions, and restrictions on access to fields and markets, have had a devastating and destabilizing impact on ethnic populations.⁸
13. The quasi-civilian government which took power in 2001 has signed peace agreements with various ethnic groups.⁹ Nevertheless, reports of human rights abuses perpetrated by the military persist.¹⁰

2. ***Background on the Military Offensive in Eastern Myanmar Between 2005 and 2008 including Offenses Against Civilians***

14. The Myanmar military engaged in a pattern of abuse amounting to war crimes, crimes against humanity and serious violations of human rights during the Military Offensive in eastern Myanmar, which lasted from late 2005 to 2008.¹¹ The military targeted the Karen National

Union (“KNU”), the non-state armed group Karen National Liberation Army (“KNLA”), and the ethnic Karen population in eastern Myanmar.¹² The military focused its activities in northern Kayin (or Karen) State and eastern Bago Division.¹³

15. The primary goal of the Military Offensive was to move civilians from KNLA-controlled areas to government-controlled areas in order to impede civilian efforts to provide the KNLA with material support.¹⁴
16. The Military Offensive began in November 26, 2005, with an attack on Hee Daw Kaw village in Thandaung Township, Kayin State.¹⁵ The Southern Command fired mortars into the village.¹⁶ As villagers attempted to flee, soldiers shot at them and executed one.¹⁷ The Southern Command burned thirty homes and laid landmines to inhibit villagers from returning home.¹⁸ A villager stepped on one of these landmines and lost a leg.¹⁹ This attack alone displaced around 2,000 villagers.²⁰
17. In November and December 2005, the Southern Command continued to attack several other villages in northern Kayin State and eastern Bago Division.²¹ In early 2006, Southern Command which oversaw seven combat divisions, including the Light Infantry Division 66 (“LID 66”), entered northern Kayin State and eastern Bago Division, now Bago Region.²² Throughout the Military Offensive, the LID 66 focused geographically on Klaw Mi Der and Play Hsa Loh, while the Southern Command focused on Shah Si Boh.²³
18. These attacks were part of the Myanmar military’s civilian-clearing operations whereby civilians were forced out of their homes. The Southern Command would force civilians to transfer from KNLA-controlled areas to areas near military camps to destabilize any potential civilian support for the KNLA.²⁴ LID 66 would order civilians to move to military-controlled areas like Shah Si Boh and Play Hsa Loh.²⁵ Between 2005 and 2006, the Southern Command forcibly transferred civilians from at least fourteen villages within Thandaung Township.²⁶
19. The Southern Command would destroy civilian villages in conjunction with relocation orders so that civilians were forced to relocate.²⁷ The Southern Command would shell and burn down villages, destroy homes, and lay landmines in villages that it had ordered to relocate.²⁸ The Southern Command also destroyed civilians’ farms, livestock, food stocks, and personal property.²⁹ The Southern Command destroyed the property of civilians in Thandaung Township between 2005 and 2006 to uproot the KNLA’s civilian support base there.³⁰ The Southern Command often destroyed homes and farms outside Baw Ga Li and Kaw Thay Der.³¹ East of the Day Loh River, the Southern Command also destroyed villages and used landmines in civilian areas.³² The Southern Command burned or otherwise destroyed whole villages after civilians fled.³³ One such villager gave his account: “the church had been burned, and the houses had been burned, and the rice stores of the villagers had been burned . . . The Burmese army burnt every house . . . and the village school [was] burnt down completely.”³⁴
20. The Southern Command also appropriated property between 2005 and 2006. The Southern Command took the civilians’ personal property—often food and livestock.³⁵ The Southern

Command would sometimes demand the personal property of civilians, and civilians often complied with these demands out of fear.³⁶ The Southern Command would also take personal property from villages when villagers were absent or had fled.³⁷

21. The Southern Command also used brute force against civilians to achieve relocation. The Southern Command would threaten civilians with violence or death if they did not relocate.³⁸ In March 2006, for example, the Southern Command sent a relocation order to a village chief with a chili and a warning that “military is hot, [and] if you don’t leave you will get the chili.”³⁹
22. The Southern Command would carry out threats and kill civilians that had no part in the hostilities in order to clear civilians from certain areas. It routinely used mortars, guns, and landmines against civilians.⁴⁰ A civilian from Thandaung Township became blind and suffered injuries when he set off a landmine the Southern Command had placed in his home.⁴¹ He, like other civilians attacked, was not armed and was not taking a direct part in hostilities.⁴²
23. The Southern Command would also kill civilians as part of a strict military policy to shoot civilians upon encountering them.⁴³ An individual described how soldiers murdered six civilians, four of which they killed with a hoe.⁴⁴ Nine individuals recounted the shooting of a civilian trying to flee attacks, with one of the two eyewitnesses detailing that “he was shot through the eye, and the shot came out the back of the head. It was only one shot.”⁴⁵ The Southern Command also conducted the extrajudicial killing of civilians in their custody.⁴⁶
24. The Southern Command also murdered porters forced to labor when they tried to flee.⁴⁷ One individual witnessed the bodies of thirty to forty porters one day; he said, “Every few steps there were one or two or three who had died.”⁴⁸ For more information on forced portering, see paragraphs 27-28 below.
25. More than 370 civilians were by the Southern Command during the Military Offensive according to the Free Burma Rangers.⁴⁹ These deaths include at least thirty civilians in Thandaung Township between 2005 and 2006 and at least 11 villagers in 2006 and 2007 as reported by the Harvard Clinic.⁵⁰ These numbers do not account for the deaths of porters, which the Harvard Clinic estimates to be in the hundreds.⁵¹
26. The Southern Command tortured civilians to extract information about the KNLA.⁵² The Southern Command would frequently beat civilians forcibly working for the military.⁵³ They would also conduct simulated drownings and suffocations, hang civilians from trees, cut civilians, beat civilians, and burn civilians with fire.⁵⁴ In one case, the Southern Command beat a civilian unconscious, tied him to a post, and forced a 6-inch long knife into his mouth in an attempt to cut off his tongue.⁵⁵ The civilian could not eat for days as a result.⁵⁶ The Southern Command also committed acts of torture when it raped civilians.⁵⁷
27. In addition to acts of forcible transfer, murder, torture, and sexual violence, the Southern Command also used forced labor in areas that it operated.⁵⁸ The Southern Command forced

civilians to porter and carry supplies, construct and maintain camps, maintain roads, deliver messages, serve watch, and perform various other tasks.⁵⁹

28. Forced laborers were mistreated and sometimes even executed.⁶⁰ Civilians were often forced to work continuously for long periods of time.⁶¹ Porters were sometimes forced to carry goods for days at a time.⁶² One civilian recounted, “I noticed in 2006 that we never got any rest; we always had to work for the military.”⁶³ Soldiers also required porters to clear landmines and walk in front to guard against landmines and KNLA attacks.⁶⁴
29. The Southern Command committed more acts of violence against civilians not taking part in hostilities through the rape and torture of civilians.
30. Systematic rape and sexual violence has been used by Myanmar’s military as a strategy to subjugate and terrorize Myanmar’s ethnic populations, including the Karen.⁶⁵ Observers, including the Special Rapporteur on the situation of human rights in Myanmar, have repeatedly noted the high level of state-sponsored sexual violence occurring in Myanmar’s ethnic areas as part of on-going ethnic conflict.⁶⁶ Military-orchestrated rapes are committed by foot-soldiers and officers alike, and often feature extreme brutality, gang rapes, and/or sexual slavery.⁶⁷ In many cases, women and girls die either as a result of injuries sustained during the rape, or are killed after-the-fact to prevent them from reporting their attacks or recounting their experiences.⁶⁸
31. The Southern Command’s actions during the Military Offensive followed this pattern and featured acts of rape and sexual violence against the Karen population.⁶⁹ This was particularly true in the so called “black areas”⁷⁰ where one soldier recounted that the edit to “do whatever” in black areas included the rape of women⁷¹ and another who “asserted that soldiers would not be punished for rapes committed in black areas, unless such rapes were reported in the media.”⁷² Local human rights organization have meticulously documented instances of rape, and in the cases below, were able to directly link the acts to perpetrators in the Southern Command.
32. In one instance on January 1, 2004, Sergeant Tin Shwe and one of his friends, under the command of Light Infantry Battalion 124, abducted Naw Thay Po and one of her young children of Kaw-thay-doe village, Tan-ta-bin Township, Toungoo District.⁷³ They proceeded to rape her between Kaw-soe-kho and Kler-ler village.⁷⁴ She was brought back home by a village leader but was still in shock and could not speak properly.⁷⁵ In another, On November 11, 2004, a soldier from the Infantry Battalion 75 raped Naw Ah Law Meh⁷⁶ who was only 20 years old at the time.⁷⁷
33. On November 21, 2005, Commander Kyaw Htun of Infantry Battalion 124 sexually assaulted Naw Sun Set in Kler La village, Toungoo District.⁷⁸ She recalled, “[He] gripped my neck, pushed me down and sprang on top of me. I tried to protect myself; three times I pushed him away and shouted. But he closed my mouth with one hand and with the hand tried to pull off my sarong and underwear. I kept shouting and pushed and pushed him three times until I felt tired.”⁷⁹ On the same day, a soldier also from Infantry Battalion 124 attempted to rape Naw L’s⁸⁰ in her house in Kler Lah.⁸¹ After the incident, she fled with her 3 children out of fear of their safety.⁸²

34. In mid-December 2005, Corporal San Aung of Light Infantry Battalion 349 attempted to rape Naw M⁸³ by knife in her home in Dweh Loh township, Papun District.⁸⁴ Due to her fears, she fled with her 3 children.⁸⁵ He later threatened to blow up her house with landmines⁸⁶ and she continues to live in constant fear of him.⁸⁷
35. On February 6, 2006, Sergeant San Aung of Light Infantry Battalion 349 raped Naw Say Paw in Ee Kyu Kee village⁸⁸ She testified, “[He] pushed me down on the ground under my house. I shouted but nobody heard me because people were at the wedding house. Then he lifted up my sarong and raped me on the ground. He came alone to me and before he blew the light out. I noticed that he was a sergeant because he wore a uniform with three lines on his arm. . . . I just know only the name of that soldier San Aung. . . . After this case had happened to me, I felt shy and I didn’t want to stay among the community and I was afraid of that person because he had his gun but I had nothing and I worried about him coming back and giving me trouble.”⁸⁹
36. Often these acts of sexual violence perpetrated by the Southern Command would go unpunished. As noted above, one former soldier admitted that soldiers would not be prosecuted for rapes committed in black areas unless they were reported in the media.⁹⁰ The Women’s League of Burma has noted a “climate of impunity for military rape.”⁹¹ Furthermore, the U.N. Secretary General has observed that “there continue[s] to be a high level of impunity for conflict-related sexual violence perpetrated by State actors and a lack of transparency in military courts.”⁹²
37. The Southern Command’s actions during the Military Offensive have gathered condemnation from U.N. officials, foreign governments, and non-governmental organizations.⁹³ In July 2007, the International Committee of the Red Cross condemned violations of international humanitarian law committed by the Government and military of Myanmar. It noted the multitude of atrocities committed by the military, including the military’s relocation of civilians, destruction of civilians’ food supplies, and physical attacks against civilians.⁹⁴

3. ***The Southern Command’s Actions Were Deliberate, Organized and Affected a Large Population***

38. The Southern Command’s actions during the Military Offensive were deliberate, organized and affected a large population. The military has a longstanding policy and practice of committing human rights abuses, including civilian clearing and sexual violence, as means of warfare.⁹⁵
39. The Southern Command’s strategy during the Military Offensive dates back to the development of the Four Cuts doctrine during the 1960s.⁹⁶ The doctrine aimed to restrict non-state armed groups from accessing material support from civilians, including food, money, and intelligence.⁹⁷ Under this doctrine, civilians were forced to relocate from areas where they could provide support to non-state armed groups.⁹⁸
40. The Four Cuts doctrine also involved the systematic use of rape and sexual violence against women as a weapon in armed conflict.⁹⁹ Sexual torture has occurred throughout Myanmar’s

ongoing conflict and is a modus operandi of the military.¹⁰⁰ Human rights groups like the Women's League of Burma and Asia Watch have documented cases of rape and torture of women in Arakan (now Rakhine), Shan, Karenni (now Kayah), Karen (now Kayin), and Mon states.¹⁰¹

41. The Southern Command was acting intentionally in an attempt to target civilians during the Military Offensive. The Southern Command attacked purely civilian areas.¹⁰² The Southern Command attacked forty-three villages in Thandaung Township in 2005 and 2006, all without any apparent military justification.¹⁰³ The Southern Command would even avoid confrontation with the KNLA in its attacks on civilians.¹⁰⁴ The Free Burma Rangers observed, "The Burma Army seems more focused on driving out the villagers of these areas than engaging the resistance directly."¹⁰⁵
42. The Southern Command would specifically target the Karen civilian population. Soldiers referred to Karen people using the derogatory term "nger pway"—a worm or small animal.¹⁰⁶ A civilian recalled a soldier saying, "I don't like you, you are Karen people, so I will force [you] to work until you die."¹⁰⁷ As a result, many victims saw racist motives from the Southern Command's actions and some military personnel suggested that there was an "ethnic dynamic" to the conflict.¹⁰⁸
43. The deliberate marking of civilian targets has been noted by experts. In May 2006, the Special Rapporteur on the situation of human rights in Myanmar, along with four other thematic special rapporteurs, urged the Government of Myanmar "to take urgent measures to end the counter-insurgency military operations targeting civilians."¹⁰⁹
44. The Southern Command's attacks against civilians were highly organized. The Southern Command used systematic approaches to clear civilian areas.¹¹⁰ The Southern Command had an extensive reporting system that required units to share information on operations, intelligence, and plans.¹¹¹ Based on this information, units within the Southern Command coordinated to gain control of transportation routes and strategic areas.¹¹²
45. The Southern Command's system of forced labor was structured. The Southern Command mandated that village leaders provide laborers and that households provide labor on a periodic basis.¹¹³ Soldiers also informally forced some civilians that they encountered to work.¹¹⁴
46. Additionally, the crimes perpetrated by the Southern Command were pervasive. The Southern Command's brutal campaign of abuses lasted more than two years, from 2005 to 2008.¹¹⁵ The acts were committed throughout eastern Myanmar.¹¹⁶
47. The Southern Command's actions affected a large portion of the population. More than 370 civilians died and potentially hundreds of prisoners were forced to work for the Southern Command.¹¹⁷ The Southern Command's clearing campaign also led to the displacement of as many as 42,000 civilians.¹¹⁸ In February 2006, the U.N. Special Rapporteur on the situation of human rights in Myanmar noted the large number of civilians forced to flee their homes due to

the military's counter-insurgency program and condemned military actions during the Military Offensive.¹¹⁹

48. Forced labor also affected many civilians. The Harvard Clinic received reports of forced labor from 32 civilians in Thandaung Township from 2005 to 2006.¹²⁰ The Southern Command's use of prisoner porters to carry military supplies was a particularly frequent occurrence.¹²¹ Large groups of civilian porters were forced to work at a single time.¹²² The Southern Command would force large groups of prisoners and civilians from Baw Ga Li and Kaw Thay Der to serve as porters and transport military supplies.¹²³ The Harvard Clinic received reports of 200 civilian porters used at a time.¹²⁴ The Free Burma Rangers reported that 2,000 civilian porters were once used and 850 another time.¹²⁵
49. In September 2006, the U.N. Special Rapporteur on the situation of human rights in Myanmar stated that "serious human rights violations have been widespread and systematic, suggesting that they are not simply isolated acts of individual misconduct by middle- or low-ranking officers, but rather the result of a system under which individuals and groups have been allowed to break the law and violate human rights without being called to account."¹²⁶
50. Soldiers from the Southern Command and LID 66 were responsible for the aforementioned acts of forcible transfer, murder, torture, rape, and forced labor that affected so many civilians in Myanmar during the Military Offensive. Twenty-five lower-level officers serving for Southern Command have been identified as committing these offenses.¹²⁷ There is also strong evidence that LID 66 soldiers were responsible for these offenses but specific individuals have not been identified.¹²⁸

4. **Ko Ko was the Commander Responsible for the Southern Command**

51. During the Military Offensive, Ko Ko was a commander of the Southern Command from 2003 to 2008.¹²⁹ In this role, he was present in eastern Myanmar during the Military Offensive, and he was responsible for operations in northern Kayin State and eastern Bago Division.¹³⁰ He oversaw the operations of the Southern Command garrison battalions, including IB 26, IB 30, IB 39, IB 48, IB 53, IB 57, IB 60, IB 73, IB 75, IB 92, IB 124, IB 264, IB 349, LIB 350, LIB 351, LIB 439, LIB 440, LIB 589, LIB 598, LIB 599.¹³¹ He also oversaw and received reporting from combat divisions, including LID 66, Operation Control Command ("OCC") 10, OCC 15, and OCC 16.¹³²
52. The military had a robust communications and reporting system that enabled Ko Ko to stay informed about subordinates' actions.¹³³ Units were expected to provide commanders with regular and detailed reports on operations, intelligence, and plans.¹³⁴
53. Additionally, as a commander, Ko Ko had significant control over the actions of soldiers under his command. The Southern Command structure was rigid and highly structured.¹³⁵ Southern Command units were highly coordinated with regard to tactical maneuvers like civilian-clearing operations.¹³⁶ Commanders had the ability to order, reassign, and promote subordinates.¹³⁷

Soldiers gave testimony indicating that they were under the tight control of their commanders to obey and execute orders.¹³⁸ Ko Ko's orders during the Military Offensive have been captured in a wire intercept.¹³⁹

54. There is no evidence that Ko Ko attempted to prevent, report, or penalize his subordinates for their actions during the Military Offensive.¹⁴⁰ Instead, he promoted subordinates after the Military Offensive based on their actions during the Military Offensive.¹⁴¹

C. Use of White Phosphorous at the Letpadaung Copper Mine

55. Land rights have been a contentious issue in Myanmar for many years and several of the ethnic armed conflicts within the country are tied somehow to control over natural resources.¹⁴² Rising to nationwide prominence in 2011, an increase in protests related to land rights was accompanied by a clampdown on protesters and activist speech.¹⁴³
56. The Letpadaung copper mine project, a joint venture between Myanmar Wanbao Mining Copper Limited, a subsidiary of a Chinese company, and Union of Myanmar Economic Holdings Limited (UMEHL, the largest military-owned holding company in Myanmar), involved acquisition of 6785 acres of land from 30 villages, including the complete relocation of four villages, Zeedaw, Saedee, Kandaw and Wet Hme.¹⁴⁴
57. In December 2010, the Sarlingyi township authorities ordered the residents of the four named villages to relocate; some agreed but many did not.¹⁴⁵ The evictions took place in the absence of due process, and residents had no avenues of recourse to challenge the forced relocations.¹⁴⁶ Farmers also lost access to their lands when Myanmar Wanbao fenced off portions of farmland in 2011-2012.¹⁴⁷ Today, over half of the project area has been cordoned off by Myanmar Wanbao, which, at the end of 2014 announced its intention to obtain the remaining half, renewing fears that remaining residents would be evicted or forcibly relocated.
58. Since around the beginning of the Letpadaung copper mine project, villagers have approached the Myanmar Wanbao company and the government authorities with their complaints.¹⁴⁸ At the time of the Letpadaung protest on November 29, it was a high profile issue in the country, prompting thousands of people to join demonstrations in Yangon and Mandalay and eliciting reactions from major political figures.¹⁴⁹
59. Notably, the Letpadaung copper mine is not the first time company construction has prompted demonstrations: during the construction of the Maysitone Dam, protests and criticism emerged, even in the domestic media. In the case of the Maysitone Dam, public outrage eventually led to suspension of the project.¹⁵⁰ The aforementioned sets the historical context for the Letpadaung protests.

1. The Letpadaung Protests

60. In May 2012, approximately 100 villagers traveled to the Myanmar Wanbao company compound to complain about the placement of construction materials on their farmlands. A staff member of Myanmar Wanbao told the villagers the company was willing to negotiate with them.¹⁵¹
61. On June 3, 2012, UMEHL, the Sarlingyi township authorities, the District Governor, police, and two monks representing the villagers signed an agreement to temporarily stop constructing the mine and dumping waste materials. This agreement also stated that remaining households, which had not been evicted, from Wet Hme, Saetee and Zee Daw villages would not have to relocate.¹⁵² According to villagers, Myanmar Wanbao continued to construct the mine and dump materials in violation of the agreement.¹⁵³
62. On July 15, 2012, Myanmar Wanbao placed signs around the company compound, along the access road, and in the mining area that declared those areas were restricted under Section 144 of the Code of Criminal Procedure. Even villagers whose farms were in the restricted areas could not access their lands.¹⁵⁴
63. By November 2012, the villagers had applied 11 times to the Sarlingyi police for permission to organize peaceful assemblies, but the police refused them each time.¹⁵⁵
64. Between November 17-21, 2012, villagers set up six protest camps: the main camp was outside Myanmar Wanbao's compound and five other camps were located at different points within the mining area and along mine access roads. Monks and more than 1000 people in the area joined the protests. The protesters maintained a peaceful 24-hour presence at the six camps.¹⁵⁶
65. On November 20, 2012, more than 1000 people held a peaceful protest outside the Myanmar Wanbao compound.¹⁵⁷
66. On November 23, 2012, the lower house of Parliament (Pyithu Hluttaw) unanimously adopted a motion calling for "an independent, national-level commission" to investigate the Letpadaung expansion, and the existing mine at Sabetaung and Kyisintaung.¹⁵⁸
67. Also on November 23, a government delegation was sent to Letpadaung, led by U Aung Min, Union Railways Minister; U Hla Maung Shwe, special adviser to the President; and U Than Htike, Sagaing Region Minister of Mines. During a meeting with protesters, Minister Aung Min guaranteed that the government would not to take violent action against peaceful protesters.¹⁵⁹
68. During this time Daw Aung San Suu Kyi, a Member of the Parliament's Rule of Law Committee, announced that she was planning to visit the Letpadaung mine area on 29 November 2012 to meet the protesters and investigate the impacts of the mine on the village and villagers.¹⁶⁰
69. On November 28, 2012, Ko Ko issued an order, in his capacity as the Minister of Home Affairs, stating that if the protesters did not disperse by midnight, the Myanmar Police would take action against them and use all available means within the law.¹⁶¹ The national media published the

written order from the Ministry of Home Affairs.¹⁶² Additionally, the Monywa District Police Colonel made announcements about this order on Myanmar Television.¹⁶³

2. *The Myanmar Police Use of White Phosphorous Munitions Against Protesters*

70. At each of the six camps on November 29, 2012, from 2:30 to 3:15 in the morning, Myanmar Police in riot gear used loud speakers to order people to leave the protest camps, citing the order from the Minister of Home Affairs.¹⁶⁴ The protesters remained and Myanmar Police or fire brigade staff sprayed the protestors with water from high-pressure fire hoses for 10–15 minutes, thoroughly soaking the protesters and the areas and also preventing protesters from standing up. In each camp, 50–100 heavily armed police approached the unarmed protesters (who numbered between 80 and 200, depending on the camp).¹⁶⁵ Afterwards, Myanmar Police started launching “fire bombs” at the protestors in the different camps.¹⁶⁶ The Final Report of the Letpadaung Taung Investigation Commission chaired by Aung San Suu Kyi, found that 55 canisters were fired during the attack.¹⁶⁷
71. Independent investigations later identified the “fire bombs” as white phosphorus munitions.¹⁶⁸ White phosphorus is a toxic chemical that can be dispersed in a variety of munitions. It ignites on contact with the air and continues to burn until the phosphorus is consumed or until there is a deprivation of oxygen. The explosion of white phosphorus munitions results in the indiscriminate scattering of fragments, while the burning creates a thick white smoke and can be used as a smoke screen,¹⁶⁹ and the heating and burning caused by white phosphorus increases on contact with wet clothes and skin.¹⁷⁰
72. The Myanmar Police shot or threw the white phosphorus bombs directly at the soaked protestors, although some went over their heads and hit nearby palm trees.¹⁷¹ One protestor said that the Myanmar Police launched the white phosphorus munitions at people, even the elderly, when they were leaving the camps.¹⁷² The Myanmar Police launched several munitions in each camp; witnesses in the main camp counted ten rounds of “fire bombs.”¹⁷³
73. Video footage from The Irrawaddy news channel shows liquid being sprayed at high pressure, bright explosions, smoke, and fire, corroborating witness testimony.¹⁷⁴ A video released by Democratic Voice of Burma (DVB) shows burning camps.¹⁷⁵ Furthermore, various photos taken by journalists on the morning of the attack show smoke and fire from burning roof shelters and flags as well as victims burned by the munitions.¹⁷⁶
74. On the night of the police attack there were approximately 500 monks and 50 villagers, activists, and other people at the six protest camps, and between 110 and 150 people were injured as a result of the attack.¹⁷⁷ More than 100 monks were hospitalized and 57 suffered deep burns requiring long-term medical care.¹⁷⁸ The many who were burned severely had skin and flesh fall off their bodies. The injured reported suffering intense pain.¹⁷⁹

75. The leader of the camp in the mining area, Phyu Phyu Win, described the effects of white phosphorus that she witnessed and experienced while fleeing the camp:

A young monk was hit very badly right next to me. The burning material covered his body. I saw his skin drop off his body like pieces of clothing. He fell to the ground and cried: 'sister, don't leave me here!' Other monks took turns carrying him. I was also hit by small fireballs on my arms and side. They continued to burn in my body for several minutes.¹⁸⁰

76. U Teikkha Nyana, An elderly monk at the main camp described being hit with a white phosphorus munition:

Near the gate [of the Wanbao compound], there were five demonstrators standing there. They opened the gate and arrested them. I was about 15 feet away from the entrance. In front of me, some of the young monks were standing. Suddenly the fire ball fell down. It landed close to me, it was like a round tube and fire came out like a fire cracker. I was sitting cross-legged, the fire bomb hit me on the back on the right hand side. I had a blanket and a bag and even though the whole body was wet, the fire started. I tried to put out the fire and rolled on the ground. I saw fire all around. I tried to stand up and put out the fire. Another fire bomb fell between my legs. I was on fire on my back and one arm, also my legs. It was very painful. There was a burning smell from the body like a barbecue. My robe was burnt. I had pebbles and stones on my body.¹⁸¹

77. U Teikkha Nyana was taken initially to Mandalay Hospital, but because Mandalay did not have a specialist burn ward, he was transferred to Yangon General Hospital. Daw Aung San Su Kyi later arranged for him to be treated in Bangkok, based on his doctor's recommendation. He stayed in a Bangkok hospital for more than three months. He described his treatment during this time:

I had multiple surgeries and skin grafts nearly every three weeks. They used my own skin for grafts. They changed my dressings every day, it took about 45 minutes and it was incredibly painful. About seven to eight medical staff had to change the dressings. It was the worst time, the skin graft was easier because of the morphine. I still find it difficult to sit on the floor, I find it difficult to walk for long or far. My skin feels very tight. My left heel is painful. My nerve endings are not working properly, my toes and skin are numb on the left hand side. I don't know if a thorn pricks me right away. I can't move my right hand or leg properly, the skin feels tight.¹⁸²

78. A young monk who was burned in the same November 29, 2012 attack was in the same Bangkok hospital as U Teikkha Nyana. U Teikkha Nyana recalled how the young monk screamed in pain when the medics changed his wound dressing.¹⁸³

79. At no time have the Myanmar Police nor the local authorities provided assistance, medical treatment, or other remedies to the injured protestors.¹⁸⁴
80. Despite the emergence of international human right reports finding the use of white phosphorous¹⁸⁵ and the former Special Rapporteur on the situation of human rights in Myanmar's finding that incendiary devices were used in clearing this protest,¹⁸⁶ the authorities continue to deny its use, maintaining that the Myanmar Police had used water cannons, tear gas, and smoke bombs in accordance with international standards on riot control. However, ALS, a respected international laboratory in Bangkok, analyzed the residue of one of the expended smoke bomb canisters. The chemical analysis determined conclusively that it was white phosphorous munitions.¹⁸⁷ The victims' injuries were also consistent with white phosphorus burns, according to a forensic medicine expert.¹⁸⁸
81. The Letpadaung Taung Investigation Commission was established by President Thein Sein on December 1, 2012. The original mandate of the Commission included investigating "causes of protests that demanded the shutdown of the copper mine project" and "review on control of protests and injuries of members of the Sangha." These clauses were removed and the Commission was reconstituted with fewer members.¹⁸⁹ The Commission did not conduct an independent investigation into the use of white phosphorus.
82. The Commission's report referred to the white phosphorous munitions as "mee khoe bohn", which translates as "smoke bombs."¹⁹⁰ It quoted the police chief of Sagaing Division as saying that the same canisters were used in 2007 and did not have any incendiary effect. The Commission was given considerable supporting evidence, including samples of the expended canisters and chemical analysis of one of them from an independent laboratory, but did not offer any findings regarding the use of white phosphorus.¹⁹¹
83. The Commission performed an investigatory function and did not issue sanctions against perpetrators or make recommendations on effective remedies for victims.¹⁹² Its findings seemed to take the word of the government and Myanmar Police at face value instead of delving deeper into the issues at hand.¹⁹³
84. No official involved in the attack has been investigated, prosecuted, or otherwise sanctioned for their role in the white phosphorus attack.¹⁹⁴

3. The Myanmar Police Use of White Phosphorous was Systematic

85. The Myanmar Police used the same tactics, including the use of water cannons and white phosphorus munitions, in six different locations. Hundreds of police with full riot gear were involved in this operation. Additionally, in each camp, the Myanmar Police cited to the same order from the Ministry of Home Affairs. The Myanmar Police units were thus highly organized and deliberate in their use of white phosphorus.

4. Ko Ko's Played a Central Role in the Myanmar Police's Use of White Phosphorous Against Civilians

86. On November 28, 2012, Ko Ko, in his capacity as Minister of Home Affairs, issued an order stating that if the protesters did not disperse by midnight, the Myanmar Police would take action against them. In his capacity as a high-ranking superior in the chain of command, Ko Ko oversees all police units in the Myanmar Police, which falls under the Ministry of Home Affairs.¹⁹⁵ Furthermore, the consistent and systematic nature of the Myanmar Police's actions and tactics in this instance, including the use of white phosphorus munitions in each camp,¹⁹⁶ indicates that orders came from higher levels.
87. As an additional note fact that the Letpadaung protest was the highest profile issue in the country, prompting many thousands of people to join support demonstrations in Yangon and Mandalay, and eliciting reactions from major political figures, means that it was an issue of national security that would have required Ko Ko's involvement as the Minister of Home Affairs.

D. Accountability for Ko Ko Within Myanmar is Impossible

88. Criminal accountability for Ko Ko's crimes is impossible in Myanmar because (1) international crimes are not codified in Myanmar's Criminal Code; (2) Myanmar's Constitution guarantees total impunity for military personnel, and; (3) insurmountable practical obstacles prevent civilian litigants from seeking accountability in civil courts.

1. **International Crimes are Not Codified in Myanmar's Criminal Code**

89. Myanmar's Criminal Code was codified in 1861, during British colonial rule, and was last amended in 1974. The Criminal Code does not include any provisions criminalizing conduct now recognized to constitute war crimes, crimes against humanity or torture.¹⁹⁷

2. **Myanmar's Constitution Guarantees Total Impunity for Military Personnel**

90. Myanmar's Constitution guarantees impunity for military personnel that perpetrate international crimes in four ways: (1) it sets the military apart from the civilian governance apparatus; (2) it contains specific provisions conferring impunity; (3) it grants the Commander-in-Chief unprecedented control over military justice; and (4) it protects courts-martial behind a veil of secrecy.
91. First, unlike any other country in the world, Myanmar's Constitution makes the military a legally autonomous entity outside of the sovereign state, placing it outside of any civilian oversight by the executive, legislative or judicial branches.¹⁹⁸ The President, designated as "Head of State," has no sovereign power over the military or military-controlled territories in Myanmar and cannot order the military to prosecute members of its ranks.
92. Second, impunity for military perpetrators of international crimes is enshrined in Myanmar's Constitution. Article 445 guarantees that no proceeding shall be instituted against any member of the Government of Myanmar "in respect to any act done in the execution of their respective

duties.”¹⁹⁹ As the former Special Rapporteur on the situation of human rights in Myanmar has indicated, this provision can be construed as a guarantee of immunity for military actors from investigation, prosecution, or punishment for crimes committed in carrying out their roles, including for sexual violence committed in conflict.²⁰⁰

93. Third, Myanmar’s Constitution establishes military autonomy over all its judicial processes and gives the Commander-in-Chief “final and conclusive” authority over all cases and complaints.²⁰¹ Under this system, serious human rights violations committed by the military fall under the jurisdiction of a totally military-controlled system with no civilian oversight and where the final disposition of every case depends on a decision by the Commander-in-Chief.²⁰²
94. Finally, even if a military prosecution were to proceed, a total lack of transparency surrounding the military court-martial system effectively creates a screen of impunity.²⁰³ More specifically, while the Government of Myanmar has repeatedly asserted that action has been taken against military perpetrators of international crimes of sexual violence in conflict, no information is provided as to what charges were pursued or what punishment was assessed.²⁰⁴ Furthermore, as the military code is not publicly available, it is unclear if (and highly unlikely that) the prosecutions comport with international standards. Moreover, it is unknown if any military commanders have been prosecuted for what has been described as their imprimatur on a pattern and practice of international crimes.²⁰⁵

3. **Insurmountable Practical Barriers Prevent Initiation of Criminal Proceedings**

95. Complainants in Myanmar who wish to initiate criminal proceedings against military or government personnel are routinely blocked, delayed, harassed, threatened and barred. Two examples are presented here.
96. For example, on March 7-8, 2015, a group of injured monks met with local and international lawyers from Justice Trust to initiate a criminal complaint against Ko Ko and others for their involvement in the crackdown at Letpadaung.²⁰⁶
97. After going to the Myanmar Police station to file a First Information Report (“FIR” is the first step in opening a criminal case in Myanmar), the lead plaintiff, Tikha Nyana was told by the chief of the police station that the officer could not register the FIR without authorization from superiors.
98. Several weeks later, the police chief delivered a letter addressed the plaintiff explaining that the Myanmar Police could not open the FIR without express written authorization from the office of President Thein Sein.²⁰⁷
99. Roughly a month later, Special Branch police visited the monasteries where several of the other plaintiffs are residents, met with the senior abbots, and threatened the other plaintiffs with expulsion from the monkhood. This intimidated the plaintiffs into abandoning the lawsuit. The

lead plaintiff, Tikha Nyana, continued with the lawsuit.

100. In July and August, the legal team prepared affidavits to send the case to Supreme Court, despite the police or lower court's failed to initiate proceedings. Not able to convince local notaries to certify the affidavits for fear of persecution, the lead plaintiff sought certification from a Mandalay court. The court clerk made them wait all day, then said they had to return on October 1 for an official response. The court clerk said their affidavits would be accepted only if they deleted "sensitive" information, including the names of the accused, actions of the Myanmar Police, use of white phosphorus weapons, and photographs of the injuries. In effect, the modified affidavits only included the plaintiffs' biographical data and the fact that they were injured at Letpadaung. The lead plaintiff had the affidavits certified anyway and the case is still pending.

101. In another incident, Khin Khin Kyaw, a human rights lawyer, filed criminal charges on August 25, 2015 against police divisions for using excessive force against peaceful protesters on March 10, 2015 and against Minister of Home Affairs Ko Ko and Deputy Police Chief Nandar Win for their superior responsibility. On September 8, the judge dismissed Khin Khin Kyaw's legal motion against Ko Ko and Nandar Win for lack of jurisdiction, claiming that Myanmar's judiciary cannot review police actions without written authorization from President Thein Sein. On September 15, the same judge charged Khin Khin Kyaw with disrupting the court, which carries penalties of six months in jail, loss of legal license, and a fine.²⁰⁸

III. LEGAL ARGUMENT

A. Switzerland has Universal Jurisdiction to Prosecute Ko Ko's Crimes

102. Switzerland has two bases for universal jurisdiction in this case: (1) universal jurisdiction based on Switzerland's commitments pursuant to international conventions; and (2) universal jurisdiction over serious international crimes.

1. *Switzerland Can Exercise Universal Jurisdiction Over Crimes it has Committed itself to Prosecute Under International Conventions*

103. Article 6, paragraph 1 of the Swiss Criminal Code of December 21, 1937 (RS 311.0) grants Switzerland universal jurisdiction to prosecute Ko Ko for the crimes alleged herein. Specifically, article 6 states:

Any person who commits a felony or misdemeanor abroad that Switzerland is obligated to prosecute under the terms of an international convention is subject to this Code provided: (a) The act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission, and (b) If the author is in Switzerland and is not extradited.

a. *Switzerland is Obligated to Prosecute War Crimes, Crimes Against Humanity and Torture Under the Geneva Conventions,*

***the Rome Statute of the International Criminal Court and the
Convention against Torture.***

104. The Swiss Federal Supreme Court has held that Switzerland is a monist state in which international law is automatically effective in the Swiss legal system.²⁰⁹ Further, when domestic and international obligations conflict, the Federal Supreme Court almost always refers to the primacy of international law.²¹⁰
105. Switzerland ratified the Geneva Convention relative to the protection of civilian persons in time of war (Geneva Convention IV) on March 31, 1950.²¹¹ Under article 146 of Geneva Convention IV, Switzerland is obligated to “enact . . . legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention”²¹²
106. Switzerland has enacted such legislation in its Criminal Code under several articles, including: 264*a* (crimes against humanity), 264*c* (serious violations of the Geneva Conventions), 264*d* (other war crimes), 264*e* (unjustified medical treatment, violations of sexual rights and human dignity), and 264*j* (other violations of international humanitarian law).
107. Article 146 of Geneva Convention IV also obligates Switzerland to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, *and shall bring such persons, regardless of their nationality, before its own courts.*”²¹³ By enacting laws enabling universal jurisdiction for international crimes (Criminal Code articles 6(1), 7(2), and 264*m*), Switzerland has taken the critical step of enabling itself to prosecute international crimes whether or not committed on its territory.
108. Switzerland ratified the Rome Statute of the International Criminal Court (“Rome Statute”) on October 12, 2001.²¹⁴ Preambular paragraphs 4 and 6 of the Rome Statute affirm that the most serious international crimes must not go unpunished and declare every State’s duty to exercise its criminal jurisdiction over those responsible for international crimes. Switzerland amended its Criminal Code to include crimes pursuant to the Rome Statute, including war crimes and crimes against humanity.²¹⁵
109. Switzerland adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”) on October 6, 1986 and it entered into force on June 26, 1987. The prohibition against torture is absolute and non-derogable, according to article 2(2) of the Convention. As a State party to the Convention against Torture, Switzerland has the obligation to prosecute acts of torture, even if they are committed outside Switzerland on a non-Swiss victim and by a non-Swiss perpetrator.²¹⁶ The crime does also not have to be perpetrated in the context of an armed conflict, a crime against humanity, or genocide.

**b. *Criminal Jurisdiction for Ko Ko’s Crimes Does Not Exist Under
Myanmar’s Domestic Laws***

110. As noted above in paragraphs 88 through 101, the antiquated penal code, the impunity enshrined in Myanmar's constitution, and the practical barriers facing civil litigants, all establish that criminal jurisdiction does not exist in Myanmar for Ko Ko's crimes.

c. *Ko Ko Will be in Switzerland and Will Not be Extradited*

111. It has been reported in the news media that Ko Ko will travel to Geneva as the head of Myanmar's UPR Committee on November 6, 2015 and as far as has can be discovered, there are currently no requests for the extradition of Ko Ko pending in any State for any reason.²¹⁷ Therefore, Ko Ko will be present on Swiss soil and could be subject to universal jurisdiction under article 6(1) of Switzerland's Criminal Code.

2. *Switzerland Can Exercise Universal Jurisdiction Over Particularly Serious Crimes Prohibited by the International Community*

112. Swiss Criminal Code articles 7(2) and 264m(1) grant Switzerland universal jurisdiction over serious crimes prohibited by the international community.²¹⁸ Article 7(2) applies the Swiss Criminal Code to persons who commit violations abroad against non-Swiss citizens if (1) the offense is not subject to criminal law jurisdiction; (2) the perpetrator is in Switzerland; (3) extradition is permissible, but the perpetrator is not being extradited; and (4) the offender has committed a particularly serious felony that is proscribed by the international community. Article 264m(1) states that a person who commits war crimes or crimes against humanity abroad "is guilty of an offense if he is in Switzerland and is not extradited to another State"²¹⁹

a. *Criminal Jurisdiction for Ko Ko's Crimes Does Not Exist Under Myanmar's Domestic Laws*

113. As noted above in paragraphs 88 through 101, the antiquated penal code, the impunity enshrined in Myanmar's constitution, and the practical barriers facing civil litigants, all establish that criminal jurisdiction does not exist in Myanmar for Ko Ko's crimes.

b. *Ko Ko Will be in Switzerland*

114. The analysis here is identical to that under paragraph 111.

c. *Ko Ko is Eligible for Extradition for the Crimes Committed, but is Not Being Extradited.*

115. Since Switzerland is a monist state,²²⁰ upon ratifying all four of the Geneva Conventions of 1949, the provisions of those Conventions were immediately incorporated into Swiss law.

116. Under those Conventions—specifically article 49 of Geneva Convention I, article 50 of Geneva Convention II, article 129 of Geneva Convention III, and article 146 of Geneva Convention IV—Switzerland has the obligation to either prosecute or extradite perpetrators of serious international crimes.

117. It has been reported in the news media that Ko Ko will travel to Geneva as the head of Myanmar's UPR Committee on November 6, 2015 and as far as has can be discovered, there are currently no requests for the extradition of Ko Ko pending in any State for any reason.²²¹ Therefore, Ko Ko will be present on Swiss soil and could be subject to universal jurisdiction under article 6(1) of Switzerland's Criminal Code.

d. *The Crimes Ko Ko has Committed are Serious and Prohibited by the International Community*

118. The multiple war crimes, crimes against humanity and torture committed by Ko Ko described herein are referred to in Geneva Convention IV article 146 as "grave," and in article 5 the Rome Statute as "the most serious crimes of concern." In other words, these crimes are considered to be the most serious crimes prohibited by the international community.

B. International Law Generally Does Not Recognize Immunity for International Crimes

119. While Swiss domestic law does not grant substantive or procedural immunity from criminal jurisdiction for crimes committed abroad, Switzerland is bound in this context by relevant provisions of public international law,²²² including under international conventions and customary law.

120. With respect to General Ko Ko's travel to Geneva in November 2015 as a part of Myanmar's delegation to the Universal Periodic Review, General Ko Ko has immunity under Article 4 of the Convention on the Privileges and Immunities of the United Nations (1946). However, this immunity is specifically limited to instances where General Ko Ko travels on behalf of the Government of Myanmar to the United Nations or conferences convened by the United Nations. Furthermore, depending on the factual circumstances of his travel, General Ko Ko could have immunity under the Convention on Special Missions.

121. Absent any immunity granted to General Ko Ko by convention, General Ko Ko lacks both immunity *ratione personae* (personal immunity) and *ratione materiae* (functional immunity) under customary international law.

1. The Swiss Federal Supreme Court and Public Policy Favor the Absence of Immunity for International Crime

122. As a preliminary matter, there are strong arguments to be made that customary immunity should be narrowly construed so that accountability for heinous international crimes cannot be avoided. The Swiss Federal Criminal Court, in its decision in the *Nezzar* case, found that the former Algerian Minister of Defence did not have immunity from prosecution, because:

[I]t would be contradictory and futile to on the one hand affirm the intention to combat against these grave violations of the most fundamental human values and, on the other, to accept a wide interpretation of the rules governing functional or organic

immunity (*ratione materiae*)...in such case, it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same legal order.²²³

123. Accordingly, any extension of customary immunity to Ko Ko should be strictly considered.

2. *Absence of Immunity Ratione Personae*

124. Immunity *ratione personae* is granted to certain high-ranking officials, including Heads of State, Heads of Government and Ministers of Foreign Affairs from prosecution during their time in office.²²⁴ It should be noted that a common factor of this list are state actors who represent the State in international relations as a part of their office or those who need to travel to represent their State internationally.²²⁵

125. While Ko Ko is currently a minister in the Government of Myanmar, his roles as the Minister of Home Affairs and Minister for Immigration and Population do not grant him personal immunity.

126. Both are roles that are focused on the conduct of affairs inside Myanmar's territorial borders. In his role as the Minister of Home Affairs, Ko Ko oversees the Myanmar Police, the General Administration Department, the Prisons Department and the Bureau of Special Investigation.²²⁶ Further, the stated objectives of the Ministry are the: (1) security of the State; (2) maintenance of law and order; (3) preservation of community peace and tranquility; and (4) to serve the interest of the people.²²⁷ These departments and objects are solely concerned with regulating internal state issues. Similarly, in his role as the Minister for Immigration and Population, Ko Ko is tasked with protecting the state borders and regulating the actions of people inside Myanmar.²²⁸

127. Accordingly, while Ko Ko may have immunity by convention while travelling outside the borders of Myanmar for official reasons, his roles as the Minister of Home Affairs and Minister of Immigration and Population do not grant him immunity *ratione personae*.

3. *Absence of Immunity Ratione Materiae*

128. Immunity *ratione materiae* is granted for the official acts of state actors and continues ever after the official has left office.²²⁹ The purpose of this immunity is to protect a "foreign official from the consequences of acts attributable to the State for which he is acting and thereby to ensure that State sovereignty is respected."²³⁰ However, this immunity is not extended to international crimes, as the perpetration of acts that are illegal under international law cannot be considered official acts of state.²³¹

129. The crimes alleged against Ko Ko herein; war crimes, crimes against humanity and torture, are all international crimes, which cannot qualify as official acts. Accordingly, Ko Ko does not have *immunity ratione materiae* for these crimes.

C. **Ko Ko is Responsible for War Crimes, Crimes against Humanity and Torture**

1. **The Southern Command Committed War Crimes During the Military Offensive in Eastern Myanmar**

130. The acts discussed herein satisfy both the contextual and specific elements of war crimes under the Swiss Criminal Code.

a. ***Acts Committed by the Southern Command During the Military Offensive Satisfy the Contextual Elements of War Crimes***

131. Under Swiss Criminal Code article 264*b*, certain crimes committed in the context of a non-international armed conflict constitute war crimes. Such acts require a nexus to armed conflict, which is a contextual element that distinguishes war crimes from general offenses and crimes against humanity.

132. The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) stated that a non-international armed conflict includes “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²³² The Rome Statute excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”²³³

133. The Military Offensive was a non-international armed conflict. In its 2006 Annual Report on Myanmar, the International Committee of the Red Cross (“ICRC”) concluded that Government of Myanmar forces and non-state armed groups in Shan and Karen states and eastern Bago division were in “armed conflict.”²³⁴ Furthermore, 2006 reports by the Special Rapporteur on the situation of human rights in Myanmar describe “conflict” in Karen state and other states.²³⁵

134. The Southern Command’s actions against civilians were fundamental to its fight against the KNLA. The primary objective of the Military Offensive was to impede civilians from providing material support to the KNLA, this objective was achieved by targeting civilians and driving them away from areas where the KNLA had a presence.

135. Therefore, the prohibited acts described in more detail below occurred in connection with an armed conflict.

b. ***Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Serious Violations of the Geneva Conventions During the Military Offensive in Eastern Myanmar***

136. Under article 264*c* of the Swiss Criminal Code, a person commits a “serious violation of the Geneva Conventions” if, in connection with an armed conflict, he/she, *inter alia*, carries out a prohibited act against persons or property protected by international humanitarian law. Under

customary international humanitarian law, civilians and civilian objects are protected. Such prohibited acts include intentionally committing homicide; torture or inhuman treatment; illegally destroying property; or subjecting persons to unlawful transfer or deportation.

i. Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Intentional Homicide

137. Swiss Criminal Code article 264*c*(2) states that the “intentional homicide” is a war crime when committed against civilians during a non-international armed conflict. Under Swiss Criminal Code article 12, a person acts intentionally when he “carries out the act in the knowledge of what he is doing and in accordance with his will.” Under the same law, “[a] person acts willfully as soon as he regards the realization of the act as being possible and accepts this.”

138. The Southern Command committed intentional homicide of civilians during the Military Offensive. The Southern Command conducted the extrajudicial killing of civilians in their custody; shot civilians on sight; and murdered forced laborers when they tried to flee. The Southern Command reportedly killed more than 370 civilians during the Military Offensive. The deaths of forced laborers may account for hundreds of additional deaths.

ii. Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Torture

139. Swiss Criminal Code article 264*c*(2) criminalizes torture as a war crime when committed against civilians during a non-international armed conflict. Context is provided for the elements of this crime by the elements of the corresponding crime under the Rome Statute.²³⁶ Under the Rome Statute’s Elements of Crimes to article 8(2)(a)(ii)-1, the war crime of torture requires, in part that: (1) the perpetrator inflicted severe physical or mental pain or suffering on one or more persons; and (2) the perpetrator inflicted the pain or suffering to punish, intimidate, coerce, or discriminate.

140. The Southern Command committed torture and other inhumane acts when it conducted simulated drowning and suffocations, hung civilians from trees, and cut, beat, burned, and raped civilians.

141. These acts of torture inflicted severe physical and mental pain and suffering upon the victims and the communities to which they belonged. Victims were left traumatized by their torture, sometimes unable to speak or eat because of the physical and mental trauma inflicted upon them. Torture demoralized and shattered the communities of the victims.

142. These acts of torture were committed to punish, intimidate, and coerce civilian populations. The Southern Command used torture to coerce civilians to share information about the KNLA.

They also used rape to inflict sexual torture on women as a means of punishment, intimidation, and control over women and their communities.

iii. Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Destruction and Appropriation of Property

143. Swiss Criminal Code article 264c(2) criminalizes the destruction and appropriation of property as a war crime when committed against civilians during a non-international armed conflict. Under that section, this crime is completed when the destruction or appropriation is not justified by military necessity and is carried out unlawfully and wantonly.
144. The Southern Command's attacks were not justified by military necessity. Instead, the Southern Command conducted its campaign primarily to displace the ethnic populations that could potentially support the KNLA, which has been determined to be an impermissible military objective.²³⁷
145. The Southern Command's attacks on civilian property during the Military Offensive were unlawful. Under customary international humanitarian law, parties to a conflict must at all times distinguish between civilian objects and military objects—attacks carried out against military objects are permissible, attacks carried out against civilian objects are unlawful.²³⁸
146. The Southern Command destroyed specifically civilian property in Thandaung Township between 2005 and 2008. The Southern Command destroyed homes, farms, livestock, food stocks and personal property after civilians fled their village.
147. The Southern Command also appropriated specifically civilian property—often food and livestock—between 2005 and 2008. The Southern Command would demand the personal property of civilians, and civilians often complied with these demands out of fear and would also take personal property from villages when villagers were absent or had fled.
148. The Southern Command's attacks on civilian property during the Military Offensive were carried out wantonly. Merriam-Webster's dictionary defines "wanton" as "showing no thought of care for the rights, feelings, or safety of others; not limited or controlled."²³⁹
149. The Southern Command's destruction and appropriation of civilian property was indiscriminate and savage. It burned homes and schools to the ground, shelled villages from afar, laid landmines near villagers' homes, and destroyed civilian's entire stores of food.

iv. Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Forcible Transfer of Civilians

150. Swiss Criminal Code article 264c(2) criminalizes unlawful deportation or transfer as a war crime when committed against civilians during a non-international armed conflict. Context is

provided for the elements of this crime by the elements of the corresponding crimes under the Rome Statute.²⁴⁰ Under the Rome Statute's Elements of Crimes to article 8(2)(a)(vii)-1, the war crime of unlawful deportation or transfer requires, in part, that the perpetrator deport or transfer one or more persons to another location.

151. The Southern Command ordered civilians to transfer from KNLA-controlled areas to other locations near Myanmar military camps. When civilians did not do this voluntarily, the Southern Command coerced and forcibly transferred civilians from at least fourteen villages within Thandaung Township between 2005 and 2006 by indiscriminately attacking civilians, bombing villages, and destroying civilians' homes, farms and other property.

c. *Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Violations of Sexual Rights*

152. Under article 264e of the Swiss Criminal Code, a person commits a “serious violation of sexual rights” if, in connection with an armed conflict, he/she “rapes a person of the female gender protected by international humanitarian law or . . . forces a person to tolerate a sexual act of comparable severity”

153. Context is provided for the elements of this crime by the elements of the corresponding crimes under the Rome Statute.²⁴¹ Elements of Crimes to article 8(2)(b)(xxii)-1 of the Rome Statute provides a comprehensive definition which is instructive:

(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

and

(2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

154. It should be noted that the Rome Statute's progressive definition is gender-neutral and permits the rape of a person of the male gender, in contrast with the Swiss Criminal Code.

155. Similarly the Elements of Crimes to article 8(2)(b)(xxii)-6 provides definition to the “forces a person to tolerate a sexual act of comparable severity” component of article 264e:

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by

threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

156. With respect to the comparable severity issue, it states that the conduct must be of a comparable gravity to that of a serious violation of article 3 common to the four Geneva Conventions.
157. The Southern Command has committed numerous violations of sexual rights, including rape of women and other sexual acts of comparable gravity. Soldiers have admitted that in black zones, rape was freely permitted with impunity. Soldiers abducted and raped women from villages and entered civilian houses and raped and subjected women to other acts of sexual violence.
158. These violations of women's sexual rights were committed by force or threat of force. Soldiers would use physical force in perpetrating these violations, including gripping women's necks, pushing women to the ground, forcing off clothing, and abducting women.²⁴² Soldiers would also threaten force: they would brandish weapons like guns and knives or use verbal threats like threats to destroy victims' homes.²⁴³

d. *Acts Committed by the Southern Command During the Military Offensive Constitute the War Crime of Violations of Human Dignity*

159. Under article 264e of the Swiss Criminal Code, a person commits a violation against human dignity if, in connection with an armed conflict, he/she "subjects a person protected by international humanitarian law to especially humiliating or degrading treatment." Context is provided for the elements of this crime by the elements of the corresponding crimes under the Rome Statute.²⁴⁴ Under the Rome Statute's Elements of Crimes to article 8(2)(b)(xxi), the standard to be met for the war crime of outrages upon personal dignity includes, in part, that "the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage to personal dignity." Further context is provided by the European Commission of Human Rights, which has defined "degrading treatment" as treatment that "grossly humiliates the victim before others or drives the detainee to act against his will or conscience."²⁴⁵
160. During the Military Offensive, the Southern Command subjected the civilian population to grossly humiliating and degrading treatment.
161. At the broadest level, the Southern Command used extreme and barbarous violence to force civilians from their homes and villages. The Southern Command also systemically raped and sexually assaulted women and girls in order to erode ethnic communities. Many of these victims

were grievously injured or even killed during these attacks; others continue to face debilitating mental suffering.

162. Additionally, the Southern Command hung civilians from trees, cut, beat and burned them, performed simulated drownings and suffocations, and tortured them in other ways.

163. Finally, Southern Command subjected villagers to debilitating fear by indiscriminately placing landmines in around their homes and livelihoods. Villagers would abandon their homes and personal property in fear of the Southern Command's savage tactics.

e. *Acts Committed by the Southern Command During the Military Offensive Other War Crimes*

164. Under article 264*d* of the Swiss Criminal Code, a person commits other war crimes if he/she directs attacks (1) “against the civilian population . . . or against individual civilians not taking direct part in the hostilities” or (2) “against civilian objects, undefended settlements or buildings or demilitarized zones that are not military objectives”

165. With regard to attacks against civilians, context is provided by the International Committee of the Red Cross on the “direct participation in hostilities” language found in the Rome Statute.²⁴⁶ For a civilian to take direct part in hostilities:

(1) [t]he 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).

166. The Southern Command conducted attacks against civilians during its civilian clearing operations. They fired at villagers in their homes and at villagers attempting to flee during the enforcement of relocation orders. It also laid landmines in civilian villages to prevent relocated civilians from returning. These civilian targets were not taking direct part in hostilities. Attacks against civilians were often separate from attacks on the KNLA, and civilian attacks rarely followed KNLA assaults. The Southern Command often targeted purely civilian areas and avoided KNLA units during these attacks.

167. The Southern Command conducted attacks on civilian objects. The Southern Command shelled civilian villages and farms during its civilian clearing operations. The Southern Command did this to force civilians to relocate and to prevent civilians from returning home after they had relocated. These civilian-object targets are not permissible military objectives. The Southern

Command operated with a desire to uproot the KNLA’s civilian support base, which the International Criminal Court (“ICC”) has stated is an impermissible military objective.²⁴⁷

2. ***The Southern Command Committed Crimes against Humanity During the Military Offensive in Eastern Myanmar***

a. ***Acts Committed by the Southern Command During the Military Offensive Satisfy the Contextual Elements of Crimes Against Humanity***

168. The Swiss Criminal Code, in article 264a, sets forth three contextual (or “chapeau”) factors which must be met to satisfy occurrence of a crime against humanity: (1) that there was an “attack”; (2) that the “attack” was either widespread or systematic; and (3) that the “attack” was directed against a civilian population. The contextual elements of a widespread or systematic attack directed against a civilian population apply to the individual crimes alleged in paragraphs 182 through 203 below.

i. **The Military Offensive in Eastern Myanmar Constitutes and was Part of an “Attack”**

169. For an act to constitute a crime against humanity under the Swiss Criminal Code, it must be part of an “attack.” The Rome Statute defines “attack” as “a course of conduct involving the multiple commission of [prohibited acts]” “pursuant to or in furtherance of a State or organizational policy to commit such attack.”²⁴⁸ The Rome Statute’s Elements of Crimes to article 7 further defines “policy to commit such attack” to require “that the State or organization actively promote or encourage such an attack against a civilian population.”

170. Additionally, “as part of” necessitates a connection between the alleged crime and the “widespread or systematic attack.” This requires the alleged crimes were *related* to the attack on a civilian population, which reflects customary international law and the Rome Statute.²⁴⁹ The relationship between the alleged crime and the “widespread or systematic attack” is clearly established if the crime was instigated or directed by policy.²⁵⁰

171. The Southern Command during the Military Offensive committed numerous prohibited acts, including intentional homicide, enslavement, torture, deportation and forcible transfer, persecution, and other inhumane acts. Reports indicate a high incidence of these prohibited acts throughout eastern Myanmar throughout the period of armed conflict during the Military Offensive.²⁵¹

172. The prohibited acts were related to the attack on civilian populations and the attack was conducted in furtherance of a State policy to commit such attack. The Southern Command conducted a coordinated offensive to clear civilians from KNLA-controlled areas by forcibly transferring civilians. The civilian clearing operations were planned by high-level military officials and implemented by officers through the command structure. The operations were part of a

military strategy that dates back to the Four Cuts doctrine, designed to impede non-state armed groups from getting material support from civilians, including food, money, recruits and intelligence. The Southern Command also attempted to inhibit civilians from supporting the KNLA by murdering, torturing, and enslaving civilians.

ii. The Attack was Both “Widespread” and “Systematic”

173. The perpetrator’s attacks as a whole must be “widespread” or “systematic” to constitute a crime against humanity. That is, the individual prohibited acts do not need to be widespread or systematic, so long as the attack as a whole is widespread or systematic.²⁵²
174. The attacks orchestrated by the Southern Command against civilians was both “widespread” and “systematic.”
175. “Widespread” refers to the large-scale nature of the attack and the number of victims affected by the attack, but there is no particular number of victims that makes an attack widespread.²⁵³
176. The attack was “widespread” as evidenced by the large-scale nature of the attack and by the frequency, geographical breadth, and multi-year timespan during which the actions against a large number of civilians took place. More than 42,000 civilians were displaced by the Military Offensive from 2006-2008. Additionally, more than 370 civilians were reportedly killed by the Southern Command during the Military Offensive. This number does not include the deaths of forced laborers, which might number in the hundreds. Large groups of civilian porters were forced to work at a single time. Some 2,000 civilian porters were used once and 850 were used another time. Rape and sexual violence was also widespread. This was particularly true in the so called “black areas” where one soldier recounted that the edit to “do whatever” in black areas included the rape of women and another who “asserted that soldiers would not be punished for rapes committed in black areas, unless such rapes were reported in the media.” In sum, the victims of the Southern Command’s prohibited acts number in the thousands.
177. “Systematic” refers to the organized and repeated nature of the attack.²⁵⁴ The International Criminal Tribunal for Rwanda defined “systematic” as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources”²⁵⁵ or “carried out pursuant to a preconceived policy or plan.”²⁵⁶ A systematic attack involves “a pattern or methodical plan”²⁵⁷ that is “thoroughly organized and following a regular pattern.”²⁵⁸
178. The attack was “systematic” because the Southern Command’s actions were organized and frequently repeated. The Southern Command followed extremely consistent patterns and civilians faced similar abuses throughout eastern Myanmar. The attack on civilians was an organized attempt to limit civilian support of the KNLA. The Southern Command’s force labor system was organized. The Southern Command required village leaders to provide laborers. It also required households to provide labor on a periodic basis. The rape and sexual torture of

women was also systematic and structural in nature. Systematic rape and sexual violence has been used by Myanmar's military as a strategy to subjugate and terrorize Myanmar's ethnic populations. The Southern Command's actions during the Military Offensive followed this pattern and also featured acts of rape and sexual violence against the Karen population.

iii. The Attack was Directed at a Civilian Population

179. The attack must be directed at a civilian population to constitute a crime against humanity. Civilian population is defined as “people who are not taking any active part in hostilities, including members of the armed forces who laid down their arms and those person places *hors de combat* by sickness, wounds, detention or any other cause.”²⁵⁹ This has more broadly been interpreted to include “all persons except those who have the duty to maintain public order and have the legitimate means to exercise force.”²⁶⁰ Furthermore, the civilian population need only be predominantly civilian in nature; the presence of “certain non-civilians in their midst does not change the character of the population.”²⁶¹
180. The attack committed by the Southern Command was directed at civilian populations. A main strategy of the Military Offensive was to drive civilians away from KNLA-controlled area so that they could not provide material support to the KNLA. The Southern Command conducted clearing operations for this purpose. It targeted civilians and their property by shooting civilians on sight, attacking civilian areas, and burning villages.
181. Civilian populations targeted in these civilian clearing operations were not taking any active part in hostilities. The Southern Command would even avoid the KNLA in its pursuit of civilian targets. Southern Command attacks against civilians were often separate from attacks on the KNLA, and civilian attacks rarely followed KNLA assaults.

b. Acts Committed by the Southern Command During the Military Offensive in Eastern Myanmar Constitute the Crime Against Humanity of Intentional Homicide

182. The Swiss Criminal Code article 264a(1)(a) defines the crime against humanity of intentional homicide to be the “intentionally kill[ing] another person” when committed as a widespread or systematic attack directed at civilians.²⁶² Under Swiss Criminal Code article 12, a person acts intentionally when he “carries out the act in the knowledge of what he is doing and in accordance with his will.” Under the same law, “[a] person acts willfully as soon as he regards the realization of the act as being possible and accepts this.”
183. The Southern Command intentionally killed civilians. Its soldiers routinely targeted civilians with mortar and gun fire, as well as with landmines and extremely violence sexual violence. It killed forced laborers/porters and left them where they lay. In certain circumstances, the Southern Command operated under a strict “shoot-on-sight” policy against civilians. It also explicitly threatened village leaders and villagers with death if they did not do as the Southern

Command directed. Throughout the course of the Military Offensive, more than 370 of civilians were confirmed killed, with hundreds more suspected deaths.

c. *Acts Committed by the Southern Command During the Military Offensive in Eastern Myanmar Constitute the Crime Against Humanity of Enslavement*

184. A person is liable for enslavement as a crime against humanity under Swiss Criminal Code article 264a(1)(c) when that person “assumes and exercises a right of ownership over a person, in particular in the form of trafficking in persons, sexual exploitation or forced labour” as part of a widespread or systematic attack against civilians. The Rome Statute’s Elements of Crimes to article 7(1)(c) provide that covered acts include “purchasing, selling, lending or bartering such a person or person, or by imposing on them a similar deprivation of liberty.”

185. The Southern Command “assume[d] and exercise[d] a right of ownership” over civilians in the form of forced labor. The Southern Command forced civilians to porter and carry supplies, construct and maintain camps, maintain roads, deliver messages, serve watch, and perform various other tasks. Forced laborers were often mistreated and forced to work continuously for long periods of time. They were required to put themselves in danger to protect soldiers against attacks and landmines, and they were sometimes executed by soldiers.

d. *Acts Committed by the Southern Command During the Military Offensive in Eastern Myanmar Constitute the Crime Against Humanity of Torture*

186. Swiss Criminal Code article 264a(1)(f) states that a person commits the crime against humanity of torture when that person “inflicts severe pain or suffering or serious injury, whether physical or mental, on a person in his or her custody or under his or her control” as a widespread or systematic attack directed at civilians.

187. The Southern Command tortured civilians by hanging them from trees, raping them, cutting, beating, and burning them, and conducting simulated drownings and suffocation.

188. These acts of torture inflicted severe physical and mental pain and suffering. Victims were left traumatized by their torture, sometimes unable to speak or eat because of the physical and mental trauma inflicted upon them. Torture demoralized and shattered the communities of the victims.

189. The requirements of “custody” or “control” in article 7(2)(e) of the Rome Statute was included “in order to establish some link of power or control between the perpetrator and the victim.”²⁶³

190. The link between the power of the Southern Command the relative weakness of the civilians facing their attacks is evident from the barbarity of the Southern Command’s attacks, their forcible transfer of large civilian populations, the use of sexual violence to punish and exert

control over women, and enslavement of the civilian population. For one example, the Southern Command would frequently beat civilians forcibly working for the military.

e. *Acts Committed by the Southern Command During the Military Offensive in Eastern Myanmar Constitute the Crime Against Humanity of Violation of Sexual Rights*

191. Swiss Criminal Code article 264a(1)(g) makes the violation of sexual rights a crime against humanity when, as part of a widespread or systematic attack directed at civilians, the perpetrator “rapes a person of the female gender or . . . forces a person to tolerate a sexual act of comparable severity”

192. The Rome Statute’s Elements of Crimes comprehensively defines each of the violations of sexual rights under article 7(1)(g), including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual violence. With respect to rape, the Elements of Crimes to article 7(1)(g)-1 provides a comprehensive definition which is instructive:

(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

and

(2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

193. It should be noted that the Rome Statute’s progressive definition is gender-neutral and permits the rape of a person of the male gender, in contrast with the Swiss Criminal Code.

194. Similarly the Elements of Crimes to article 7(1)(g)-6 provides definition to the “forces a person to tolerate a sexual act of comparable severity” component of article 264a(1)(g):

195. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.

196. The Southern Command has committed numerous violations of sexual rights, including rape of women and other sexual acts of comparable gravity. Soldiers have admitted that in black

zones, rape was freely permitted with impunity. Soldiers abducted and raped women from villages and entered civilian houses and raped and subjected women to other acts of sexual violence.

197. These violations of women's sexual rights were committed by force or threat of force. Soldiers would use physical force in perpetrating these violations, including gripping women's necks, pushing women to the ground, forcing off clothing, and abducting women.²⁶⁴ Soldiers would also threaten force: they would brandish weapons like guns and knives or use verbal threats like threats to destroy victims' homes.²⁶⁵

f. *Acts Committed by the Southern Command During the Military Offensive in Eastern Myanmar Constitute the Crime Against Humanity of Forcible Transfer*

198. Swiss Criminal Code article 264a(1)(h) states that a person who "expels or by other coercive acts displaces persons from an area in which they are lawfully present" commits a crime against humanity when the acts are committed as a widespread or systematic attack against civilians. The Rome Statute's Elements of Crimes to article 7(1)(d) further provides that coercion can include "fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."

199. The Southern Command ordered civilians to transfer from KNLA-controlled areas to other locations near Myanmar military camps. When civilians did not do this voluntarily, the Southern Command coerced and forcibly transferred civilians from at least fourteen villages within Thandaung Township between 2005 and 2006 by indiscriminately attacking civilians, bombing villages, and destroying civilians' homes, farms and other property.

g. *Acts Committed by the Southern Command During the Military Offensive in Eastern Myanmar Constitute the Crime Against Humanity of Persecution*

200. Persecution is a crime against humanity under the Swiss Criminal Code article 264a(1)(i) when the perpetrator, in a widespread and systematic attack against civilians, "in violation of international law and for political, racist, ethnic, religious, social or other reasons, severely denies or deprives a group of people of fundamental rights in connection with an offence [designated as a war crime] or for the purpose of the systematic oppression or domination of an ethnic group." The Rome Statute's Elements of Crimes to article 7(1)(h) provides that in this context the targeting can be "based on political, racial, ethnic, cultural, religious, gender [sic] as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law."

201. The Southern Command deprived the ethnic Karen people of fundamental rights, including their fundamental rights to life, liberty, security of person, freedom of movement, and freedom from slavery and torture.

202. These actions were committed for political, racist, and ethnic reasons. The Southern Command aimed to maintain political control and subvert threats from the KNLA. Many victims saw racist motives in the Southern Command's actions and some military personnel suggested that there was an "ethnic dynamic" to the conflict.
203. Finally, civilians' rights were deprived in connection with the war crimes of intentional homicide, torture, destruction of property, and unlawful transfer (see paragraphs 130-167 above) as well as the systematic oppression of the Karen.

3. ***The Use of White Phosphorous at the Letpadaung Copper Mine Constitutes Torture***

204. Since Switzerland is a monist state,²⁶⁶ provisions of the Convention against Torture were immediately incorporated into Swiss law upon ratification.
205. Article 1(1) of the Convention against Torture defines "torture" as: (1) any act by which severe pain or suffering, whether physical or mental, (2) is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, (3) when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

a. ***The Use of White Phosphorous as a Weapon Causes Severe Pain or Suffering***

206. Physical torture can include "severe pain or suffering" that is physical, mental, or both.²⁶⁷
207. "Severe [physical] pain or suffering" is a lesser threshold than "extreme pain or suffering," which was understood by the drafters of the Conventions to mean "pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Thus, torture includes acts that cause less pain than the pain of serious physical injury. This understanding of severe physical pain or suffering is accepted under human rights law and customary international law.²⁶⁸
208. With respect to "severe [mental] pain or suffering," the Committee against Torture has stated that mental torture is not limited to "prolonged mental harm," but includes "a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration."²⁶⁹ As mentioned above, mental torture can also include the mental effects of physical torture. Some frequent examples of mental torture (involving "severe [mental] pain or suffering") include: re-experiencing the traumatic event, emotional numbing, hyper-arousal, depressive symptoms, and feeling detached from one's body.²⁷⁰
209. The injuries caused by the Myanmar Police's use of white phosphorous causes severe physical and mental pain and suffering.

210. As a general matter the heat produced by white phosphorus and the difficulty in putting out the fire and burns caused intense pain to those who came into contact with it, especially those who were hit directly by munitions, and white phosphorus injuries are often long-lasting. The surgery and grafting process takes months, and afterwards.
211. The injured, including U Teikkha Nyana, face long-lasting injuries resulting from the inability to put phosphorous fires out when it is used as a weapon and from lengthy and painful skin grafting surgeries. Three years after the white phosphorus attack, U Teikkha Nyana has difficulty walking and sitting, has lost sensation in his toes and skin, and lost mobility in a hand and leg. This experience is common for victims of white phosphorus, who often permanently lose strength, mobility, function, and sensation in affected body parts. Thus, victims experience the effects of “serious physical injury” that includes the “impairment of bodily function” and the “extreme pain or suffering” that accompanies it.
212. Additionally, many victims experience mental trauma and an inability to assume their former roles in society, due to mobility problems, among other things. One study noted “Isolation during treatment, and being forced to ‘confront ... the sight of one’s own naked and burned body ... and the stench of one’s own rotting flesh’ can be particularly horrifying.”²⁷¹ Due to the lengthy healing process for white phosphorus burns, victims would be forced to witness their physical deterioration in addition to experiencing the pain of treatment for a long time. During recovery, the victims are forced to confront their injuries and re-experience the pain of the white phosphorus attack. Facing the appearance and stench of the wounds, which U Teikkha Nyana likely detached himself from in his description of the smell, is also emotionally numbing. In addition to coping with his own injuries and medical treatment, U Teikkha Nyana had to hear the screams of another victim, exacerbating his experience of mental harm.

b. *The Myanmar Police Intentionally Used White Phosphorous to Punish and Intimidate Civilians*

213. The Committee against Torture has not defined “punish” or “intimidate.” The ordinary meaning of “intimidate” is “to make timid or fearful; *especially*: to compel or deter by or as if by threats”²⁷² and the ordinary meaning of “punish” is “to impose a penalty on for a fault, offense, or violation; to inflict a penalty for the commission of (an offense) in retribution or retaliation.”²⁷³
214. Myanmar Police deliberately targeted the protesters with the white phosphorus by throwing munitions directly at people or the camp. Furthermore, by first hosing the protesters with water, which is known to intensify the pain caused by white phosphorus, the Myanmar Police intended to increase the severe pain and suffering caused by exposure to the agent.²⁷⁴ The Myanmar Police continued to use these munitions even after seeing the impact and effect on the protesters. Myanmar Police also attacked people who were leaving the area. These facts indicate that the severe pain and suffering was intentionally inflicted by the Myanmar Police on the protesters.²⁷⁵

215. The background to the protests, coupled with the Myanmar Police tactics, suggests that white phosphorus was used to punish or intimidate the protesters. The Letpadaung protests had received extensive of media and public attention in Myanmar, which put significant pressure on the government to act. As discussed, Parliament had agreed to establish a commission to investigate the mining situation and Daw Aung San Suu Kyi had planned to meet with protesters.

216. The protesters were “warned” of their imminent evacuation (on November 28, 2012) and again before the onslaught began. When the protesters failed to heed the warning, the Myanmar Police intentionally used excessive force seemingly to penalize the protesters for staying in the camps and to instill fear in them. White phosphorus, which leaves horrifying and painful wounds, was likely used to deter the protesters from continuing their demonstrations for fear of being harmed similarly in the future. The fact that Myanmar Police continued to chase and beat protesters even after they fled the protest camps further shows that the Myanmar Police were taking reprisals against the protesters for their speech, presence in the camps, and for further hurting the government’s image domestically and internationally.

c. *The White Phosphorous was Used by the Myanmar Police in Their Capacity as Public Officials*

217. The Committee against Torture understands “public official or other person acting in an official capacity” to mean someone exercising *de jure*—or, in some instances, *de facto*—governmental authority who accordingly perform government functions.²⁷⁶

218. Police perform the government functions as law enforcers. The Myanmar Police was directed to undertake law enforcement by taking measure in accordance with the law. The Myanmar Police were thus acting in their official capacity as public officials.

4. *The Use of White Phosphorous at the Letpadaung Copper Mine Constitutes the Crime Against Humanity of Torture*

219. Swiss Criminal Code article 264a(1)(f) states that a person commits the crime against humanity of torture when that person “inflicts severe pain or suffering or serious injury, whether physical or mental, on a person in his or her custody or under his or her control.” In addition to satisfying the constitutive elements of the underlying crime of torture, the Swiss Criminal Code, in article 264a, sets forth three contextual (or “chapeau”) factors which must be met to satisfy occurrence of a crime against humanity: (1) that there was an “attack”; (2) that the “attack” was either widespread or systematic; and (3) that the “attack” was directed against a civilian population.

a. *The Use of White Phosphorous Constitutes and Was Part of an “Attack”*

220. For an act to constitute a crime against humanity under the Swiss Criminal Code, it must be “part of an attack.” The Rome Statute defines “attack” as “a course of conduct involving the multiple commission of [prohibited acts]” “pursuant to or in furtherance of a State or organizational policy to commit such attack.”²⁷⁷ The Rome Statute’s Elements of Crimes to article 7 further defines “policy to commit such attack” to require “that the State or organization actively promote or encourage such an attack against a civilian population.”
221. The use of white phosphorus was an attack, according to this definition. The Myanmar Police used white phosphorus to commit prohibited acts of torture per Ko Ko’s order directing the Myanmar Police to disperse protesters. This involved multiple commissions of prohibited acts including the use of white phosphorous munitions in six different locations. This is also evidence that the use of white phosphorus occurred pursuant to a policy to commit an attack.
222. Additionally, “as part of” necessitates a connection between the alleged crime and the “widespread or systematic attack.” This requires the alleged crimes were *related* to the attack on a civilian population, which reflects customary international law and the Rome Statute.²⁷⁸ The relationship between the alleged crime and the “widespread or systematic attack” is clearly established if the crime was instigated or directed by policy.²⁷⁹

b. *The Use of White Phosphorous was “Systematic”*

223. Prohibited acts, including torture, must be “widespread” or “systematic” to constitute a crime against humanity. The perpetrator’s attacks as a whole must be “widespread” or “systematic.” That is, the individual prohibited acts do not need to be widespread or systematic, so long as the attack as a whole is widespread or systematic.²⁸⁰
224. “Systematic” refers to the organized and repeated nature of the attack.²⁸¹ The International Criminal Tribunal for Rwanda defined “systematic” as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources”²⁸² or “carried out pursuant to a preconceived policy or plan.”²⁸³ A systematic attack involves “a pattern or methodical plan”²⁸⁴ that is “thoroughly organized and following a regular pattern.”²⁸⁵
225. In this case, the policy is evidenced by Ko Ko’s order directing the Myanmar Police to disperse the protesters. The Myanmar Police use of the same tactics, including white phosphorus munitions, simultaneously in six different locations is evidence of a well-organized and preconceived (systematic) attack that took place on the basis of a common policy or plan.

c. *The Myanmar Police Employed White Phosphorous Against a Civilian Population*

226. The attack must be directed at a civilian population to constitute a crime against humanity. Civilian population is defined as “people who are not taking any active part in hostilities, including members of the armed forces who laid down their arms and those person places *hors de*

combat by sickness, wounds, detention or any other cause.”²⁸⁶ This has more broadly been interpreted to include “all persons except those who have the duty to maintain public order and have the legitimate means to exercise force.”²⁸⁷ Furthermore, the civilian population need only be predominantly civilian in nature; the presence of “certain non-civilians in their midst does not change the character of the population.”²⁸⁸

227. Myanmar Police deliberately targeted the protesters with the white phosphorus by throwing munitions directly at people or the camp. The protesters, who were unarmed, clearly not a part of an armed group, peaceably assembling and posed no threat of attack. Therefore the protesters clearly constitute a civilian population.

d. *The Use of White Phosphorous Caused Severe Pain or Suffering*

228. The extreme heat produced by white phosphorus and the difficulty in putting out the fire and burns caused severe pain to those who came into contact with it, especially those who were hit directly by munitions. The wounds themselves continued to cause severe suffering, even after the burning stopped, and white phosphorus injuries are often long-lasting. Victims of incendiary weapons, including white phosphorus, can permanently lose strength, mobility, function, and sensation in affected body parts. Many victims experience mental trauma and an inability to assume their former roles in society, due to physical barriers. One study noted “Isolation during treatment, and being forced to ‘confront ... the sight of one’s own naked and burned body ... and the stench of one’s own rotting flesh’ can be particularly horrifying.”²⁸⁹

229. Even those who were not burned by the white phosphorus reported feelings of shock, confusion, and mental suffering.²⁹⁰

e. *The Myanmar Police Controlled the Civilians Against Whom they Used White Phosphorous*

230. Article 264a(1)(f) of the Swiss Criminal Code requires “custody” or “control,” meaning the perpetrator’s power or control over the victim. The requirements of “custody” or “control” in article 7(2)(e) of the Rome Statute was included “in order to establish some link of power or control between the perpetrator and the victim.”²⁹¹

231. Each camp had a heavy, armed police presence; 50-100 police officers for 80-200 protesters depending on the camp. The Myanmar Police sprayed the protesters with high powered water hoses, soaking the protesters and the areas, preventing the protesters from standing up. Thus, the protesters were under the control of the Myanmar Police during the white phosphorus attack.

D. Ko Ko is Responsible for War Crimes, Crimes Against Humanity and Torture Under a Theory of Command Responsibility

232. Under Swiss Criminal Code article 264k and the Convention against Torture, Ko Ko bears responsibility for the crimes committed by soldiers from Southern Command during the Military Offensive and for the use of white phosphorous against civilians at the Letpadaung copper mine by Myanmar Police.

1. ***Ko Ko Bears Command Responsibility for the War Crimes and Crimes Against Humanity that Occurred During the Military Offensive***

a. ***Ko Ko Bears Command Responsibility for Failing to Take Appropriate Preventive Measures to Stop the Commission of War Crimes and Crimes Against Humanity***

233. Swiss Criminal Code article 264k(1) assigns command responsibility to (1) a superior who (2) is aware that (3) a subordinate is carrying out a war crime or crime against humanity and (4) who fails to take appropriate preventive measures to prevent such acts.

i. **Ko Ko Had Effective Control Over the Southern Command**

234. International law and jurisprudence provide context in evaluating whether a military commander is a “supervisor” that can be held responsible for his subordinates. Under the Rome Statute, a supervisor must exercise “effective command and control” over the subordinates to be held criminally responsible for their actions.²⁹² Similarly, the ICTY determined that “[t]he simple exercise of powers of influence over subordinates does not suffice.”²⁹³ The ICC has held that for a commander to have effective control, he must have had “power to prevent, repress and/or submit the matter to the competent authorities for investigation.”²⁹⁴ The Court stipulated factors relevant to this determination, including: “the official position of the suspect; his power to issue or give orders; the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed); the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; the power to promote, replace, remove or discipline any member of the forces.”²⁹⁵

235. Ko Ko was a Major General in the Myanmar Military and was the commander of Southern Command from 2003 to 2008. He was present in Eastern Myanmar during the Military Offensive and oversaw the operations of the Southern Command garrison battalions and combat divisions such as LID 66 in northern Kayin State and eastern Bago Division during the Military Offensive. As commander, Ko Ko had effective control over the perpetrators of war crimes and crimes against humanity.

236. A wire intercept containing Ko Ko’s orders during the Military Offensive instructing the shelling of villages (which in fact happened), provides evidence of his ability to issue orders to his subordinates and have them followed. The military structure was rigid and highly structured; soldiers testified that they were under the tight control of superior officers to obey and execute their orders, enabling Ko Ko to have his orders followed. The Southern Command had robust

reporting infrastructures and procedures that required regular, detailed reports from commanders and units. Superior officers had the ability to move and promote subordinates. Ko Ko ratified subordinates' actions by promoting them based on their actions during the Military Offensive.

ii. **Ko Ko was Aware of the War Crimes and Crimes Against Humanity Being Carried Out by His Subordinates**

237. Whether a superior is “aware” can be established through direct or circumstantial evidence.²⁹⁶ The ICC has set forth factors to assess actual knowledge, including: “the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.”²⁹⁷ Actual knowledge may also be proven if a commander “is part of an organised structure with established reporting and monitoring systems.”²⁹⁸

238. Ko Ko's awareness of his subordinates actions can be established by circumstantial evidence. Ko Ko was present in eastern Myanmar during the Military Offensive. The crimes were widespread throughout eastern Myanmar, and documentation of the crimes spanned more than two years. Further, the policies regarding civilian clearing and sexual torture are longstanding policies and practices of the military, over which knowledge can be imputed to Ko Ko as a commander in the military.²⁹⁹ Ko Ko exerted control over his troops to be able to maintain or change military practices; his orders are captured in a wire intercept. Additionally, the means of communication between units was sophisticated. Ko Ko would have had knowledge of these crimes because the Southern Command reporting system required units to provide superior officers with frequent reports on operations, intelligence, and plans. Ko Ko was also put on notice of the perpetrators' crimes because the international community condemned the military's actions in public statements and reports.³⁰⁰

iii. **The Criminal Acts in Question are War Crimes and Crimes Against Humanity Carried Out by His Subordinate**

239. As described in more detail above, the Southern Command's acts in question constitute the war crimes of intentional homicide, torture, property destruction, forcible transfer, attacks on civilians and civilian object, and violation of sexual rights. Additionally, the acts constitute the crimes against humanity of intentional homicide, enslavement, torture, violation of sexual rights, forcible transfer, persecution, and other inhumane acts.

240. A “subordinate” is generally characterized by the hierarchical relationship between him and his supervisor, whereby the supervisor holds a *de jure* or *de facto* position of authority over the subordinate.³⁰¹

241. To hold the supervisor responsible for acts of subordinate, it must be shown that subordinates are liable for the underlying crimes.³⁰² Where specific names of culpable subordinates are unavailable, it is sufficient to identify them as a group by reference to their “category” or position.³⁰³ However, there is no requirement that a supervisor know the exact identity of culpable subordinates.³⁰⁴

242. The Harvard Clinic has identified twenty-five lower-level officers serving in Southern Command who committed war crimes and crimes against humanity, for which they may be held liable.³⁰⁵ The Clinic also has strong evidence that LID 66 soldiers are responsible for war crimes and crimes against humanity but has not been able to identify specific individuals.³⁰⁶ As the Commander of the Southern Command during the Military Offensive, Ko Ko had *de jure* authority over all military personnel below him. Also, it can be inferred that Ko Ko had *de facto* control over at least the officers carrying out the crimes by the wire intercept of Ko Ko’s specific commands coupled with the subsequent promotions of the individual officers carrying out the attacks during the Military Offensive.

iv. **Ko Ko Failed to Take Appropriate Measures to Prevent the Commission of War Crimes and Crimes Against Humanity**

243. The term “appropriate measures” can be informed by jurisprudence from the ICC because article 264~~k~~ of the Swiss Criminal Code is the domestication of the Rome Statute.³⁰⁷ The ICC has interpreted “necessary and reasonable measures” as those “suitable to contain the situation” at the time, in terms of preventing or repressing the crimes and are those within the powers and abilities of the superior to take.³⁰⁸ This standard is also accepted in customary international humanitarian law for command responsibility for failure to prevent war crimes.³⁰⁹

244. Ko Ko failed to take any measures to prevent war crimes and crimes against humanity during the Military Offensive. In fact, there is evidence that he ordered and escalated the attacks against civilians.

b. ***Ko Ko Bears Command Responsibility for Failing to Take Appropriate Measures to Ensure the Prosecution of Perpetrators of War Crimes and Crimes Against Humanity Committed During the Military Offensive***

245. Swiss Criminal Code article 264~~k~~(2) assigns command responsibility to (1) a superior who (2) is aware that (3) a subordinate is carrying out a war crime or crime against humanity and (4) who fails to take appropriate measure to ensure prosecution of the perpetrators of such crimes.

i. **Ko Ko Had Effective Control Over the Southern Command**

246. The rules and analysis here is identical to that under paragraphs 234 through 236.

ii. **Ko Ko was Aware of the War Crimes and Crimes Against Humanity Being Carried Out by His Subordinates**

247. The rules analysis here is identical to that under paragraphs 237 through 238.

iii. **The Criminal Acts in Questions are War Crimes and Crimes Against Humanity by His Subordinates**

248. The rules analysis here is identical to that under paragraphs 239 through 242.

iv. **Ko Ko Failed to Take Appropriate Measure to Ensure the Prosecution of Subordinates for War Crimes and Crimes Against Humanity**

249. Looking to the Rome Statute language for guidance, since article 264*k* of the Swiss Criminal Code domesticates the Statute,³¹⁰ the obligation under the Swiss Criminal Code to “take appropriate measures to ensure the prosecution” is analogous to Article 28 of the Rome Statute’s provision to “take all necessary and reasonable measures within his or her power ... to submit the matter to the competent authorities for investigation and prosecution.”

250. Such a duty requires that the commander takes active steps, including sanctions, in order to ensure that the perpetrators are brought to justice³¹¹ Even if a superior cannot sanction his forces, he has the obligation to submit the matter to competent authorities for investigation and prosecution.

251. Ko Ko failed to take any measures to ensure the investigation or prosecution of war crimes and crimes against humanity committed by his subordinates. Ko Ko had the ability to refer the situation to military, judicial or other oversight authorities, however, there is no evidence that he attempted initiate any proceedings. Ko Ko also had the authority to reassign or demote subordinates, and yet he did not take such actions. In fact, he even promoted subordinates.

252. The failure of Ko Ko, among others, to ensure prosecution of perpetrators has been noted by international organizations and experts. In 2015, the Human Rights Council adopted a resolution urging the Government of Myanmar to end impunity for human rights and humanitarian law abuses that have occurred in the country.³¹² The U.N. Special Rapporteur on the situation of human rights in Myanmar, in her 2015 report to the General Assembly, urged the government to end ongoing impunity related to conflict-related abuses.³¹³

2. ***Ko Ko Bears Command Responsibility for the Use of White Phosphorous at the Letpadaung Copper Mine***

a. ***Ko Ko is Liable Under the Convention against Torture for the Use of White Phosphorous Against Civilians***

253. As established in paragraphs 204-218 above, the use of white phosphorous by the Myanmar Police against civilians at the Letpadaung Copper Mine violates the Convention against Torture. The Convention against Torture requires that individual perpetrators, as well as their supervisors, are held to account for acts of torture. The Committee emphasizes the necessity of investigating superior responsibility “for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein.”³¹⁴ The Committee against Torture, which interprets the Convention against Torture, provides that:

those exercising superior authority – including public officials – cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.³¹⁵

i. Ko Ko Exercised Superior Authority Over the Myanmar Police

254. The Committee against Torture has not defined “superior authority.”

255. The relevant ordinary meaning of “superior” is “of higher rank, quality, or importance”³¹⁶ and “authority is “persons in command; specifically: government.”³¹⁷

256. As head of the Ministry of Home Affairs, which oversees the Myanmar Police, Ko Ko exercised superior authority over the Ministry of Home Affairs and its constituent divisions, including the Myanmar Police.

ii. The Myanmar Police’s Use of White Phosphorous Against Civilians Constitutes Torture Committed by Subordinates

257. In their capacity as public officials, the Myanmar Police deliberately used white phosphorus as a weapon to cause severe pain and suffering and punish and intimidate the civilian protesters. Thus, the Myanmar Police use of white phosphorus against the protesters constitutes torture under the Convention.

258. The Committee Against Torture has not defined “subordinate.”

259. The ordinary meaning of “subordinate” is “placed in or occupying a lower class, rank, or position.”³¹⁸

260. Thus, in relation to a subordinate, someone exercising superior authority “power to influence or command thought, opinion, or behavior” is understood to be someone of higher rank than the subordinate who has the power to influence or command thought, opinion, or behavior.

iii. Ko Ko Knew or Should Have Known that His Subordinates Were Using or Were Going to Use White Phosphorous to Torture Civilians

261. Actual knowledge cannot be presumed, but it can be established through direct or circumstantial evidence.³¹⁹ The ICC has set forth factors to assess actual knowledge, including: “the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.”³²⁰ Actual knowledge may also be proven if a commander “is part of an organised structure with established reporting and monitoring systems.”³²¹

262. Ko Ko’s actual knowledge can be established through the following pieces of evidence: the use of white phosphorus against civilians occurred in six different camps, during the same time frame on the same day, November 29, 2012; hundreds of heavily armed police used white phosphorus against civilians; the modus operandi of the Myanmar Police in the six locations were identical; white phosphorus munitions were launched several times in each camp; and Ko Ko, as the Minister of Home Affairs who oversees the policy, possesses high rank and responsibility in the hierarchical structure. The systematic nature of the attacks committed at the same time with the same methods in different locations by large numbers of police, coupled with Ko Ko’s high-level *de jure* position in the hierarchical structure, establishes Ko Ko’s actual knowledge that the Myanmar Police were using or were going to use white phosphorus against the protesters on November 29, 2012.

263. The ICC has defined the “should have known” standard requires the superior to “ha[ve] merely been negligent in failing to acquire knowledge” of his subordinates’ illegal conduct. This standard “requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.”³²²

264. With respect to the actions of the Myanmar Police in dispersing peaceful protesters at the Letpadaung Copper Mine, Ko Ko’s order to the Myanmar Police on November 28, 2012 is evidence that he knew the police, who were acting under his direct orders, would take action against the protesters. The consistent and systematic nature of the Myanmar Police’s actions and tactics in this instance, including the use of white phosphorus munitions in each camp, also indicates that orders came from above.

iv. Ko Ko Failed to Take Reasonable and Necessary Measures to Prevent the Myanmar Police’s Use of White Phosphorous

265. The ICC has interpreted “necessary and reasonable measures” as those “suitable to contain the situation” at the time, in terms of preventing or repressing the crimes.³²³ “Necessary and reasonable measures” are those within the powers and abilities of the superior to take.³²⁴ This standard is also accepted in customary international humanitarian law for command responsibility for failure to prevent war crimes.³²⁵

266. As discussed above, Ko Ko knew or should have known the Myanmar Police were using or were likely to use white phosphorus to commit torture. However, he took no action to contain, prevent or repress the situation or the use of white phosphorus. For example, he could have easily specified which tactics police should and should not use in advance of the November 29 dispersion exercise. In addition, once he knew or had reason to know of the Myanmar Police’s use of white phosphorus, Ko Ko could have ordered the Myanmar Police to stop using these weapons against the protesters.

267. The Myanmar Police’s systematized strategy and attacks indicate that they were all acting on the same orders. Since all of the Myanmar Police used white phosphorus in all of the camps, the Myanmar Police must not have been ordered to refrain from using this deadly weapon at any time.

b. *Ko Ko Bears Command Responsibility for Failing to Take Appropriate Measures to Stop the Commission of the Crime Against Humanity of Torture for the Use of White Phosphorous Against Civilians*

268. Swiss Criminal Code article 264k(1) assigns command responsibility to (1) a superior who (2) is aware that (3) a subordinate is carrying out or will carry out a war crime or crime against humanity and (4) who fails to take appropriate measures to prevent such acts.

i. *Ko Ko Oversees the Myanmar Police*

269. The Rome Statute provides context in evaluating whether a military commander is a “supervisor” that can be held responsible for his subordinates. Under the Rome Statute, a supervisor must exercise “effective command and control” over the subordinates to be held criminally responsible for their actions.³²⁶ The ICTY determined that “[t]he simple exercise of powers of influence over subordinates does not suffice.”³²⁷ The ICC held that the commander must have had “power to prevent, repress and/or submit the matter to the competent authorities for investigation.”³²⁸ The Court stipulated factors relevant to this determination: “(i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of

the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.”³²⁹

270. Ko Ko was the Minister of Home Affairs at the time the Myanmar Police used white phosphorous against civilians. The Ministry of Home Affairs oversees the Myanmar Police. Thus, at the time the attack occurred, Ko Ko held the highest official position in the Myanmar Police’s chain of command. In that capacity he had the power to issue or retract orders, ensure compliance with those orders, promote or reprimand subordinates, and coordinate broad-based police action and policy. Accordingly, Ko Ko had effective command and control over the police perpetrators of the attack.

ii. Ko Ko Was Aware that the Myanmar Police Were Using or Would Use White Phosphorous

271. Whether a superior is “aware” can be established through direct or circumstantial evidence.³³⁰ The ICC sets out factors to assess actual knowledge. These include: “the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior’s position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.”³³¹ Actual knowledge may also be proven if a commander “is part of an organised structure with established reporting and monitoring systems.”³³²

272. As established in paragraph 262, Ko Ko was aware at the time of the use of white phosphorus against the protesters. However, he took no action to contain, prevent or repress the situation or the use of white phosphorus. For example, he could have easily specified which tactics police should and should not use in advance of the November 29 dispersion exercise. In addition, once he knew or had reason to know of the Myanmar Police’s use of white phosphorus, Ko Ko could have ordered the Myanmar Police to stop using these weapons against the protesters.

iii. The Use of White Phosphorous Against Civilians Constitutes the Crime Against Humanity of Torture Committed by a Subordinate

273. The Myanmar Police’s use of white phosphorus constitutes the crime against humanity of torture. The use of white phosphorus against the protesters constituted torture, because it caused severe pain and suffering and the protesters were under the control of the police during the attack. It was crime against humanity because it was part of a systematic attack against a civilian population.

274. A “subordinate” is generally characterized by the hierarchical relationship between him and his supervisor, whereby the supervisor holds a *de jure* or *de facto* position of authority over the subordinate.³³³
275. To hold the supervisor responsible for acts of subordinate, it must be shown that subordinates are liable for the underlying crimes.^[ii] Where specific names of culpable subordinates are unavailable, it is sufficient to identify them as a group by reference to their “category” or position.^[iii] However, there is no requirement that a supervisor know the exact identity of culpable subordinates.^[iv] In fact, to establish the existence of a superior-subordinate relationship, it is “sufficient to specify to which group the perpetrators belonged and to show that the Accused exercised effective control over that group.”³³⁴
276. The perpetrators using white phosphorus munitions were easily identifiable as police, given their uniforms and riot gear, and accordingly belonged to the police “group.” It must now be shown that Ko Ko and the Myanmar Police had a superior-subordinate relationship. As a superior overseeing the Myanmar Police, Ko Ko had *de jure* authority over the Myanmar Police. He also had *de facto* control over the Myanmar Police, as he directed the Myanmar Police to take action and the Myanmar Police acted on his instructions. His *de jure* and *de facto* powers would have allowed him to prevent, repress and/or submit police crimes to the competent authorities for investigation, satisfying the conditions for “effective control.” Thus, Ko Ko exercised effective control over the Myanmar Police, establishing the superior (Ko Ko)-subordinate (police) relationship.

iv. Ko Ko Failed to Take Appropriate Measures to Prevent the Use of White Phosphorous Against Civilians

277. The term “appropriate measures” can be informed by jurisprudence from the ICC because article 264*k* of the Swiss Criminal Code is the domestication of the Rome Statute.³³⁵ The ICC has interpreted “necessary and reasonable measures” as those “suitable to contain the situation” at the time, in terms of preventing or repressing the crimes and are those within the powers and abilities of the superior to take.³³⁶ This standard is also accepted in customary international humanitarian law for command responsibility for failure to prevent war crimes.³³⁷
278. As discussed above, Ko Ko knew or should have known the Myanmar Police were using or were likely to use white phosphorus to commit torture. However, he took no action to contain, prevent or repress the situation or the use of white phosphorus. For example, he could have easily specified which tactics police should and should not use in advance of the November 29 dispersion exercise. In addition, once he knew or had reason to know of the Myanmar Police’s use of white phosphorus, Ko Ko could have ordered the Myanmar Police to stop using these weapons against the protesters.
279. The Myanmar Police’s systematized strategy and attacks indicate that they were all acting on the same orders. Since all of the Myanmar Police used white phosphorus in all of the camps, the

Myanmar Police must not have been ordered to refrain from using this deadly weapon at any time.

c. *Ko Ko Bears Command Responsibility for Failing to Take Appropriate Measures to Ensure the Prosecution of Perpetrators of the Crimes Against Humanity of Torture*

280. Swiss Criminal Code article 264k(2) assigns command responsibility to (1) a superior who (2) is aware that (3) has carried out a war crime or crime against humanity and (4) who fails to take appropriate measure to ensure prosecution of the perpetrators of such crimes.

i. *Ko Ko Oversees the Myanmar Police*

281. The analysis here is identical to that under paragraphs 269 through 270.

ii. *Ko Ko Was Aware that the Myanmar Police Had Used White Phosphorous*

282. The analysis here is identical to that under paragraphs 271 through 272.

iii. *The Use of White Phosphorous Against Civilians Constitutes the Crime Against Humanity of Torture Committed by a Subordinate*

283. The analysis here is identical to that under paragraphs 273 through 276.

iv. *Ko Ko Failed to Take Appropriate Measure to Ensure the Prosecution of the Subordinate Police Personnel who Used White Phosphorous Against Civilians*

284. Looking to the Rome Statute language for guidance, since article 264k of the Swiss Criminal Code domesticates the Statute,³³⁸ the obligation under the Swiss Criminal Code to “take appropriate measures to ensure the prosecution” is analogous to Article 28 of the Rome Statute’s provision to “take all necessary and reasonable measures within his or her power ... to submit the matter to the competent authorities for investigation and prosecution.”

285. Such a duty requires that the commander takes active steps, including sanctions, in order to ensure that the perpetrators are brought to justice³³⁹ Even if a superior cannot sanction his forces, he has the obligation to submit the matter to competent authorities for investigation and prosecution.

286. Ko Ko oversees the Myanmar Police and is thus positioned to issue sanctions to punish police officers, which he has not done. In the alternative, he also has not submitted the matter to competent judicial authorities, which are generally understood to be independent, impartial bodies with investigatory and prosecutorial powers.

287. In fact, investigations and attempts at prosecutions for the events at Letpadaung have failed. First, recent lawsuits attempting to hold Ko Ko and others accountable by competent authorities have been delayed, rejected and denied. Second, the Letpadaung Investigation Commission is the only governmental body that has investigated the events of November 29, 2012, and it did so ineffectively. Its findings, which seemingly accepted the viewpoint of the government and Myanmar Police without further investigation, implicate issues of bias.

IV. CONCLUSION

288. Ko Ko bears criminal command responsibility for the war crimes of serious violations of the Geneva Conventions, violations of sexual rights, violations of human dignity, “other” war crimes and the crimes against humanity of intentional homicide, enslavement, torture, violations of sexual rights, forced labor, persecution and other inhuman acts, that took place during the Military Offensive. He commanded the units that carried out these crimes, he was aware they were taking place, and he failed to both prevent them and prosecute the perpetrators.

289. Ko Ko also bears criminal command responsibility for committing torture under the Convention against Torture and the crime against humanity of torture for the Myanmar Police’s use of white phosphorous against civilians. He was the superior overseeing the Myanmar Police units that carried out the white phosphorous attacks, he was aware these attacks were taking place, and he failed to both prevent them and prosecute the perpetrators.

290. Because criminal jurisdiction does not exist in Myanmar to bring Ko Ko to account for these crimes, we implore Swiss authorities to arrest and prosecute Ko Ko under the principle of universal jurisdiction.

¹ Many human rights advocates still refer to the country by its former name, “Burma” because the country was renamed Myanmar by the military junta in 1989. Because this decision was made without consulting public will or opinion, many human rights advocates still refer to the country as “Burma.” We use “Myanmar” to avoid confusion because we are addressing both the historical nation-state as well as its current government.

² Shwe Yee Saw, *Govt, NGOs prepare to face off at UN on human rights*, THE MYANMAR TIMES, Jan. 30 2015; David Baulk, *Spotlight on Human Rights Abuses – Editorial Opinion*, BANGKOK POST, Feb. 14, 2015; OHCHR, UPR Sessions – Timetable 23rd Session (November 2-13, 2015), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx>.

³ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 67 (Nov. 2014). At the time of the Military Offensive in question, Light Infantry Division 66 (LID-66), which was the specific military unit responsible for many of the international crimes alleged herein, reported to Southern Command. Thus, while during other time periods and during other offensives, LID-66 and Southern Command are distinct in the Myanmar Military’s command structure, for purposes of criminal responsibility for the acts alleged herein, LID-66 was part of and within Southern Command.

⁴ <http://www.burmalibrary.org/docs11/NLM2011-03-31.pdf>

⁵ <http://www.irrawaddy.org/election/news/all-eyes-averted-notorious-general-steps-up>

⁶ TOPICH & LEITICH, *supra* note 3, at 147; STEINBERG, *supra* note 2, at 184; CHARNEY, *supra* note 3, at 202.

⁷ Progress Rep. of the Special Rapporteur on the situation of human rights in Myanmar to the Human Rights Council (Tomás Ojea Quintana), ¶ XX, U.N. Doc. A/HRC/19/67 (March 7, 2012)[hereinafter Special Rapporteur Report (March 2012)]; Progress Rep. of the Special Rapporteur on the situation of human rights in Myanmar to the Human Rights Council, ¶62, U.N. Doc. A/HRC/13/48 (Mar. 2010); MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY (2nd ed. 1999); TOPICH & LEITICH, *supra* note 3, at 148; STEINBERG, *supra* note 2, at 187; Amnesty Int’l, *Burma: Extrajudicial Execution and Torture of Members of Ethnic Minorities* (1988).

⁸ Press Release, UN Commission on Human Rights, UN Human Rights Experts Call on Myanmar to End Counter-Insurgency Operations Targeting Civilians in Northern Karen State and Eastern Pegu Division (May 16, 2006).

⁹ BURMA NEWS INTERNATIONAL, DECIPHERING MYANMAR'S PEACE PROCESS: A REFERENCE GUIDE 39 (Apr. 2013) available at <http://www.burmalibrary.org/docs14/Deciphering-Myanmar-Peace-Process-ocr-tu-red.pdf>; TOPICH & LEITCH, *supra* note 3, at 143.

¹⁰ Global Justice Center & Leitner Center, *Promises not Progress: Burma's National Plan for Women Falls Short of Gender Equality and CEDAW* 17 (Aug. 2015).

¹¹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 4 (Nov. 2014).

¹² Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

¹³ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 33 (Nov. 2014).

¹⁴ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

¹⁵ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

¹⁶ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

¹⁷ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

¹⁸ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

¹⁹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

²⁰ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 32 (Nov. 2014).

²¹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 33 (Nov. 2014).

²² Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

²³ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 38 (Nov. 2014).

²⁴ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 48-49 (Nov. 2014).

²⁵ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 38 (Nov. 2014).

²⁶ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 48 (Nov. 2014).

²⁷ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 37 (Nov. 2014).

²⁸ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 3 (Nov. 2014).

²⁹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 50 (Nov. 2014).

³⁰ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 50 (Nov. 2014).

³¹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 38 (Nov. 2014).

³² Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 40 (Nov. 2014).

³³ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 50 (Nov. 2014).

³⁴ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 50 (Nov. 2014).

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- ³⁵ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 51 (Nov. 2014).
- ³⁶ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 51 (Nov. 2014).
- ³⁷ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 51 (Nov. 2014).
- ³⁸ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 48-49 (Nov. 2014).
- ³⁹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 49 (Nov. 2014).
- ⁴⁰ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 33 (Nov. 2014).
- ⁴¹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 48 (Nov. 2014).
- ⁴² Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 48 (Nov. 2014).
- ⁴³ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 38 (Nov. 2014).
- ⁴⁴ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 52 (Nov. 2014).
- ⁴⁵ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 52 (Nov. 2014).
- ⁴⁶ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 52 (Nov. 2014).
- ⁴⁷ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 51 (Nov. 2014).
- ⁴⁸ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 52 (Nov. 2014).
- ⁴⁹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 52 (Nov. 2014).
- ⁵⁰ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 51-52 (Nov. 2014).
- ⁵¹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 52 (Nov. 2014).
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¹⁵² Amnesty p37

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¹⁵⁷ AI p38

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¹⁶⁹ BISHARAT p.93 ; AI 45

¹⁷⁰ Justice trust 21
¹⁷¹ AI p43
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¹⁷³ Justice Trust 18 – 19; AI p43
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¹⁸⁴ AI 46, 47; can cite directly to the ALS lab results Yee sent
¹⁸⁵ *See, e.g.*, AI 41–56 ; Justice Trust 21–23.
¹⁸⁶ A/HRC/25/64, para. 29
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¹⁹⁵ http://myanmarpoliceforce.org/mm/index.php?option=com_content&view=article&id=172:2012-09-01-09-22-22&catid=94:2012-09-01-05-21-38&Itemid=290
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¹⁹⁷ Myanmar Penal Code
¹⁹⁸ IAN HOLLIDAY, BURMA REDUX: GLOBAL JUSTICE AND THE QUEST FOR POLITICAL REFORM IN MYANMAR 82 (2011).
¹⁹⁹ 2008 Constitution, art. 445.
²⁰⁰ *See* Special Rapporteur Report (Sept 2014), ¶ 65. *See also* Special Rapporteur Report (Sept 2013), ¶ 70; Rep. of the Special Rapporteur on the situation of human rights in Myanmar to the General Assembly (Tomas Ojea Quintana), ¶ 55, U.N. Doc. A/64/318, (24 Aug. 2009)[hereinafter Special Rapporteur Report (Aug. 2009)]; *see also* WLB Report (Jan. 2014), at 29.
²⁰¹ 2008 Constitution, art. 20(b), (“The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces”), art. 294, (“In the Union, there shall be a Supreme Court of the Union. Without affecting the powers of the Constitutional Tribunal and the Courts-Martial, the Supreme Court of the Union is the highest Court of the Union”), art. 319, (“According to Sub-Section (b) of Section 293, the Courts-Martial shall be constituted in accord with the Constitution and the other law and shall adjudicate Defence Services personnel”), art. 343, (“In the adjudication of Military justice: (a) the Defence Services personnel may be administered in accord with law collectively or singly; (b) the decision of the Commander-in-Chief of the Defence Services is final and conclusive.”).
²⁰² WLB Report (Jan. 2014) at 30-31; 2008 CONSTITUTION, art. 343.
²⁰³ WLB Report (Nov. 2014) at 9, (“Given the majority of cases are concluded or dismissed within the court martial system – which entirely lacks transparency – survivors are routinely denied justice for crimes committed against them. Conscious of the de facto impunity from prosecution afforded to military, and the slim chance of obtaining any kind of meaningful justice, many survivors choose to remain silent – further entrenching a lack of accountability and transparency at every level.”).
²⁰⁴ Statement from Tin Kyaw, Permanent Representative of Myanmar to the U.N.S.C, at the Open Debate on Women, Peace and Security, ¶ 58, U.N. Doc. S/PV.7160 (April 25, 2014); Rep. of the Special Rapporteur on the situation of human rights in Myanmar to the U.N. General Assembly (Tomas Ojea Quintana), Annex: Responses of the

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²⁰⁵ See e.g. WLB Report (Jan. 2014) at 1.

²⁰⁶ Much of the information on this case contained herein is based on personal information and experience of lawyers at Justice Trust, a co-signer to this Mock Indictment. When an assertion is not supported by a footnote, we rely on this primary knowledge.

²⁰⁷ On file with authors.

²⁰⁸ <http://www.fortifyrights.org/publication-20151014.html>

²⁰⁹ BGE 7 782.

²¹⁰ ATF 125 II 417.

²¹¹ <https://treaties.un.org/pages/UNTSOnline.aspx?id=1>

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²¹³ GC IV article 146. Emphasis added.

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²¹⁵ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statue of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBl 2008 3863).

²¹⁶ CAT arts. 2, 4, 5; Reply of Switzerland to Report on the Scope and Application of the Principle of Universal Jurisdiction by the 6th Committee of the 66th Session of the General Assembly.

²¹⁷ Shwe Yee Saw, *Govt, NGOs prepare to face off at UN on human rights*, THE MYANMAR TIMES, Jan. 30 2015; David Baulk, *Spotlight on Human Rights Abuses – Editorial Opinion*, BANGKOK POST, Feb. 14, 2015; OHCHR, UPR Sessions – Timetable 23rd Session (2-13 November 2015), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx>.

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²¹⁹ Swiss Criminal Code art. 264*m*

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²²² Bundergericht [BGer][Federal Supreme Court] Jul. 25, 2012, §5.3, B.B.2011.140.

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²²⁴ Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.) 2002 I.C.J. 3, ¶ 51 (Judgment) (Feb. 14).

²²⁵ Michael Wood, *The Immunity of Official Visitors*, MAX PLANCK YEARBOOK OF UNITED NATIONS L. 35, 45-46 (2012).

²²⁶ <http://www.modins.net/myanmarinfo/ministry/home.htm>

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²³⁰ Bundergericht [BGer][Federal Supreme Court] Jul. 25, 2012, §5.3.2, B.B.2011.140.

²³¹ See Prosecutor v. Blaškić, Case No. IT-95-14-AR, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 41 (Oct. 29, 1997) (“those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity”); Prosecutor v. Milošević, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶ 32 (Nov. 8, 2001).

²³² *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

²³³ Rome Statute of the International Criminal Court, art. 8, U.N. Doc. A/Conf.183/9 (1998).

²³⁴ International Committee of the Red Cross (ICRC), *ICRC Annual Report 2006 - Myanmar*, May 24, 2007.

²³⁵ Report of the Special Rapporteur on the situation of human rights in Myanmar, U.N. Doc. E/EC.4/2006/34, ¶ 104, Feb. 7, 2006; Report of the Special Rapporteur on the situation of human rights in Myanmar, U.N. Doc. A/RES/61/232, ¶ 3(b), Mar. 13, 2006;

²³⁶ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statue of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBl 2008 3863).

²³⁷ International Criminal Court in Case No. ICC-01/04-01/07-717 *Prosecutor v. Katanga et al.*

²³⁸ ICRC, CIHL Database, Rule 7.

²³⁹ <http://www.merriam-webster.com/dictionary/wanton>

- ²⁴⁰ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statute of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBl 2008 3863).
- ²⁴¹ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statute of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBl 2008 3863).
- ²⁴² For examples, see *State of Terror: The Ongoing Rape, Murder, Torture and Forced Labor Suffered by Women Living under the Burmese Military Regime in Karen State*, KAREN WOMEN'S ORGANIZATION 68-97 (Feb. 2007), <https://karenwomen.files.wordpress.com/2011/11/state20of20terror20report.pdf>.
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- ²⁴⁴ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statute of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBl 2008 3863).
- ²⁴⁵ *The Greek Case*, 1969 Y.B. Eur. Conv. H.R. (Eur. Comm'n H.R.) 186.
- ²⁴⁶ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, INTERNATIONAL COMMITTEE OF THE RED CROSS 16 (May 2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.
- ²⁴⁷ *Prosecutor v. Katanga et al*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges ¶ 311 (Sept. 30, 2008).
- ²⁴⁸ Rome Statute of the International Criminal Court, art. 7(2)(a), U.N. Doc. A/Conf.183/9 (1998). See also Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Commentary submitted by Switzerland on Article 7 of the International Criminal Court, 1999.
- ²⁴⁹ See *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 271 (Int'l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999); AN ALTOGETHER DIFFERENT ORDER
- ²⁵⁰ International Law Commission, Draft Code of Crimes Commentary to Article 18, ¶ 5; *Prosecutor The Prosecutor v. Jean-Paul Akayesu*, ICTR- 96-4-T, Judgment of 2 September 1998: ¶ 579.
- ²⁵¹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 45 (Nov. 2014).
- ²⁵² *Prosecutor v. Tibomir Blašković*, Case No. IT-95-14-A, Appeal Judgment ¶ 101 (July 29, 2004); *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-A, Appeal Judgment, ¶¶ 93-96 (June 12, 2002); *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgment ¶¶ 135-6 (Sept. 1, 2004),
- ²⁵³ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment ¶¶ 579-580; *Prosecutor v. Georges A. N. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgment ¶¶ 67-69 (May 26, 2003); *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Trial Judgment ¶ 204 (Jan. 27 2000).
- ²⁵⁴ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment ¶ 648 (May 7, 1997); *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96- 23-T, Trial Judgment, ¶ 429 (Feb. 22, 2001); *Prosecutor v. Elizaphan Ntakirutimana et al.*, Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Judgment ¶ 804 (Feb. 21, 2003).
- ²⁵⁵ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment ¶ 580 (Sept. 2, 1998).
- ²⁵⁶ *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment ¶ 123 (May 21, 1999).
- ²⁵⁷ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment ¶ 646 & 648 (May 7, 1997).
- ²⁵⁸ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment ¶ 580 (Sept. 2, 1998).
- ²⁵⁹ *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T, ¶ 582 (Int'l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998).
- ²⁶⁰ *Prosecutor v. Clément Kayishema and Obed Ruzindana*, No. ICTR-95-1-T, ¶ 127 (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999).
- ²⁶¹ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 638 (Int'l Crim. Trib. Former Yugo., Trial Chamber II, May 7, 1997).
- ²⁶² SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 757 (1938), art. 264a(1)(a) (Switz.).
- ²⁶³ Roy S. Lee & Hakan Friman, eds., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 90 (2001) (Darryl Robinson commentary).
- ²⁶⁴ For examples, see *State of Terror: The Ongoing Rape, Murder, Torture and Forced Labor Suffered by Women Living under the Burmese Military Regime in Karen State*, KAREN WOMEN'S ORGANIZATION 68-97 (Feb. 2007), <https://karenwomen.files.wordpress.com/2011/11/state20of20terror20report.pdf>.
- ²⁶⁵ For examples, see *State of Terror: The Ongoing Rape, Murder, Torture and Forced Labor Suffered by Women Living under the Burmese Military Regime in Karen State*, KAREN WOMEN'S ORGANIZATION 68-97 (Feb. 2007), <https://karenwomen.files.wordpress.com/2011/11/state20of20terror20report.pdf>; *Human Rights Group News Bulletin*,

KAREN HUMAN RIGHTS GROUP (Mar. 15, 2006), <http://khr.org/2006/03/khr06b2/attempted-rapes-and-other-abuses-northern-karen-districts>.

²⁶⁶ BGE 7 782.

²⁶⁷ Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT'L REV. RED CROSS 591 (2007), available at <https://www.icrc.org/eng/assets/files/other/irrc-867-reyes.pdf>.

²⁶⁸ Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeals Judgment, ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007), <http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf>.

²⁶⁹ Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 13, U.N. Doc. CAT/C/USA/CO/2 (2006).

²⁷⁰ Reyes at 602.

²⁷¹ AMNESTY INTERNATIONAL at 49.

²⁷² “intimidate,” MERRIAM-WEBSTER DICTIONARY.

²⁷³ “punish,” MERRIAM-WEBSTER DICTIONARY.

²⁷⁴ Justice trust p22- 23

²⁷⁵ AI 50

²⁷⁶ Elmi v. Australia, ¶ 6.5, U.N. Doc. CAT/C/22/D/120/1998 (1999) (finding that “members of [non-state] factions can fall, for the purposes of the application of the Convention, within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1”); H.M.H.I. v. Australia, ¶ 6.4, U.N. Doc. CAT/C/28/D/177/2001 (2002) (finding that “in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1”).

²⁷⁷ Rome Statute of the International Criminal Court, art. 7(2)(a), U.N. Doc. A/Conf.183/9 (1998). See also Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Commentary submitted by Switzerland on Article 7 of the International Criminal Court, 1999.

²⁷⁸ See Prosecutor v. Tadic, No. IT-94-1-A, ¶ 271 (Int'l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999); AN ALTOGETHER DIFFERENT ORDER

²⁷⁹ International Law Commission, Draft Code of Crimes Commentary to Article 18, ¶ 5; Prosecutor The Prosecutor v. Jean-Paul Akayesu, ICTR- 96-4-T, Judgment of 2 September 1998: ¶ 579.

²⁸⁰ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgment ¶ 101 (July 29, 2004); Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23-A, Appeal Judgment, ¶¶ 93-96 (June 12, 2002); Prosecutor v. Radoslaw Brđanin, Case No. IT-99-36-T, Trial Judgment ¶¶ 135-6 (Sept. 1, 2004),

²⁸¹ Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Trial Judgment ¶ 648 (May 7, 1997); Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96- 23-T, Trial Judgment, ¶ 429 (Feb. 22, 2001); Prosecutor v. Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Judgment ¶ 804 (Feb. 21, 2003).

²⁸² Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment ¶ 580 (Sept. 2, 1998).

²⁸³ Prosecutor v. Clément Kayishema & Obed Ruzindana, Case No. ICTR-95-1-T, Judgment ¶ 123 (May 21, 1999).

²⁸⁴ Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Trial Judgment ¶ 646 & 648 (May 7, 1997).

²⁸⁵ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgment ¶ 580 (Sept. 2, 1998).

²⁸⁶ Prosecutor v. Jean-Paul Akayesu, No. ICTR-96-4-T, ¶ 582 (Int'l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998).

²⁸⁷ Prosecutor v. Clément Kayishema and Obed Ruzindana, No. ICTR-95-1-T, ¶ 127 (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999).

²⁸⁸ Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 638 (Int'l Crim. Trib. Former Yugo., Trial Chamber II, May 7, 1997).

²⁸⁹ AI 49

²⁹⁰ AI 50

²⁹¹ Roy S. Lee & Hakan Friman, eds., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 90 (2001) (Darryl Robinson commentary).

²⁹² Rome Statute of the International Criminal Court, art. 28(a), U.N. Doc. A/Conf.183/9 (1998).

²⁹³ Prosecutor v. Hadžihasanović, & Kubura, Case No. IT-01-47-T, Judgment, ¶ 80 (Mar. 15, 2006).

²⁹⁴ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ¶ 416 (June 15, 2009).

²⁹⁵ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ¶ 417 (June 15, 2009).

²⁹⁶ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ¶ 430 (June 15, 2009).

²⁹⁷ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ¶ 431 (June 15, 2009).

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- ²⁹⁹ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 8 (Nov. 2014).
- ³⁰⁰ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 64 (Nov. 2014).
- ³⁰¹ Čelebidi, Appeal Judgment ¶¶ 303, 193; Aleksovski, Appeal Judgment ¶ 76
- ³⁰² Orid, Appeal Judgment ¶ 35
- ³⁰³ Hadžihasanović, Trial Judgment ¶ 90
- ³⁰⁴ Blagojević and Jokić, Appeal Judgment ¶ 287
- ³⁰⁵ Harvard International Human Rights Clinic, *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar* 66 (Nov. 2014).
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- ³⁰⁷ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statute of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBI 2008 3863)
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- ³⁰⁹ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment ¶ 702 (Sept. 2, 1998); *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment ¶ 703 (May 21, 1999); *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-A, Judgment ¶ 707 (Feb. 20, 2001).
- ³¹⁰ No I 1 of the Federal Act of 18 June 2010 on the Amendment of Federal Legislation in Implementation of the Rome Statute of the International Criminal Court, in force since 1 Jan. 2011 (AS 2010 4963; BBI 2008 3863)
- ³¹¹ Bemba para. 442 <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>
- ³¹² Human Rights Council Res. 28/23, U.N. Doc. A/HRC/RES/28/23, at 6 (Apr. 2, 2015).
- ³¹³ U.N. General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, ¶ 69, U.N. Doc. A/HRC/28/72 (Mar. 23, 2015).
- ³¹⁴ Committee Against Torture, General Comment No. 2, para. 26 (CAT/C/GC/2), 24 Jan. 2008.
- ³¹⁵ Committee Against Torture, General Comment No. 2, para. 26 (CAT/C/GC/2), 24 Jan. 2008.
- ³¹⁶ “superior,” MERRIAM-WEBSTER DICTIONARY.
- ³¹⁷ “authority,” MERRIAM-WEBSTER DICTIONARY.
- ³¹⁸ “subordinate,” MERRIAM-WEBSTER DICTIONARY.
- ³¹⁹ Bemba para. 430
- ³²⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ¶ 431 (June 15, 2009).
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- ³²⁵ https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153#Fn_35_14
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³³² *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ¶ 429 (June 15, 2009).

³³³ Čelebidi, Appeal Judgment ¶¶ 303, 193; Aleksovski, Appeal Judgment ¶ 76

ⁱⁱⁱ Orid, Appeal Judgment ¶ 35

ⁱⁱⁱⁱ Hadžihasanović, Trial Judgment ¶ 90

^{iv} Blagojević and Jokić, Appeal Judgment ¶ 287

³³⁴ Hadžihasanović, Trial Judgment ¶ 90.

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