



PWG Kachin – Protection Analyses

Restrictions on Freedom of Movement and Movement Restrictions in Kachin State 21 December 2016

Introduction and Objectives

Prolonged displacement and the escalation of armed conflict since April 2016 has had a dramatic impact on the civilian populations of Kachin¹. This paper highlights the key humanitarian and protection concerns in relation to restriction to the freedom of movement and movement restrictions faced by both Internally Displaced Persons and non-displaced civilians including host communities in Kachin State. In addition, it looks at both the legal framework or instruments binding upon both the Myanmar Army and Ethnic Armed Groups as well as practices and justifications in relation to the mentioned restrictions within the Myanmar and Kachin context.

In particular the Analyses:

- A) Provides an analyses for further analyses, debate and discussion within the PWG/AHCT/HCT;
- B) Updates the PWG Protection Analyses for Kachin².

1. The Context-existing and emerging

The most direct and commonly used movement routes between what are now known as Government Controlled Areas (GCA) and KIO Controlled Areas (KCA) of Kachin State have been gradually cut off to civilians as the conflict has continued and deepened. The route along Wai Maw/Nam Sang village and Loije has become a frontline and a de facto border between GCA and KCA since the resumption of the conflict in June 2011 and, as of the end of 2015, its perimeter has been physically barricaded, preventing civilians from moving freely in and around these areas. This is compounded by the frequent and prevalent threats to physical safety presented by landmines and active fighting. In addition, due to documentation challenges detailed in the section below, many of the some 45,000 IDPs located within KCA face uncertainty and difficulty in moving to either GCA or China for safety or even access to basic services and markets.

While the protective environment for civilians generally and IDPs specifically has been grave since the resumption of hostilities in 2011, the situation has been particularly worrying throughout 2016 and has become alarming this month in light of conflict developments including increasingly heavy militarization of many parts of the State. Current example is represented by the seizure by Myanmar Army of key KIA frontline posts in the area of N'Krang Bum/Gidon post, a *de-facto* but strategically and politically critical border point between GCA and KCA. There are a number of populous IDP camps in close proximity to the N'Krang Bum/Gidon post and Laiza areas. The current situation finds the affected IDPs essentially squeezed between a very active frontline on the KCA side and the Chinese border, with many facing uncertainty as to whether they can seek refuge in China, or even in Laiza or elsewhere in GCA, due to uncertainty as to how far in to the KCA area the current fighting will move.

¹ PWG Protection of Civilians Note, September 2016; PWG Humanitarian Access Update, Sept-Dec 2016; Humanitarian Access: Sumprabum update, April 2016; HCT Humanitarian Access Advocacy Note Sept. 216; UNDSS monthly reports 2016 and OCHA Bulletins and SitReps 2016; DPP Baseline Report, July 2016.

² PWG Protection Analyses for Kachin and NSS, October 2015.

While at the time of writing, protection and more specifically restrictions to the freedom of movement associated risks, pertain most critically to KCA camps, close attention must be paid to the situation of civilians in other “hot-spot” areas of Kachin including GCA Waingmaw, Mougau, Mohnyin, Momauk, Mansi, Chipwe and Hpakant³. These areas are tense and heavily militarized by one or both parties to the conflict and the PWG identified a number of concerning protection incidents and conducted protection monitoring in relation to freedom of movement, protection and safety of civilians. Now more than ever, it is essential that IDPs and other civilian populations of Kachin are granted their entitlement to freedom of movement, particularly with regard to seeking protection, safety, life-saving and life-sustaining services. Further, all actors involved in responding to the needs of these vulnerable populations, particularly Protection actors but not only, should be aware of the rights of affected populations, the obligations of both parties to the conflict to guarantee and protect those, as well as contribute in the mitigation of protection risks and threats through their actions.

Contrary to the conditions laid out in Rule 56 of Customary IHL⁴, humanitarian agencies and personnel are also affected by movement restrictions. This further limits the access of civilians, particularly IDPs, to essential services and further contracts the already critically limited space in which they can assure the enjoyment of protection and basic needs. The Myanmar Military and Government must respect the right of Myanmar citizens to seek safety and a decent standard of living in a location of their choosing. Similarly, the KIA and KIO must respect the will and right of civilians under its administration to seek safety and services elsewhere should they so desire. Both parties must urgently respect the civilian nature of camps, the principle of distinction between armed actors and civilian population in order to avoid making them the subject of scrutiny, restrictions and danger, as well as human rights.

2. The Concerns, Trends and Consequences:

i. Documentation

IDPs, both in GCA and KCA, might be not in possession of civil documentation which was either lost prior/during displacement or faced difficulties in obtaining it after displacement. In addition, KCA-based IDPs, that constitutes approx. the 40% of the total Kachin IDP population, might have civil documentation issued by the KIO civilian authorities which is not valid in Government Controlled Areas, and at the same time limits them in their travelling routes; or many of them cannot afford the journey to GCA through the current available routes. Due to the closure of normal travel routes from/to GCA and KCA and *vice-versa* as noted above, IDPs and residents in both GCA and KCA must travel through China in order to access certain areas in KCA/GCA. This can require a formal border pass⁵ which can be difficult to obtain for those without existing basic documentation and that is anyway for short period of stay⁶. In addition, Chinese and Myanmar authorities have recently increased their documentation checks and an increase of arrests in China of IDPs not having the proper documentation (but also for being affiliated to KIA/KIO – *see below*) has been reported⁷.

ii. Checkpoints⁸

³ But not only, had being specific areas of Puta-O and Tsalaw also affected in terms of protection of civilians from armed conflict.

⁴ “The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted”

⁵ Generally takes 7 days to obtain during “normal” periods; has been limited for IDPs residing in KCA area in 2016

⁶ Relevant once again in case of displacement from KCA into China and the need/possibly to stay longer than short-time.

⁷ Please refer to PWG for further details

⁸ Further details available upon request from the PWG

In GCA, both formal and informal and increases of checkpoints and/or checkpoint-related processes are reported such as temporary road obstructions along the main roads⁹, as well as periodic increased intensity of searches and questioning at a number of locations. It is more difficult to obtain information and incidents on the KCA side but informal “advisories” and restrictions are frequently reported. On the China side, as a result of the ongoing conflict, the authorities have increased the number of checkpoints and intensified their checking procedures. This is limiting IDPs in their movement¹⁰.

iii. Curfews

Periodic, informal and occasionally more formal curfews in a number of areas, including the Wards in and around Myitkyina and Bhamo as well as camps in sensitive, hotspot areas are increasingly reported. These curfews are generally sporadic but often very restricting in terms of timings in particular, preventing civilians from accessing markets and livelihoods¹¹.

iv. Arbitrary detentions

Increased reports of arbitrary arrests and detentions as well as incidents of portering are being received¹² by the PWG, not just of civilians moving but of civilians located in and around areas of skirmishes and landmine/Improvised Explosive Device (IED) incidents. Often civilians in detention are being charged under Article 17.1 of the 1908 Unlawful Association Act¹³. These kinds of arrests and detentions create fear amongst civilians that may ultimately create a serious deterrent to movement.

¹⁴

v. Civilian character of camps

Checkpoints and as well as military camps are being installed or maintained in the vicinity of IDP camps posing risks to the population residing in the camps. In the past months, an incident have been reported of shooting of soldiers presumably being under influence¹⁵, as a result curfews have been put in place for the safety of the civilians – limiting their movement. In the latter half of 2016, there have been a number of worrying and credible reports of IDPs camps and villages being entered by military personnel with civilians being searched, interrogated and even arrested. In addition, reports have been received and accusations made of EAG groups having (increased) presence around IDP camps. This is however difficult to verify given the nature of the conflict dynamics and sources.

Lack of respect for civilian nature of camps presents huge protection concerns as well as limits the freedom of movement of civilians given that it can result in negative attention and pose a risk to the camp potentially being perceived as being aligned with the armed group residing in the vicinity of the camps and they can become a target of searches, registration and residents residing inside can be subject to arrest.

vi. Militarization and troop build up¹⁶

⁹ Such as the BMO-MYT road and Loiye – BMO road.

¹⁰ Whereas before April it was tolerated by the Chinese government for the IDPs to cross China in order to access GCA.

¹¹ More details available from PWG on request and case-by case bases.

¹² The highest profile case recorded is the case of 49 Kachin youth from Putao being arrested at a Loiye checkpoint en route from a training in KCA. They are currently still detained in Bhamo prison.

¹³ a blanket charge frequently used during the junta era to punish any form of contact with rebel groups

¹⁴ Details of other relevant incidents available from the PWG upon request

¹⁵ Denied by relevant Battalion – however no explanation has been given on the shooting incidents as of to date

¹⁶ Further details available from PWG and/or UNDSS upon request.

Since the escalation of the conflict as of April 2016, Kachin has seen an increase of military troops throughout Kachin State and as of December 2016 many key areas such as the Townships referred to above are heavily militarized with reinforcement ongoing. As above mentioned, incidents or portering¹⁷ and continued rumors of potential forced recruitment of civilians moving alongside the main road¹⁸ has created fear and apprehension amongst the civilian populations and, again, serves as a deterrent to movement when the role of reinforcements remains unknown, undefined and susceptible to change.

vii. Landmine contamination

Kachin State being one of the most heavily landmine contaminated areas in both Myanmar and the world, an increase has been observed in number of mine incidents in recent months, especially in areas that have been subject to recent armed clashes or are being potential target areas. This has created fear among the civilian and as a result further restricted the movement of the civilian population, especially around “informal” cross-line paths.

viii. Access to basic services

As noted in the opening section of this document, the access of civilians to basic services is further compromised by the ongoing formal and informal restrictions on humanitarian agencies to access and provide services in vulnerable areas. In addition to above mentioned restriction in travelling cross border which is limiting the access to services for IDPs residing in KCA, given that they are heavily depend on markets and services across the border (either China or GCA). Life-saving services such as food, shelter and medical assistance (but also livelihood opportunities and cheaper markets) are due to restrictions of travelling cross border coupled with limitations of humanitarian agencies to provide services in these vulnerable areas constitute a serious denial of their freedom to access basic rights.

Other protection concerns

Additionally, the full enjoyment of rights such as family visit and unity when some family members are located in the opposite side (GCA vs KCA), House-Land and Property related rights (especially when in villages or origins located in GCA difficult to reach), psycho-social discomfort due to the feeling of isolation, lack of medium/long-term vision for their future due to the volatile situation , rights to return at their own path and others evidenced by the PWG during protection monitoring and the PIM mechanism.

Both parties and their associated governing authorities shall be reminded that preventing civilians from leaving an area of conflict, if certain conditions are not met, might be contrary to a number of provisions of IHL and IHRL as also below reported.

3. The Legal Framework and Instruments: Obligations and Justifications?

Before entering into the legal analyses, it is worth to mention that while the legal basis for restrictions on the freedom of movement imposed on the civilian population in Kachin remains unclear, some elements of response can be found in the “Unlawful Associations Act” and in the Counter-insurgency policies and practices of the Myanmar Army. Also, there are International Law and Principles related references that could apply for what concerns freedom of movement restrictions affecting civilians.

¹⁷ Reference to PIM forms – 3rd quarter

¹⁸ Even in camps and areas in township such as Myitkyin and Waing Maw.

A) National law, principles and practices

Counter-insurgency Policies and Practices¹⁹

The Myanmar Army's counter-insurgency "Four Cuts" strategy was developed in the 1960's to cut off rebel forces from their four main support sources (food, funds, intelligence, and recruits) and remained largely unchanged since then. It involves cordoning off territory for concentrated operations, a "calculated policy of terror" to force populations to move, destruction of villages in sensitive areas and confiscation or destruction of food stocks that could support insurgents²⁰. Although the Government no longer explicitly references the "Four Cuts" strategy in public statements, the doctrine was listed in confidential Ministry of Defence documents as recently as 2008²¹.

A number of national and international legal instruments and guidance apply to the ongoing situation in Kachin State, particularly as regards to the freedom of movement restrictions of civilians.

B) International Law and Principles

Common Article 3 of the Geneva Conventions (GC), which have been ratified by Myanmar, establishes the minimum standards that all parties involved in a non-international armed conflict should observe concerning the treatment and protection of civilians. At a minimum, Article 3 sets out the minimum standards for all parties involved in non-international armed conflict as regards the treatment and protection of civilians, civilian objects and those no longer participating in hostilities (eg patients, i.e.). This Article provides for the protection of civilians from violence to life and person (in particular murder, mutilation, cruel treatment or torture) taking of hostages, outrages upon personal dignity (in particular humiliating or degrading treatment) and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.

¹⁹ For details, see International Human Rights Clinic at Harvard Law School, "Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar", 2014, pp. 24-27

²⁰ "Myanmar: A new Muslim Insurgency in Rakhine State", International Crisis Group, 14 December 2016.

²¹ Over the past decades, the Myanmar Army's counter-insurgency strategy has been facilitated by a color-coded classification system that dictates how soldiers interact with civilians in particular areas. Historically, Myanmar's territory has been labelled by the military with one of three colour designations—black, brown, or white—based on the extent of government control. Black areas have been those areas in which government control is weak or non-existent. Brown areas have been places where government control is challenged. White areas have been places where government control is strong. The boundaries between the different territories have been precisely defined, often running along geographic features or landmarks. Former soldiers, including one interviewed by the Clinic and others interviewed by the Clinic's expert declarants, recall seeing maps with "black" or "enemy controlled" areas clearly identified²¹.

Once an area is declared as a "black area" all civilians living in that area can be evacuated upon decision by the army, without prior notice nor any notification to the civilians of where they should go to and if/when they can come back. Furthermore, incidents of destruction and looting of property in these zones, once emptied, have been reported. Villagers who are not able to leave their home can end up being stranded for days in a high-intensity conflict area. Some who were traveling to these areas were shot at, as illustrated by the recent incidents in Hpakant and Mansi. Military checkpoints are usually established around the village and landmines planted at a very close distance to the civilians' residences and community buildings (e.g.; schools).

Geographic colour designations have historically corresponded with different rules of engagement for military personnel operating in those areas. In black areas, Myanmar military personnel have been under fewer constraints, particularly with regard to the use of force. The central feature of military conduct in black areas has been the rejection of the principle of distinction, a key tenet of international humanitarian law that requires soldiers to distinguish between civilian and military targets and refrain from attacking the former. In black areas, soldiers have been instructed that individuals present within those areas who are not Myanmar military personnel are "the enemy" and can therefore be targeted regardless of their age, gender, proximity to opposition forces, and whether they are carrying weapons - "War Crimes and Crimes against Humanity in Easter Myanmar" – Legal Memorandum, IHCR - Nov 2014 and "Preventing Indiscriminate attacks and wilful killings of civilians by the Myanmar Army" – Policy Memorandum, IHCR - March 2004.

In addition and complementary to the issue under analyses, it could be useful to mention **Article 4 of Additional Protocol II of the GC²²** related to *Fundamental Guarantees* requires the parties to respect all persons not directly involved or no longer taking part in the hostilities, and states that *“they shall in all circumstances be treated humanely without any adverse distinction”* while **Article 13** sets out the principle of distinction, specifying that attacks on groups of the population and individual citizens are prohibited in all circumstances, as are threats of violence and finally **Article 17** states the *“prohibition of forced movement of civilians”* and *“displacement shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand”*.

Linked to the latter mentioned article whose key concept is the provisional, limited in time and minimum duration and some of the humanitarian consequences mentioned in section 2 of this analyses²³, these are relevant rules that might be interpreted under **Customary IHL**:

- **Rule 129 B**: "Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or *imperative military reasons* so demand.";
- **Rule 131**: "In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated .";
- **Rule 132**: "Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist".

Both the **Universal Declaration of Human Rights (UDHR)** and the **Guiding Principles on Internal Displacement** are meant to ensure that both internally displaced and host community can move freely and rights related to freedom of movement are being respected;

Article 13 of the UDHR states *“Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.”*

Principles 14, 15, and 28(1) of the Guiding Principles on Internal Displacement intend to ensure that displaced persons are able to move freely during displacement, both to avoid unsafe situations and to undertake necessary travel. Displaced persons, in principle, should be able to choose where to live while displaced and to voluntarily choose whether and how to return.

While as Protection and humanitarian actors, the PWG will naturally refer to the above instruments and protocols, it must be noted that there also exists within the Myanmar national legal architecture, provisions and precedents which might (unsatisfactorily) be used to justify the contraction and even abuse of these basic rights which we seek to promote and protect, particularly with regard to restrictions on civilians.

The PWG is extremely concerned about recent developments in Kachin State in light of the concerns and incidents raised above²⁴. The PWG, as mention, refers in particular to **Section 17, sub sections 1**

²² Even though Myanmar has not signed the Additional Protocols to the Geneva Conventions, it is still bound by the provisions, since the Additional Protocols are considered to be Customary International Law.

²³ Rule 133: "The property rights of displaced persons must be respected."; (also: Guiding Principles on Internal Displacement, number 21)

²⁴ These concerns are exacerbated by recent developments in other parts of the country such Northern Shan State (NSS) and Northern Rakhine State (NRS) whereby military operations have been justified within the framework and legislation of the country's Constitution and attendant body of law but seemingly contrary to the standards and protocols set to and by international human rights and humanitarian bodies and actors.

and 2 of the Unlawful Associations Act²⁵ which, in the absence of due process and rule of law, leaves any and all civilians in a conflict zone open to accusations association with an EAGs and therefore susceptible to arrest, detention and sentencing on same.

Of emerging concern are calls from Myanmar Army and some elected government officials to have EAGs including the KIA designated as terrorist groups which could further shrink legal grounding and discourage EAGs from ongoing, partial adherence to IHL, IHRL and the Union laws of Myanmar.

The National Ceasefire Agreement (NCA)

During the NCA negotiations, agreement was reached to remove all Ethnic Armed Organizations that are signatories to the Nationwide Ceasefire Agreement from the list of unlawful associations. The NCA states that *“no person (or) organization associating with the signatories to this agreement shall be subject to prosecution under the Political Parties Registration Law or Unlawful Associations Act. After the signing of this Nationwide Ceasefire Agreement, any person charged or detained for alleged association with Ethnic Armed Organizations under the Unlawful Associations Act, shall be released in accordance with the law²⁶”*. However, the Kachin Independence Organization (KIO)/ Kachin Independence Army (KIA) is not part of the Nationwide Ceasefire Agreement and therefore does not enjoy the immunities under this agreement.

There is certainly precedent for and legal opinion on rights abuses on non-NCA locations in recent history as detailed in the report *‘Legal opinion regarding abuses against civilians in non-ceasefire areas as potential violations of the Myanmar Nationwide Ceasefire Agreement’* by The International Human Rights Clinic at Harvard Law School²⁷ This should be looked to in terms of both conceptualizing the current situation and understanding how it relates to infractions on IHL and IHRL.

Conclusions

The combination of restrictions on the freedom of movement of civilians, restrictions on humanitarian access, and the intensification of the conflict in Kachin State is putting a tremendous pressure on the civilian population, particularly on IDPs and most especially on those residing in KCA. Many civilians find themselves in situation where they cannot access basic services, cannot reunite with family members and most importantly cannot be assured of or seek protection and safety- nor can they feasibly plan or live a life beyond the constraints of the protracted displacement and, in many cases, impoverishment. This situation has prevailed since 2011 and but is particularly exacerbated during 2016 and, for IDPs in hot spot areas, has reached a critical and untenable level in December 2016.

All civilians must be assured of freedom of movement, freedom of access to services and protection and when movement restrictions applies due to *imperative military reasons*, it shall be provisional, limited in time and reduced to minimum, what does not seem to be the case currently in Kachin.

[END]

²⁵ , *“Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assist the operation of such association, shall be punished with imprisonment for a term which shall not be less than two years and more than three years and shall also be liable to fine”...“Whoever manages or assists in the management of unlawful association, promotes or assists in promoting a meeting of any such association, or of any members there of as such members, shall be punished with imprisonment for a term which shall not be less than three years and more than five years and shall also be liable to fine”*.

²⁶ Chapter 6 of the Nationwide Ceasefire Agreement, Future Tasks Confidence Building Measures.

²⁷ <http://hrp.law.harvard.edu/wp-content/uploads/2016/10/NCA-Violations-PDF-Final.pdf>