

War, Law, Politics: Reflections on Violence and the Kachin

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LONG-RUNNING DISPUTES BETWEEN Myanmar's governments and the country's ethnic minority peoples are a messy knot of politics, culture, economics and law. To disentangle this knot requires understanding of the nature of political power and legal authority in Myanmar. To explore why political forces are so overwhelmingly important to the understanding of Myanmar's legal environment, this chapter examines the recent history of war between the Myanmar government and the Kachin Independence Army/Organisation (KIA/O). The war that is described here commenced on 9 June 2011 with the breakdown of a 17-year ceasefire between the two sides. It was an often brutal conflict across the mountains and valleys of northern Myanmar. A new and tentative ceasefire was agreed in May 2013, followed by rounds of further negotiation. The current cessation of hostilities – as hesitant and incomplete as it remains in late 2013 – further illustrates the convoluted character of conflict resolution in situations of prolonged inter-ethnic war and mistrust.

The unravelling of the 1994 ceasefire left a festering political and security crisis in the north of Myanmar. That ceasefire had proved a linchpin of national strategy and regional security. Like many other such deals, it had legal and political implications under Myanmar's former military regime, the State Law and Order Restoration Council (SLORC)/State Peace and Development Council (SPDC), which used the arrangement to guarantee access to the rich mining, timber and hydro-power resources of the Kachin and Shan States, and to facilitate easy trade to south-western China. The arrangement was unfinished, perpetually, and thus defined by the limitations of an agreement that did not quite meet the threshold for peace and yet avoided the worst excesses of war. For those who lived under the ceasefire it was an inelegant and often unsatisfactory compromise. Resentment about its management was widespread. In parts of northern Shan State and across the Kachin State the local population made no secret of their discontent. Nonetheless the agreement was maintained because it helped to ensure economic enrichment, while dampening the prospect of reignited conflict. During the ceasefire period, the opinion that further violence would be too destructive and disruptive tended to prevail.

* This chapter draws, in part, on research conducted for two theses completed at the University of Oxford (Farrelly 2007, 2010), while the author was a Rhodes scholar at Balliol College. It is supplemented by research undertaken as a Research Fellow at the Australian National University, and completed under the auspices of an Australian Research Council Fellowship.

To understand how the Kachin ceasefire dissolved and the character of the violence that followed, this chapter argues that the creation of a strong legal basis for conflict resolution has not been a priority in Myanmar, and that political considerations have instead proved paramount. The legal basis of ceasefire agreements has been subordinated to the significant political and economic concerns that have given them momentum and purpose. What such ceasefires indicate is that parties to conflict are prepared to invoke a style of legal argument when it serves their needs, yet perceive such techniques as almost entirely instrumental. This might be a consequence of bureaucratic habit on the part of the Myanmar authorities and a lack of confidence in official agreements on the part of the Kachin leadership. Where these two groups often meet is an unstable middle ground, dominated by repeated jousting, unconsummated aspirations for settlement, and belief in the intrinsic superiority of their own positions. As a context in which the mechanics of legal dispute resolution are deployed, the Kachin situation has one crucial, and often unrecognised, element: the deployment of organised violence for political purposes.

This chapter begins with a brief overview of the modern history of armed conflict in Kachin areas of northern Myanmar. This is followed by an interrogation of the ceasefire agreement between the KIA/O and the Myanmar government in order to highlight some of the reasons that the arrangement broke down in 2011. This leads to a series of reflective analyses that seek to position the argument about the relationship between politics and law in ways that are meaningful for an understanding of the special circumstances of the Kachin conflict. This effort to explain Myanmar's long history of lurching between peace and conflict, often existing in an un-demarcated middle ground, is founded in the relationships established between war, law and politics. This presents a number of problems for the analysis of such conflicts when the prevailing assumption – at least among some outside observers – is that the solution will be forged in a legal settlement. This chapter suggests that a different approach to understanding and managing ethnic conflict in Myanmar is required. At a time when serious consideration is being paid to the relationship between peace and democracy (see Nilsen 2013), this chapter suggests a fresh understanding of the variety of ways that law and war have interacted over time.

HISTORY OF CONFLICT IN NORTHERN MYANMAR

While there have been episodes of warfare in northern Myanmar for centuries, the widespread use of modern weaponry and military doctrine began in World War II.¹ At this time the British colonial government had 'controlled' northern Burma for 60 years, and many Kachin had already converted to Christianity from their earlier animistic beliefs, yet it was only the global conflagration that forced the *Jinghpaw Wunpawng* (the united Kachin) into mass contact with the modern world. During the war, almost all Kachin groups allied with British and American forces against the Japanese and their Burmese collaborators.² Allied airbases were established in the Kachin State and Kachin guerrilla units, specialising in combat behind Japanese lines, distinguished themselves in battle (Zedric and Dilley 1996: 146; Myihto Gam Awng 2000: 41–43). Fierce fighting in Kachin

¹ For an account of the eve of this period see Sadan 2010.

² One Kachin chief who sought to align with the Japanese was Sima Duwa Naung, a Buddhist, who is often described as the 'only' Kachin who worked closely with the Japanese during the war.

areas (see for example Hpan Ja 2001: 195) led to the consolidation of a 'modern' Kachin military ethos (Lahpai No Seng 1988: 20–23; Hpauwung Tang Gun and Chyauchyi Naw Ja 2003: 3; Naw Ja 2004), galvanised by 'spectacular tactical combat success' (Paddock 2002: 27).

Upon Burma's independence from Britain in 1948, many Kachin soldiers expected that their efforts would be recognised in a democratic and federal administrative structure. Their hopes were forged by a legal document, the Panglong Agreement, signed in 1947 between the pre-independence Burmese, Shan, Kachin and Chin leaderships (Tucker 2001: 128–29). Kachin hopes for a just reward ended in 1961 when many saw the proposed imposition of Buddhism as the state religion as an affront to what, by that stage, had become a very widespread and deeply-held Christian faith (Freston 2004: 95; Gravers 1999: 57; Johnson 2005: 65–66).

In direct response to their lack of autonomy under post-colonial Burmese rule, the Kachin rebellion began in 1961 to counteract the central government's twin impositions of 'Burmanisation' and Buddhism. Fuelled by resentment against Burmese dominance in national affairs, and rumoured to enjoy 'political and military support' from China (Trager 1969: 107), the KIA grew into a potent force of over 6,000 soldiers (South 2003: 166). They were 'one of the best organized and motivated rebel groups' (Seekins 1997: 536). The KIA's many battles with the government provide illustrations of Kachin martial abilities (Smith 2006: 42). During more than three decades of insurgency they used 'World War II guerrilla-tactics . . . in virtuosic fashion' (Scherrer 2003: 119; 'Jinghpaw Rangers' in Withers 2011: 59, 62–63). In an audacious 1985 KIA operation, for example, the highest-ranking ethnic Kachin officer in the Burmese Army, the Northern Commander, Brigadier General Lazum Khun Phan, was assassinated (MacDougall and Wiant 1986: 192–93). With such combat success came power and wealth. The KIA defied the central government by 'at times controlling half the Kachin state' (Freston 2004: 96), making the Kachin the most successful anti-government force in the country. Over the years, weaker insurgent groups from other parts of Burma flocked to KIA areas for training and protection (Rajah 1998: 136), as did some anti-government elements from across the border in north-east India (Goswami 2012: 188–89).

Nonetheless, the Kachin insurgency began to falter in the late 1980s under the weight of geopolitical and tactical shifts. In 1987 a series of major central government military successes in the southern Kachin State led to the 'capture of all KIA bases along the southern portion of the Burma-China border' (Haseman 1988: 226). Then in 1989 two Kachin officers, Zahkung Ting Ying and Layawk Zelum, formed the New Democratic Army – Kachin (NDA-K): a 'ceasefire army'. After their agreement with the Myanmar government they were given rights to 'legally' administer an area in far eastern Kachin State called Special Region 1. In 1991 the fourth Brigade of the KIA followed by mutinying to create the Kachin Democratic/Defence/Development Army (KDA).³ They also promptly agreed a ceasefire with the Myanmar authorities and were permitted to administer their own Special Region. Both of these armies – which the SLORC/SPDC called 'ceasefire groups' – remained relatively small and never enjoyed the support of most Kachin, who maintained strong attachments to the original, KIA-led insurgent movement. Drawing on his recent research among Kachin activists, Henry (2011: 110) explains

³ The KDA's full name changed repeatedly as the ceasefire context has required different stances. Since early 2007 the title 'Kachin Development Army' has usually been deployed by the official Myanmar media, although some of the older designations were still in use in more recent times.

that the ‘Kachin [research] participants, all from non-armed groups, said that the KIO had enjoyed broad community support since its formation, with one saying “the KIO is the heart of our Kachin people”’.

Such sentiments were tested, however, in 1993 when the three remaining KIA brigades were negotiating their own ceasefire settlement with the Myanmar government. The deal was naturally contentious, although the Kachin elite determined that it was in the best interests of Kachin society as a whole. It was ‘finalized on 29 September when Maj-Gen. Zau Mai⁴ met Myanmar’s powerful military intelligence chief, Lieut. Gen. Khin Nyunt in Myitkyina’ (Lintner 1994: 427). The final agreement was signed on 24 February 1994 (Lasi Bawk Wa 2001: 95; South 2003: 167). It has been suggested that Chinese pressure led the remnant KIA brigades to negotiate this truce (Sik 1995: 382; Freston 2004: 96; South 2003: 166). It is also commonly accepted that the ceasefire was agreed because, after decades of fighting, there was a stalemate in ‘a war that neither side [could] hope to win’ (Karan 2004: 278).

THE KACHIN CEASEFIRES

That ceasefire provided numerous advantages for both KIA/O and Myanmar leaders. The agreement was that ‘the KIO/KIA continue to administer about two fifths of Kachin State – the territories that had remained under its control by the time of signing the ceasefire agreement’ (Grundy-Warr and Dean 2003: 88). Under the terms, the KIA/O were also granted special privileges to manage a semi-autonomous region called Special Region 2, which included their current headquarters at Laiza near the Chinese border in far eastern Kachin State. The ceasefire was supposed to give the KIA/O the ‘inside of any political process’ and so fortify Kachin interests in the military stalemate (Smith 2006: 51). During the ceasefire years, in the Special Region – and sometimes elsewhere in the Kachin State – Kachin soldiers wore their drab-green uniforms with distinctive crossed-sword shoulder patches, and were sometimes seen carrying weapons.

At the same time, many Kachin were not content with the ceasefire. In 2004 the KIA was dealt a blow by the assassination of its Deputy Chief of Staff, an attempted coup at its Laiza headquarters and the defection of its intelligence chief, Colonel Lasang Awng Wa, who left to form his own ‘KIO/KIA splinter group’ – often referred to more extravagantly as the *Lasawng Awng Wa Nyein Chan Yei Apwe* (Lasang Awng Wa Peace Group). As Kurt Lambrecht (2004: 167) has suggested, ‘the regime’s claim that the ceasefire agreements are indicative of national unity [was] belied by the fractious nature of cease-fire politics’. Conflict among factions in the Kachin independence movement – and significant internecine strife including coups and assassinations – only increased as dissent about the ceasefire strategy grew. Dean (2012: 130) has provided an accurate assessment of the effect of the ceasefire across Kachin society more generally:

The ceasefire of 1994 greatly changed the structure of security/insecurity. The military government has succeeded in generating the feelings of insecurity amongst many Kachin who live in towns and villages in the Tatmadaw⁵ controlled areas. The physical presence of uniformed soldiers and the army camps in Kachin State serves as a constant reminder of direct Myanmarese

⁴ Zau Mai was then the deputy Chairman of the KIO.

⁵ This is Burmese for ‘Defence Services’.

State domination. Feelings of insecurity predominate as villagers remain vulnerable to the army's 'legal' yet illegitimate practices.

The challenge faced by the Kachin leadership during these years was that while they needed the ceasefire to support local economic and cultural activities, at a political level it became increasingly difficult to justify. Many prominent Kachin became outspoken opponents of the ceasefire and its implications for what they still considered the rightful campaign for greater Kachin autonomy and, indeed, self-determination.

The next challenges to the ceasefire and its status emerged after the promulgation of Myanmar's new 2008 Constitution. That Constitution was designed to integrate ethnic political movements, such as the KIA/O, into a single, national political and legal order. It was the culmination of a long-term legal and political reform agenda in which members of the KIA/O had actively participated. As Lieutenant Colonel Hla Min (1998: 39) once explained, 'The military government is systematically moving towards the main objective of a modernized, well-developed and peaceful nation within a consolidated union and supportive economic infrastructure'. Their progress towards that objective had been frustratingly slow, with a series of erratically scheduled National Assemblies, yet once the agreement was made there was some hope that further progress towards a federal union would be possible. As I explain elsewhere (Farrelly 2012a), there was an appetite for conciliation and compromise among the Kachin leadership. When, in the lead-up to the 2010 general election, leaders from the KIA/O formed a new political party, the Kachin State Progressive Party (KSPP), the optimism among many Kachin was palpable (on the 2010 elections, see Lidauer and Saphy, this volume).

For the Kachin, the challenge of working with the Myanmar government was complicated by their internal divisions and close links to the Myanmar Army. The KIA/O remained the most significant Kachin military and political force but it faced challenges from the NDA-K, headed by Zahkung Ting Ying, and from the Lasang Awng Wa Group, which had splintered from the KIA in 2004. Named after a former KIA intelligence supremo, this group's independent status was symptomatic of the internal conflict that occasionally ruptured the KIA/O. There were also sporadic outbreaks of factional brawling among the KIA/O leadership itself, some of which led to dramatic purges of senior officials. Throughout such turbulence, the Myanmar Army's Northern Command remained a constant presence in the life of the KIA, with regular delegations travelling between the two sides. On special occasions, such as at the Kachin State Day Manau festivities, held around 10 January each year, there were opportunities for the two sides to mingle and share confidences. These occasions were well lubricated by the hospitality of Kachin economic leaders benefiting from the concessions, especially in mining and logging, made directly possible by the ceasefire between the Kachin and Myanmar sides.

In the end, the nexus between Kachin military and political interests motivated the Myanmar side to call for the demobilisation of autonomous KIA forces. During a series of tortuous negotiations from 2008 to 2010 the KIA/O and Myanmar failed to come to an agreement on precisely how the Kachin armed group would be integrated into Myanmar's national security forces. This precipitated a crisis where the KSPP was barred from contesting the November 2010 election, leading to victories by the military-aligned Union Solidarity and Development Party (USDP) in most of northern Myanmar's Kachin-dominated constituencies. As tensions grew in late 2010 and the early months of 2011 it appeared that new conflict was likely. Then, a number of otherwise insignificant

incidents between KIA and government forces led to the formal breakdown of the ceasefire on 9 June 2011. This came at a time when the government was facing a number of ‘diminished but not yet exhausted’ conflicts along its eastern borders (Ball and Farrelly 2013). If, as Dean argues, ‘the ultimate aim of the ceasefires has been to gradually disarm and weaken the ethnic political resistance groups’ (2012: 130), then the resumption of hostilities in Kachin areas was a test of the KIA/O’s frailty.

THE END OF THE CEASEFIRE

Before its implosion, analysts tended to concur that the Kachin ceasefire was not predicated on shared understandings of a legally enforceable agreement but rather on the distribution of various economic and political opportunities. Those arrangements meant the Myanmar government could work alongside Kachin interests to share the resources available in Kachin areas. At the top of the list for the division of these spoils were the jade mines centred on Hpakant in western Kachin State. From the mid-1990s, a new generation of Kachin, Chinese and Myanmar business interests coalesced to exploit the booming Chinese demand for imperial green jade and its lesser, yet still precious, cousins. One jade catalogue describes the area as the ‘world’s most significant jadeite tract . . . among some of the most inaccessible forested terrain’ (Holmes 2005: 26). The profits available to those who controlled major stakes in the mines were incredible, and a sprawling workforce was accommodated in the informal settlements around the mining sites. Over time, heavy equipment was imported to support the mining operations and with it a new, sophisticated approach to the industry emerged.

This was only possible because of the ceasefire. During the years of conflict that followed the 2011 resumption of hostilities, Myanmar’s jade production suffered. For a period, the government-sponsored jade auctions, held at regular intervals in the new capital of Naypyitaw, needed to be suspended because of the paucity of supply. The ceasefire itself was intimately linked to the jade industry and it is no coincidence that, at the elite level, wealth from the mines helped to lubricate the interactions of the two sides. For the Kachin, the links between this new wealth and the ceasefire were apparent. Kachin mining conglomerates such as Jadeland Myanmar (discussed at some length in Farrelly 2007) became readily associated with economic, cultural and political success. Their leaders were well-recognised figures in Kachin society and worked consistently to establish themselves as facilitators of political and cultural interaction.

In general, the KIA/O ceasefire provided enough space for the two sides to develop mutually beneficial and reinforcing interactions. These interactions gave the Myanmar government an opportunity to consolidate its military presence in northern Myanmar, especially in areas near Myitkyina, Bhamo and Hpakant. Lands near the Kachin State capital of Myitkyina were re-fortified with the garrisons of new battalions, and the entire system was consolidated around the control of the Myanmar Army’s Northern Command. Its soldiers, with their distinctive upwards-facing arrow, were a daily presence on the streets of places like Myitkyina, where they mingled with a population that increasingly reflected the migration policies of the government. Ethnic Burmans (*Bama*) from elsewhere in Myanmar were encouraged to seek residence in Kachin State, with provisions made for their relocation to new residential areas, and many took the opportunity to develop new lives around this northern frontier. The way that inter-ethnic

interactions emerged and were consolidated gave the illusion that there was a final and formal *détente* between the Kachin and the Myanmar side. Below the surface, however, the ceasefire was precarious.

That fragility became particularly apparent in the lead-up to the 2008 constitutional referendum. The Kachin leadership, emphasising their KIA/O ties, had participated in the drawn-out constitution drafting process and were, in general, optimistic that they could tolerate its provisions and limitations. The years of ceasefire had provided lessons in the advantages of staying close to Myanmar decision makers and working to support their intentions. After the promulgation of the Constitution, the KIA/O struggled to obtain approval for their political party to run in the 2010 election, frustrating their efforts to be full partners in the electoral process. Rounds of negotiations failed to achieve the desired compromise, with the government insisting that the new KSPPP sever all links to the KIA. Given the background of leading figures in its establishment, this would prove an impossible demand. Notwithstanding the impracticalities of the government approach, many on the Kachin side also hesitated to provide such a ready surrender to Myanmar demands. Other ethnic parties generally managed to convince the authorities that they could be included without undue risk, with dozens of ethnic political parties contesting the 2010 poll. Most of these parties ultimately had members elected to legislative bodies at both local and national levels.

After missing out on the opportunity to secure a modicum of legislative representation, it was apparent by early 2011 that Kachin politics, as an exception to the overall pattern of post-election integration and collaboration, was entering a new and dangerous phase, with the prospect of conflict looming once more (see Farrelly 2011a). Early clashes between KIA and government forces led to the full resumption of hostilities in June 2011. The proximate cause of this renewed conflict was a dispute over border security but there was no doubt that the preamble to the conflict, based in the long and fraught years of ceasefire, was the fundamental issue. Leaders from the government and Kachin sides then took to their familiar positions of accusation and counter-accusation as violence escalated and the prospect of a quick resolution faded away. At no stage in this process was adherence to the law the fundamental issue – indeed it is hard to determine whether there were any legal grounds for the new war. Instead, throughout the lead-up to the new war, there was a consistent problem of political negotiation failing to fully reconcile different political positions. As Holliday (2013: 93) succinctly put it, ‘problems amassed during five decades of military misrule proved resistant to rapid resolution. National reconciliation with ethnic groups gained no purchase in Kachin State’.

Over time, the notion of reconciliation in the context of the end of the 17-year ceasefire became tied to the invocation of the Panglong Agreement – the foundational ethnic pact signed back in 1947. This legal and political covenant has taken on great significance for the Kachin, while the Myanmar side has sought to downplay its contemporary role. There are good strategic reasons for emphasising the status of this document, especially at a time when the government enthusiastically ties itself to General Aung San’s independence legacy. It is in this context that ‘Panglong’ has taken on mythical status for those who have struggled for the rights of ethnic peoples in a federal union of Myanmar, and who consider the agreement signed with Aung San before his assassination to be the linchpin of future peace and security. The idea that the Panglong Agreement determines the regulation of ethnic politics is one that has developed organically, spurred also by the expectation that if Aung San Suu Kyi ever takes power she will be more inclined to

acknowledge its inclusive spirit (see Diamond 2012). Nonetheless the Myanmar government has consistently rejected the notion that this decades-old document is relevant to today's peace negotiations and, in particular, to the Kachin conflict.

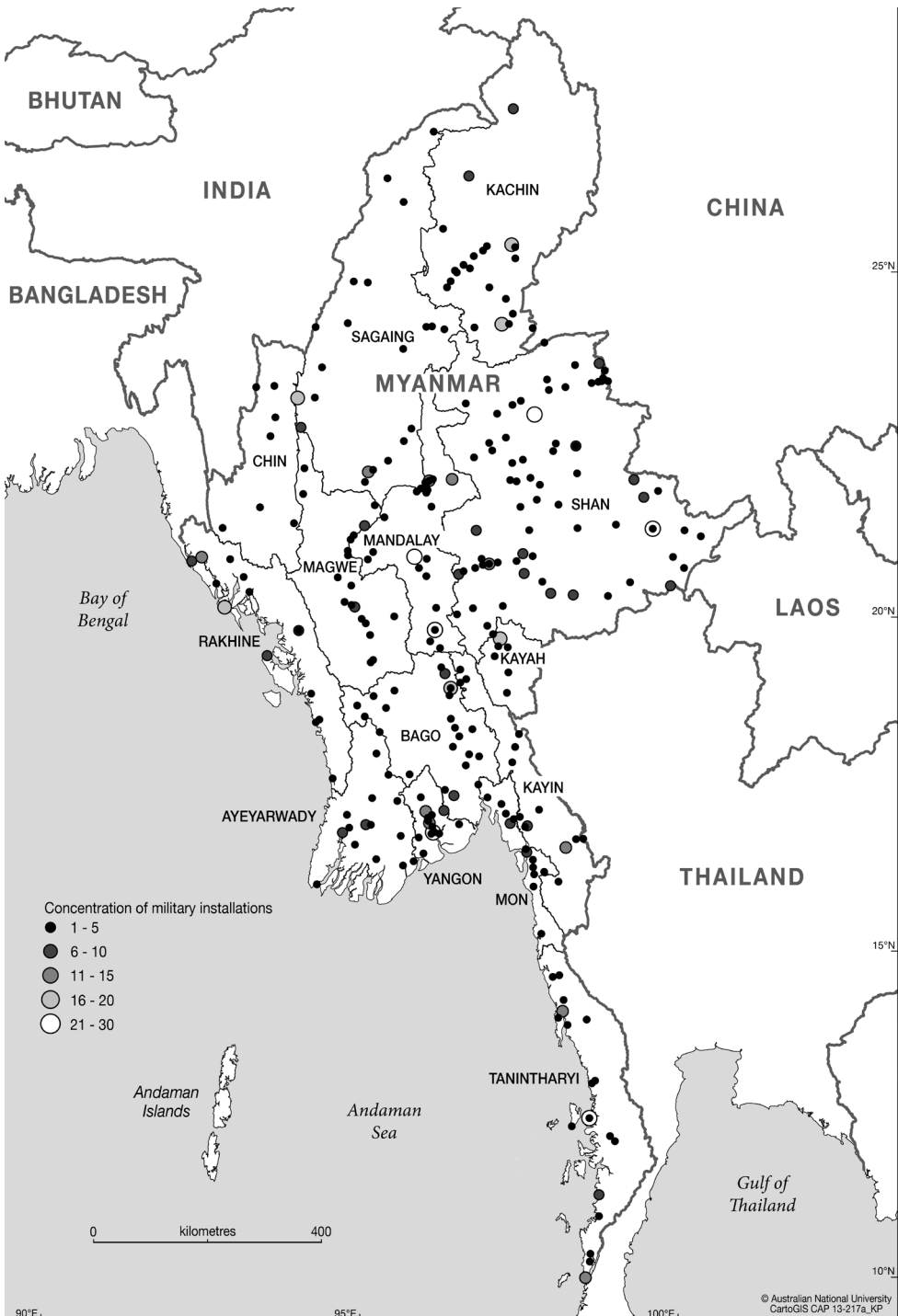
There may come a time when the Panglong Agreement, or some reincarnation, is central to the outcomes of ethnic politics. For now, however, in the calculus of risk and reward that determines Myanmar government decision-making and the agendas of ethnic political leaders, it is the use of violence, rather than legal argument, that has mattered. Part of the reason that violence and politics have become so intimately enmeshed is that the two sides have not developed shared understandings of legal mechanisms and are continually exasperated by different understandings of these issues. This is partly a consequence of the way the Myanmar armed forces have spread themselves across the length and breadth of the country since seizing power in the coup of 1962 (Farrelly 2013a). There are few areas that are not home to at least some bases belonging to the Myanmar Army. These range from relatively modest outposts to much more significant facilities. It is those more significant facilities that are presented in Map 1. It shows that there are large numbers of major Myanmar Army installations in the crucial parts of eastern Kachin State and northern Shan State that are designed to limit the freedom of movement granted to the KIA/O. There are few other parts of the country where so many military installations are concentrated.

A WAR OF AMBUSH AND NEGOTIATION

The preponderance of Myanmar military deployments to the northern Shan State and the eastern Kachin State meant that, once the ceasefire collapsed on 9 June 2011, the two sides were ready for war, with men and materiel close to the frontlines. They had been preparing for years. Nonetheless, during the early phase of the new war there were opportunities to de-escalate the violence. Over a number of days the two sides were forced to consider the alternatives to renewed war. These were not embraced for a number of reasons, including the fact that the two sides moved quickly to reinforce themselves. A shroud of ambiguity, uncertainty and denial soon enveloped much of the day-to-day conflict, although more spectacular operations, such as those launched by KIA operatives around Myitkyina, received widespread media attention (Farrelly 2011b). The escalation dynamics in such a conflict are difficult to generalise because it is decisions made at various levels of command that make violent action possible. For the Myanmar side, the challenge was to defend against the ferocious attacks of small bands of well-trained, heavily armed and highly motivated KIA fighters (see KNG 2011). These fighters used the tactic most readily at the disposal of guerrilla forces the world over: ambush. In a war its legal status is relatively clear. It is legitimate to use surprise and audacity to mount offensive operations against an enemy. The legal status of the war between the KIA and the Myanmar Army was, however, never clarified to the extent that all ambiguity could be eliminated.

For the KIA, the most effective way to ensure it extracted a price from the Myanmar Army for its incursions was to use its roaming squads, often with only a handful of members, to attack mobile Myanmar Army units. Some of these ambushes resulted in large numbers of Myanmar dead, and in most cases the KIA managed to extract its

Map 1: Concentration of Major Myanmar Military Installations



forces without suffering casualties.⁶ The aftermath of some attacks was later broadcast on Youtube, a new outlet that allows KIA combat to be digested by a wider audience. The success of these guerrilla tactics, honed now by generations of KIA fighters, ensured that the Myanmar side needed to be wary of unnecessary manoeuvres in vulnerable areas. As the scope of KIA activity widened, such areas spread into vast swathes of northern Shan State and right across the Kachin State. The KIA mounted audacious raids targeting Myanmar supply lines, and in the process attacked railway and shipping infrastructure. This was a stark reminder to Myanmar commanders of the incident in 1985, when the Northern Commander was killed by the KIA in a brazen attack. In September 2012 a member of the assassination squad, Lahpai Zazu Seng, was released from prison after serving a 27-year sentence (Lawi Weng 2012). On his release he signed a document stressing that he would work for the peace and development of the country.

Despite such gestures, the ambushes in rural areas of the Kachin and Shan States continued, and both sides sought to fortify their positions and bring in heavier weaponry. Sometimes the sporadic ambushes would lead to prolonged battles between the two sides, and on occasions there were days-long engagements. Under these circumstances, the KIA would often struggle to maintain the battlefield dominance that it enjoyed in opportunistic raids on Myanmar patrols and outposts. Instead, Myanmar artillery and, occasionally, airpower was arrayed against KIA positions. The Myanmar media, especially government-controlled daily newspapers such as *The New Light of Myanmar*, worked to undermine the story of heroic KIA operations (Farrelly 2012b). They downplayed Kachin success and sought to undermine community confidence. Part of the strategy involved trumpeting any signs that the KIA was, once again, facing internal disunity. In official announcements the Myanmar government tended to use the phrase ‘return to the legal fold’ to describe the surrender of KIA personnel (see MRTV3 2012).

The legal basis of the ambush and negotiation dynamics was often difficult to discern. Indeed, during the first year of the war the Myanmar government wrong-footed some of its critics when it suspended construction on the Myitsone dam, at a site north of Myitkyina. This unilateral presidential decision came in the wake of widespread criticism from environmental and ethnic activists. The US\$4.6 billion Chinese-backed hydro-electricity project has since fallen into abeyance. According to Kyi Phyo Wai (2012: 47), ‘Conquering the controversial Myitsone dam project was a rare victory by local Kachin and Burmese people and was a serious test for the new civilian-led, military-backed government in Burma (Myanmar)’. The decision once again reinforced the political basis for making decisions in Myanmar. It has never been clear that any legal justification could be mustered for this abrupt move against the Chinese project. In a context where politics has tended to overwhelm other priorities the final phase of the war is telling.

In the last months of 2012 the conflict between the KIA and the Myanmar government began to escalate with more intense and prolonged engagements. After long appearing prepared to accept the fixed Kachin positions along the Chinese border, the government ramped up its attacks. These led, during a difficult period in December 2012, to intense bombardments of Laiza, the KIA/O’s de facto capital, and the surrounding areas of

⁶ For some early estimates of casualties in the 2011–13 Kachin war, see Farrelly (2011c) and Bo Hmu Gyi (2011). Reliable figures are not available for the conflict as a whole but there is appreciation on both sides that the combat death toll was very significant. As one Myanmar government figure told the author in 2013: ‘We don’t know how many died but it is too many, always too many’.

dense Kachin military deployments. Protecting Laiza became the KIA's final priority against an onslaught of ground and artillery attack. In some places, these assaults were supported by the Myanmar air force, which used its attack helicopters to intimidate KIA positions. The use of air power against the KIA was considered 'ungentlemanly' but when civilians were killed in these aerial raids the Kachin saw the international media pay more attention. Calls for restraint went unheeded as both sides struggled to consolidate their positions. The need to gain the upper hand before any further negotiations began appeared paramount.

And then the real negotiations began. The Chinese government, which had watched this war rage along its border, sought to play a more consistent role in the resolution of the violence. According to Sun (2013: 2), at that time 'Beijing [was] fully aware of the fact that the disintegration of the KIA is not in China's interests. Rogue Kachin guerrillas would no longer be restrained and might potentially attack any target they identify'. This concern saw the Chinese begin to play a more active role in discussions, hosting some of the key meetings between the KIA/O and the Myanmar government. Other international actors, most notably the United Nations, the European Union and the United States, also worked towards securing a reasonable settlement. The Myanmar Peace Centre – a semi-independent conflict resolution agency funded by foreign donors and supported by the Myanmar government – was heavily involved. A tentative agreement was secured by the end of May 2013, and with it a new chance to explain the relationship between law and war in northern Myanmar.

Explaining Law and War

On all sides, inter-ethnic civil war in Myanmar is authorised by executive powers that have been subjected to little legal scrutiny. Under the 2008 Constitution there are only modest mechanisms for Myanmar's legislatures to provide formal oversight of military activities, let alone active combat operations. The parallel structure established to quarantine military prerogatives from civilian control ensures that the Myanmar Army, in particular, is free to prosecute its national security mission independent of civilian oversight. Sensitivities about the military's role – especially given its dominance since the coup of 1962 (see Farrelly 2013a) – have yet to be accompanied by any diminution of its crucial role in government decision making. There are four key aspects of the relationship between law and war in Myanmar that require analytical attention.

First, the Myanmar military has excused itself from legal scrutiny and operates independent of notional oversight mechanisms. During the SLORC/SPDC period (1988–2011), the government and the military were fused to the extent that all meaningful power was subject to military and executive fiat. Senior General Than Shwe, who rose to hold the supreme position in the former junta, built a system where the hierarchy of the armed forces was mimicked by a parallel system of political control. This meant that, for example, the Northern Commander of the Myanmar Army was also the Chairperson of the Kachin State Peace and Development Council. In this dual role the region's senior military commander, usually a Brigadier or Major General, would hold significant political power. Since the reforms implemented by the Thein Sein government that began in 2011, many aspects of this former power structure have changed. Nonetheless, the military remains immune from the legislative, and even executive,

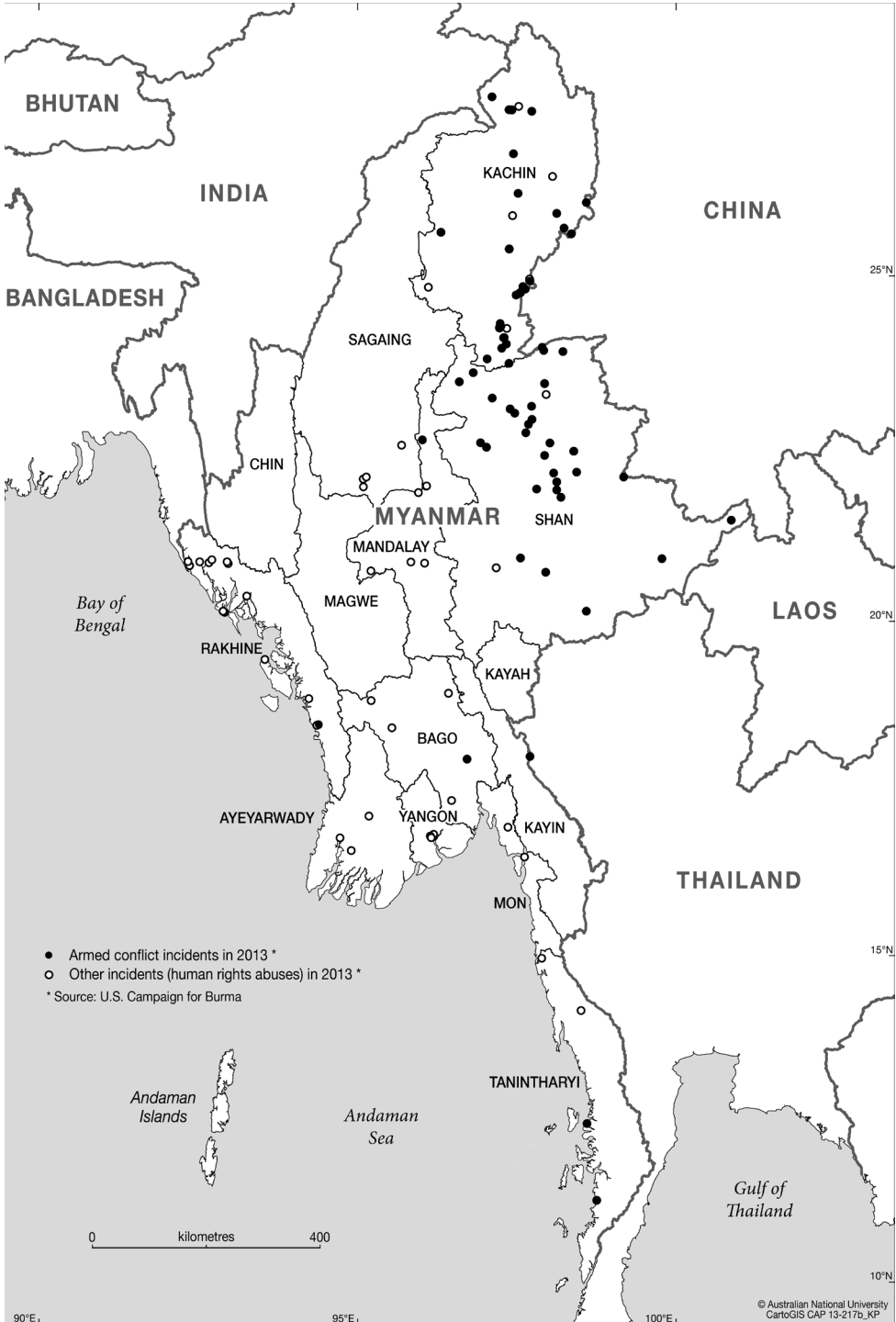
oversight that has emerged in other parts of government activity. Their prosecution of the war with the KIA is an example of the structure at this stage. The supreme National Security Council has replaced the SPDC as the premier forum for military leaders. President Thein Sein chairs the committee, yet its composition of serving and retired military officers means that the Commander in Chief of Defence Services has the weight of numbers and influence. Under these regulatory circumstances, there are few, if any, mechanisms for civilians to judge the internal decision-making processes of the army and its senior leadership.

Second, the war between the KIA and the Myanmar Army was pursued in an area where independent observers have struggled to receive regular or verifiable information (see Map 2). Along the Chinese border, many battles are only ever reported by partisan Myanmar or Kachin media. Both sets of sources can prove beneficial, although they need to be judged with respect to their role in conveying accurate information. The Internet has offered readers other sources of information although they are usually subject to the same limitations as official media sources. Other groups, usually faced with resource constraints, have endeavoured to consolidate and evaluate the various information sources that exist. Yet, taken together, there is no outlet for a comprehensive understanding of the Kachin war and its implications. This raises problems for those hoping to understand the variety of combat engagements that have occurred and the legal basis under which individual commanders or military units operate.

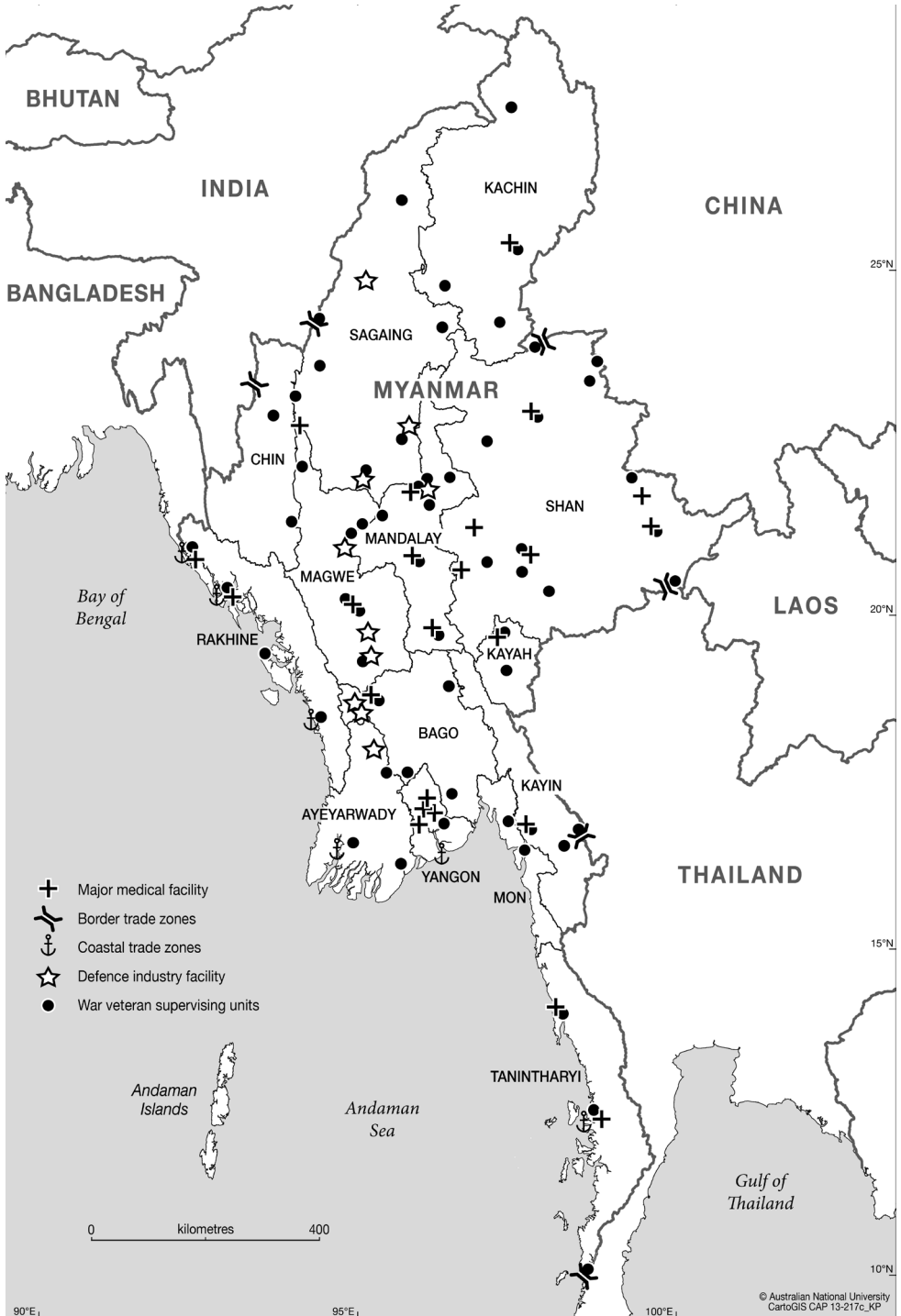
Third, the status of the KIA remains disputed by the Myanmar government. Alleged associates of the group have been prosecuted under the Unlawful Associations Act (1908) (see AHRC and ALRC 2013). The government still insists that the resolution of the conflict requires the KIA to accept legal restraints on its activities. This has an ironic resonance for some Kachin who consider that the KIA's role as champion of Kachin sovereignty and rights means it is the only legitimate government they will recognise. Furthermore, for many international observers, the aura of ethnic self-determination and resistance associated with the KIA makes them attractive for political support. Foreigners who have sought to assist the KIA have joined a long line of those hoping to offer transnational backing in Myanmar's messy wars (Farrelly 2013b). The predominantly Christian orientation of the KIA has also garnered regular interest from international missionary organisations and humanitarian organisations motivated to assist a vulnerable Christian population. Yet the KIA remains controversial in many ways and has not developed universal support, even among its own people. Before the commencement of the recent war it was common to hear scathing criticism of the KIA and its leadership, and resentment of their economic and recruiting practices. For some Kachin there is little difference between them and the Myanmar side, although those sentiments have been diluted by the ferocity of the new war.

Fourth, even during the years of ceasefire in Kachin areas, it is unclear whether the national law of Myanmar operated in a meaningful way in Kachin areas. The overlap of different political and economic interests in an unruly situation of inconsistent and tentative control has meant that legal recourse or sanctions have never been fully embraced. Map 3 offers an overview of how the area fits in economic terms in comparison to the rest of the country. In general, Kachin areas are governed more informally, and through the dominant institution of the Myanmar Army's Northern Command. This means that under conditions of conflict there are few foundations for making explicitly legal determinations of what occurs. As the map indicates, there are much greater concentrations

Map 2: Conflict in Myanmar, 2011–13



Map 3: Myanmar's Military Economy



of significant military interests, including economic ones, elsewhere in the country. In this context, the challenge is to determine on what basis law has any relationship to the overall pattern of political and social regulation. To be accused of breaking the law in Kachin areas is not necessarily a legal judgment, rather the political dimensions to any discussion of the law are paramount. In this context, the legality of war will remain a political determination, and one where histories of violence are fundamentally contested.

CONCLUSION

Since agreement for a tentative ceasefire between the Myanmar government and the Kachin was reached in May 2013 the two sides have moved into a new phase of negotiation, with further discussions occurring on a regular basis. This opportunity for a resumption of political dialogue has been welcomed by the international community as it seeks to influence the overall pattern of ethnic politics in Myanmar in what are widely considered to be more positive directions. There is, however, a lingering worry that without a resolution to conflict in Kachin areas a number of other ethnic conflicts will continue to fester. While violent incidents between the Myanmar and Kachin sides appear to have diminished there are still sporadic clashes, especially in areas where the demarcation of prevailing control is contested. To be clear, the agreement to halt offensive operations has not led to the end of all violence. The unstable situation that follows provides ready indications of the ways that legal and political agreements can interact with a long, and unresolved, history of conflict. The fundamental challenge for the Kachin and Myanmar sides has been to find structures for interaction that are mutually beneficial.

At a moment when discussions of the 'rule of law' in Myanmar have reached a new level of intensity, the appropriate application of legal mechanisms to the Kachin conflict remains unclear, although there have been legal appeals made in this context (see Crouch, this volume). Myanmar's civil wars have operated beyond either international or local legal norms, in a special category where violence and politics blur together. This category has proved amenable to long periods of ceasefire, supported by opportunities to make profit from situations of relative 'peace'. The political calculus for the Myanmar authorities, where military officers remain integral to political processes, has proved simple. Instead of justifying their decisions on the basis of legal precedents they have sought to find political solutions, founded in the need for continuing conversation between the different sides. This process has led to long-term stalemates, followed by periods of intense, and often violent, re-negotiation.

The recent war between the KIA/O and the Myanmar government has offered some further opportunities for analysts to consider the role of peacemaking in the Kachin context. In the Kachin example, the process of generating a permanent truce between the two sides has been exhausted by their duelling claims to overarching and incompatible legitimacy. For the Kachin leadership, renunciation of their most strongly-held positions is a difficult process. Slowly, and inconsistently, the Kachin have determined that secession is not a viable outcome and instead now habitually campaign for greater rights and autonomy within a federal union of Myanmar. Yet even that demand for a new legal settlement would require significant constitutional change and is considered unreasonable by many

on the Myanmar government side. Still, while reformists are in charge in Naypyitaw, the official rhetoric associated with the 2008 Constitution gives some hope to those who are inclined to consider federalism the only long-term solution to Myanmar's interlocking ethnic woes.

The relationship between law, war and politics has meant that the Myanmar government – in both its dictatorial and semi-democratic guises – finds negotiations a permanent state of affairs. Myanmar's stated need to maintain the unity of the nation state has been complicated by the fact that neither the Kachin, nor any other single group, can easily be isolated from the variety of other ethnic claims against the state. What is perceived to be good for the Kachin will need to be made available for the Mon, the Shan and others. The recent war between the KIA/O and the Myanmar Army therefore showed the other ethnic groups that they must be prepared for confrontation if they cannot work inside the prevailing legal and constitutional framework. For Myanmar's future peace, the challenge is to find mechanisms that will effectively depoliticise the ardently political claims made by all sides of these conflicts. The history of violent re-negotiation in Myanmar suggests that the character of these interactions defies management through conceivable legal frameworks. The Kachin example of war and ceasefire, negotiation and re-negotiation, provides ample evidence of the costs of political deal making. Legal commitments would at least provide greater certainty and the chance of objective adjudication.

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