

# **Achieving Justice for Gross Human Rights Violations in Myanmar**

## Baseline Study, January 2018

ICJ Global Redress and Accountability Initiative

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ICJ Global Redress and Accountability Initiative

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## TABLE OF CONTENTS

<b>PREFACE</b>	<b>3</b>
<b>BASELINE ASSESSMENT</b>	<b>3</b>
<b>1 General human rights situation in the country</b>	<b>4</b>
1.1 Background	4
1.2 Current human rights situation	5
1.3 International human rights obligations	7
<b>2 Accountability of perpetrators of gross human rights violations</b>	<b>8</b>
2.1 International law and standards on accountability	8
2.2 National laws	10
2.3 National institutions and investigations	14
2.4 Summary: investigating and prosecuting human rights violations	22
<b>3 Access to effective remedies and reparation for victims of gross human rights violations</b>	<b>23</b>
3.1 International law and standards on remedies and reparation	23
3.2 National laws and institutions	24
3.3 Barriers to remedies and reparation	30
<b>4 Independence and accountability of justice actors</b>	<b>32</b>
4.1 The role of justice actors and institutions in the pursuit of redress and accountability	32
4.2 The judiciary and the executive	33
4.3 Lawyers	35
<b>5 Post-report update</b>	<b>36</b>
<b>ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES</b>	<b>38</b>
Methodology	38

## PREFACE

There has been a rapid deterioration in the human rights situation in Myanmar since the preparation of this report in mid-2017. As in the past, perpetrators of rights violations generally enjoy impunity while victims and their families go without justice. Military impunity continues to severely undermine the rule of law.

The scale and severity of human rights violations in northern Rakhine State, predominantly perpetrated by security forces against Rohingya Muslims, has been extraordinary. Ongoing rights violations in conflict-affected areas including northern Shan State and Kachin State have also continued. Journalists reporting on these areas have faced criminal prosecutions linked to their investigative work, whilst human rights monitors face harsher restrictions on their movements.

On 10 January 2018, an investigation group of the Tatmadaw, Myanmar's military, published a summary report that described security forces and civilians as having participated in the killing of ten Rohingyas in the village of Inn Dinn in Maungdaw Township on 2 September 2017. Based on its findings, the investigation group appears to have documented serious crimes in national law and in international law. The report is significant as it is the first admission from a Government institution that acts appearing to constitute serious crimes, in this case also involving gross human rights violations, were carried out against Rohingyas in northern Rakhine State during 2017. This initial summary report did not establish if or how these acts would be investigated further and if the perpetrators would be prosecuted.

The current situation in part reflects the impacts of systematic impunity over many years and brings into sharp focus the legal issues identified in this report: lack of accountability of perpetrators of human rights violations; lack of access to effective remedies and reparation for victims; and ongoing challenges with the independence and accountability of justice actors.

## BASELINE ASSESSMENT

Several provisions of Myanmar's national laws enable impunity for human rights violations, including by shielding security forces from public criminal prosecutions. Members of the military and police force enjoy impunity largely through the use of military courts or special police courts as mechanisms of investigation and prosecution concerning the conduct of military and police personnel. Convictions are rare and penalties are relatively weak, often times not commensurate with the gravity of the acts in question. Since gross human rights violations are most common in conflict areas, particularly in Kachin and Rakhine states, these mechanisms to shield security forces act as a significant obstacle to accountability.

The result of this legal and institutional framework is that the investigation and prosecution of acts involving human rights violations is rarely undertaken within Myanmar's criminal justice machinery. Instead, security forces and ad hoc government committees tend to hold responsibility for undertaking these investigations, which rarely lead to successful prosecutions of perpetrators. Within this framework, there is no apparent logic to the State's selective investigation of alleged human rights violations.

Case studies included in this report present one discernable pattern; whereby investigations are commissioned if there is significant attention and scrutiny from national and international media, civil society and UN agencies. It is common to see simultaneous but separate investigations into the same case, but there is a lack of clarity on the interaction of these investigations.

Religious organisations, civil society groups, NGOs and UN agencies have developed detailed documentation relating to allegations of human rights violations. Such reports, including those submitted through the UN's human rights mechanisms, are regularly contested by the State. As such, the practical and evidentiary value of many of these findings, to potentially support future prosecutions, is unclear.

The outcome, either intended or incidental, is an uncoordinated and unsystematic approach to investigating human rights violations which has not shed light on the facts, nor provided access to effective remedies and reparation, nor resulted in successful prosecution of perpetrators.

It is also unclear who orders military and police investigations into human rights violations. Constitutionally, the Union Attorney General should play a key role, but military and police courts appear to limit and to varying degrees undermine the authority of his law officers to investigate and prosecute human rights cases. A general lack of transparency exists regarding the procedures, findings and outcomes of State investigations into human rights violations in Myanmar.

Furthermore, the State's capacity to process forensic evidence appears to be non-existent, as evidenced by the handling of DNA in the Kachin schoolteachers case, and with the exhumation of Ko Par Gyi's body, which did not then inform conclusions of the investigators. Police and military appear to lack the capacity or will to apply basic investigation principles at the crime-scene, in interviews and in other procedures.

Victims of human rights violations in Myanmar lack access to effective remedies and reparation. Equally troubling, in some instances they and their representatives have been prosecuted for publically highlighting alleged human rights violations. This adds to the already very low public trust in a judiciary that continues to fail in providing access to justice. Other mechanisms, such as the National Human Rights Commission, and ad hoc inquiries commissioned by Presidential notification, have also failed to provide effective remedies or reparation.

Both the executive and military continue to wield significant influence over the judiciary. Political interference is common, particularly in politically sensitive cases and especially when there are highly publicized allegations of rights violations. Law officers rarely, if ever, prosecute cases perceived to challenge military or special interests. The courts rarely review acts carried out by the State's security personnel. The lack of independence and accountability of the judiciary, special legal provisions or procedures for members of security forces, as well as an ad hoc and non-transparent approach to investigations on part of the Government enables and perpetuates a lack of accountability for gross violations of human rights by State actors whereby victims are re-victimized for seeking justice whilst perpetrators generally enjoy impunity.

## **1 General human rights situation in the country**

### **1.1 Background**

From 1962 to 2011, a succession of military governments, ruled in a strict chain of command by the country's military Head of State, perpetrated gross violations of human rights and crimes under international law in Myanmar. In 2011, executive power was transferred to a quasi-civilian government that pursued significant economic and political reforms. After receiving an overwhelming majority of the votes in the November 2015 elections, the National League for Democracy (NLD) took office in March 2016.

The NLD-led Government is Myanmar's first democratically elected, civilian-led government since the military coup of 1962. The NLD has committed to prioritize the establishment of the rule of law in Myanmar. However, it faces many long-standing challenges brought about by decades of authoritarian military rule that has systematically weakened Myanmar's judiciary and compromised the independence of its legal system. Most of the population have been consistently denied access to the courts and effective remedies as a result of unfair and discriminatory laws, as well as poor court decisions. Political and military influence over judges remains a major obstacle to the rule of law, with the executive branch, the military and security apparatus maintaining undue influence over the judiciary.

Security forces in Myanmar, including the police and army, have a long and well-documented history of violating the rights of the people of Myanmar, in particular including against members of ethnic minorities. The military (the Tatmadaw) wields undue influence over various sectors in the country, including the judiciary. By law and in practice the security forces have blocked and remain capable of blocking independent and impartial investigations, allowing impunity for human rights violations.<sup>1</sup> Victims and survivors of human rights violations, even with respect to those constituting crimes under international law, have not received effective legal redress.

Discussions on transitional justice have taken a back seat to the peace process, land reform, economic development and an exhaustive list of legislative reforms proposed by various actors. A tense balance exists between the NLD-Government and a powerful military with control over the State's administrative structures such that changing governance systems and power relationships are constantly under negotiation. Despite significant reforms, the military remains the most powerful institution in the country, largely outside the control of the civilian government. Cohabitation and cooperation with the military is a key challenge for the NLD.<sup>2</sup>

## 1.2 Current human rights situation

Despite the significant reforms, human rights abuses and violations persist throughout Myanmar, particularly in conflict areas. The State continues to interfere with the right to peacefully assembly. Use of the law to restrict freedom of expression has increased under the NLD-led Government. Lawyers face harassment, particularly if they are involved in politically sensitive cases.

Despite the on-going formal peace process, fighting between the military and ethnic armed groups has intensified in Kachin, Northern Shan, Karen and Rakhine states. Sustained military offensives have caused massive displacements – there are at present 96,000 internally displaced persons in Kachin and Shan states.<sup>3</sup> There are widespread allegations of human rights abuses committed by conflicting parties against civilians, including unlawful killings, forced recruitment, illegal detention, torture and destruction of property.<sup>4</sup>

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<sup>1</sup> ICJ, "Implementable Action Plans to the New Parliament and Government", May 2016, at URL <https://www.icj.org/wp-content/uploads/2016/06/Myanmar-Recommendation-to-NLD-Gvt-Advocacy-Analysis-Brief-2016-ENG.pdf>.

<sup>2</sup> International Crisis Group, "Myanmar's New Government: Finding Its Feet?", 29 July 2016, p. 7.

<sup>3</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *Myanmar: IDP Sites in Kachin and northern Shan States*, January 2017.

<sup>4</sup> See Statement by Ms. Yanghee LEE, Special Rapporteur on the situation of human rights in Myanmar at the 34th session of the Human Rights Council, 13 March 2017, at URL <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21355&LangID=E>.

In Northern Rakhine state, violent attacks committed on border guard posts triggered widespread 'counter-insurgency clearance operations' by security forces. These were accompanied by persistent reports of serious rights abuses by security forces such as summary killings, rape, torture, arbitrary arrests and widespread destruction of property.<sup>5</sup> While the Government has set up various committees to investigate these allegations, to date such investigations have not been thorough, independent or impartial, thus failing to provide full accountability.<sup>6</sup>

Justice remains elusive for survivors of sexual violence, particularly occurring under conditions of armed conflict. Despite frequent reports of sexual violence committed by the military, and to some extent also by ethnic armed groups, authorities have not established sufficient complaint mechanisms to facilitate reporting and accountability, and there are seldom any prosecutions that have been publicly reported.<sup>7</sup>

Outdated laws restricting freedom of expression continue to be utilised to threaten and penalise journalists, human rights defenders (HRDs) and members of civil society,<sup>8</sup> usually when they are speaking out on politically sensitive issues or those involving the interests of powerful constituencies. There has been an increasing number of prosecutions for criminal defamation against journalists, HRDs, land rights activists, students, politicians and social media users for their peaceful expression where this is deemed critical of the Government, military or private business interests of importance to the State.<sup>9</sup> Among the more commonly used legal provisions is section 66(d) of the 2013 Telecommunications Act, which has been consistently interpreted by the courts as criminalizing defamation on the internet with a penalty of up to three years in prison. Those facing charges under the law are not entitled to bail, a third party can sue on behalf of the person allegedly defamed, and many are detained for months pending trial.<sup>10</sup> Since the NLD took office in April 2016, there have been 60 cases filed brought under this provision, mostly used to prosecute social media users critical of the Government and the military.<sup>11</sup>

Government authorities also continue to employ the Unlawful Associations Act and the Peaceful Assembly and Peaceful Procession Law to arbitrarily arrest and detain individuals exercising their rights to freedom of expression, peaceful assembly and association.<sup>12</sup> For instance, in May 2016 police arrested more than 70 factory workers who were marching from Sagaing to Naypyidaw to protest working conditions. Fifty-one of these were charged under the Penal Code with unlawful assembly, rioting and making statements that could alarm the public.<sup>13</sup> In 2016, police arrested 90 political activists, including student leaders of an

<sup>5</sup> OHCHR, 'Report of OHCHR mission to Bangladesh: Interviews with Rohingya fleeing from Myanmar since 9 October 2016', 3 February 2017.

<sup>6</sup> Statement by Ms. Yanghee LEE, above note 4.

<sup>7</sup> Human Rights Watch, "World Report: Burma Events of 2016", at URL <https://www.hrw.org/world-report/2017/country-chapters/burma#c667ea>.

<sup>8</sup> UN Educational, Scientific and Cultural Organization and International Media Support, Assessment of Media Development in Myanmar (Bangkok and Copenhagen, 2016), at URL <https://www.mediasupport.org/wp-content/uploads/2016/06/Myanmar-MDI-report-June-2016.pdf>.

<sup>9</sup> Report of the Special Rapporteur on the situation of human rights in Myanmar, UN Doc A/HRC/34/67 (2016); UN Human Rights Council resolution 34/22 (2017).

<sup>10</sup> Htun Htun, "Number Jailed Under Article 66(d) Rises to Eight Since NLD Govt", *The Irrawaddy*, 8 April 2017.

<sup>11</sup> Arkar, "NLD hammered for lack of progress on freedom of expression", *DVB*, 2 May 2017.

<sup>12</sup> UN Human Rights Council resolution 34/22 (2017).

<sup>13</sup> Penal Code, Articles 143, 147 and 505(b). See: Human Rights Watch, "The Human Rights Council should adopt a strong resolution on the human rights situation in Myanmar", 24 February 2017.



interfaith peace walk in Yangon; demonstrators against the Letpadaung mine in Sagaing Division; and 76 labor rights activists marching to the capital, Naypyidaw, to protest treatment by local factory owners. Fifty-one of the labor activists were charged with unlawful assembly, rioting and disturbing public tranquility; and 15 were convicted in October 2016 and sentenced to between four and six months in prison.<sup>14</sup> In May 2017, several student activists were each sentenced to four months in prison for staging a rally outside a government education office in Mandalay: three months for violating Article 19 of the Peaceful Assembly Law, with an additional 30 days in jail for contempt of court.<sup>15</sup>

Some lawyers, particularly those involved in politically sensitive cases, continue to face threats and reprisals, including intimidation and legal sanctions. In September 2015 for example, Khin Khin Kyaw, a defence lawyer representing student protestors in Letpadan township, was charged under section 228 of the Penal Code for intentionally insulting or interrupting a public servant in judicial proceedings. The presiding judge brought this charge against her after Khin Khin Kyaw filed a legal motion seeking to hold to account the high ranking police officials responsible for violently breaking up the peaceful protests at Letpadan.<sup>16</sup>

The January 2017 assassination of a prominent Constitutional lawyer, U Ko Ni, has been seen as emblematic of the state of the rule of law in the country. While the gunman who committed the assassination has been arrested, questions surround the motivations. A thorough investigation is essential to demonstrate the Government's commitment to rule of law and justice.<sup>17</sup>

### 1.3 International human rights obligations

Myanmar's international human rights obligations flow from the UN Charter, human rights treaties, and general and customary international law.

Myanmar is a party to: the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); the Optional Protocol to the CRC on the involvement of children in armed conflict; the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; the Convention on the Rights of Persons with Disabilities (CPRD); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). While Myanmar has not signed the ICCPR, the NLD-led Government has stated that it plans to accede to the Covenant and is reportedly taking steps toward doing so.

Additional to the ICCPR, noted above, Myanmar is not yet a party to the following key treaties: First Optional Protocol to the ICCPR (on a communication procedure); Second Optional Protocol to the ICCPR aiming for the abolition of the death penalty; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment; the Optional Protocol to the Convention Against Torture; the International Convention for the Protection of All Persons from Enforced Disappearance; the International Convention on the Rights of all Migrant Workers and Members of their Families; the Optional Protocol to the CEDAW (on

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<sup>14</sup> Human Rights Watch, "World Report: Burma Events of 2016", above note 7; Report of the Special Rapporteur on the situation of human rights in Myanmar, above note 9.

<sup>15</sup> DVB, "Mandalay student activists sentenced, sing protest songs in court", *Democratic Voice of Burma*, 9 May 2017.

<sup>16</sup> Report of the Special Rapporteur on the situation of human rights in Myanmar, above note 9; Fortify Rights Press Release, "Myanmar: Drop Charges against Human Rights Lawyer Khin Khin Kyaw", 14 October 2015.

<sup>17</sup> ICJ, "Killing of lawyer U Ko Ni must be promptly and impartially investigated", 30 January 2017, at URL <https://www.icj.org/icj-statement-on-the-killing-of-lawyer-u-ko-ni/>.

a communication procedure), the Optional Protocol to the CRPD (on a communication procedure); the third Optional Protocol to the CRC (on a communication procedure); and the Rome Statute of the International Criminal Court.

## **2 Accountability of perpetrators of gross human rights violations**

### 2.1 International law and standards on accountability

With respect to all human rights, whether those applicable to a State under customary international law, or those taken up through party status to international and/or regional human rights instruments, States have both negative and positive obligations: negative duties *not* to interfere with the legitimate enjoyment of rights (e.g. to respect the non-derogable right of all persons not to be arbitrarily deprived of life); and positive duties to protect rights from interference by others (e.g. to take legislative, administrative, judicial, educative and other necessary measures to guarantee the enjoyment of the right to life by all persons within the State's jurisdiction). The latter positive duty to protect includes the requirement to criminalize acts that constitute gross human rights violations (such as torture and ill-treatment, extrajudicial killings, enforced disappearance and sexual violence) in order to ensure that perpetrators are held to account.

A specific feature of the duty to protect is the obligation to investigate, prosecute and punish all acts that amount to gross violations of human rights. Principle 19 of the UN Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity in this regard provides that: "States shall undertake *prompt, thorough, independent and impartial investigations* of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are *prosecuted, tried and duly punished*" (emphasis added).<sup>18</sup> In the transitional justice setting it is important to recall that, while truth commissions or similar mechanisms are an important aspect of the right to truth (as an element of reparation for victims), they must be used in combination with the investigation of facts undertaken with a view to prosecuting those responsible for gross violations of human rights.<sup>19</sup>

The duty to investigate and hold perpetrators to account requires that investigations be undertaken by independent and impartial investigating authorities: independent of those suspected of being involved, including of any institutions impugned; and impartial, acting without preconceptions, bias or discrimination.<sup>20</sup> For example, investigations into allegations made against security and military forces should be undertaken by an independent commission of inquiry, comprised of members that are independent of any institution, agency or person that may be the subject of investigation.<sup>21</sup> Furthermore, such

<sup>18</sup> Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/add.1 (2005).

<sup>19</sup> See, for example, *La Cantuta v Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.

<sup>20</sup> In the context of the investigation of extrajudicial killings, for example, see ICJ, *Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution—Investigation and Sanction* (2015), pp. 134-138. See also ICJ, *Practitioners Guide No 7: International Law and the Fight Against Impunity* (2015), especially Chapter V.

<sup>21</sup> For example, see: Human Rights Committee, *Concluding Observations: Sri Lanka*, UN Doc CCPR/C/79/Add.56 (1995), para 15; and *Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (United Nations, 2016) – Minnesota Protocol, Principle 11.

investigations must be thorough and effective. This requires adequate capacity and resources to be provided to investigating authorities. In the context of extrajudicial killings, and applicable also to other investigations into gross violations of human rights, the revised Minnesota Protocol sets out various recommendations on the practical implications of the need for thorough and effective investigations.<sup>22</sup> The Updated Principles also recall that investigations must be prompt, reflecting the requirement that the duty to investigate is triggered as soon as authorities become aware of allegations of gross human rights violations, regardless of whether a formal complaint has been made.<sup>23</sup>

Where prompt, thorough, independent and impartial investigations conclude that there is a prima facie case that an offence(s) constituting gross human rights violations has been committed, several consequences follow. Alleged perpetrators must be made subject to prosecution, involving all persons allegedly responsible, including superiors, by proceedings that adhere with international fair trial standards.<sup>24</sup> In the context of unlawful killings, the Human Rights Committee has clarified that this means that: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, leading to de facto impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".<sup>25</sup> Where a prosecution leads to conviction, the punishment imposed must be commensurate with the seriousness of the crime.<sup>26</sup>

Ensuring the accountability of perpetrators of gross human rights violations also forms key elements of the right of victims to effective remedies and reparation. In the case of extrajudicial killings, for example, the Human Rights Committee has explained that the duty to investigate, prosecute and punish arises from the obligation of States parties to the ICCPR to provide an effective remedy to victims of human rights violations, set out in Article 2(3) of the ICCPR, when read in conjunction with the right to life under Article 6.<sup>27</sup> Reparation includes the right to satisfaction and guarantees of non-repetition. In the context of accountability, satisfaction incorporates two key elements: 'justice' through prompt, thorough, independent and impartial investigations that lead to judicial and administrative sanctions against perpetrators; and truth, involving the verification and full and public disclosure of facts.<sup>28</sup> Guarantees of non-repetition are likewise geared towards the combatting of impunity and adopting measures to prevent the commission of further acts amounting to gross violations of human rights.<sup>29</sup> Further elements of the right of victims to effective remedies and reparation are

<sup>22</sup> Minnesota Protocol, *ibid*, Principles 12-17. See also: ICJ Practitioners Guides No 7 and 9, *Ibid*; and the UN Manual on the Effective Investigation and Documentation of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (United Nations, 2004).

<sup>23</sup> See, for example, ICJ Practitioners Guide No 7, above note 20, p. 135.

<sup>24</sup> See, for example: ICJ Practitioners Guide No 7, above note 20, especially Chapter VI; UN Human Rights Committee, 'Draft General Comment No 36. Article 6: Right to life', UN Doc CCPR/C/GC/R.36/Rev.2 (2015), para 29; Minnesota Protocol, para 1.

<sup>25</sup> Draft General Comment 36, *ibid*, para 29.

<sup>26</sup> See, for example, ICJ Practitioners Guide No 7, above note 20, pp. 217-222.

<sup>27</sup> Draft General Comment 36, above note 24, para 29. See also ICJ, *Practitioners Guide No 2: The right to a remedy and to reparation for gross human rights violations* (2007), chapters IV and VIII.

<sup>28</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its resolution 60/147 (2006), paras 3(b), 4 and 22(b) and (f); and ICJ Practitioners Guide No 2, *ibid*, chapters V and VII(IV).

<sup>29</sup> See, for example: Draft General Comment 36, above note 24, para 29; Basic Principles and Guidelines on the Right to a Remedy and Reparation, *ibid*, para 23; and ICJ Practitioners Guide No 2, above note 27, chapter VI.

considered in part 3.3 of this report.

## 2.2 National laws

### a) 2008 Constitution

The 2008 Constitution of the Republic of the Union of Myanmar confers upon the military the right to independently administer all affairs of the armed forces.<sup>30</sup> Articles 293(b) and 319 provide for the establishment of permanent military tribunals, in respect of which the Commander-in-Chief exercises appellate power and ultimate authority,<sup>31</sup> with no right of appeal to the Supreme Court or other civilian body.<sup>32</sup> National courts have no jurisdiction over the military.

Immunity provisions in the Constitution enable State actors to evade accountability for criminal acts, including gross human rights violations. The Constitution codifies impunity for human rights violations by prohibiting the prosecution of government and military officials for 'any act done in the execution of their respective duties' before March 2011.<sup>33</sup> The Special Rapporteur on the situation of human rights in Myanmar has repeatedly recommended the amendment of these constitutional provisions.<sup>34</sup>

These constitutional restrictions mean the military is accountable only to itself, including in instances of human rights violations. This has enabled members of the military to avoid prosecution for criminal acts. It is not only inconsistent with the duty of States to ensure the independent and impartial investigation and prosecution of acts amounting to gross human rights violations, but also with international standards requiring that such acts be investigated and prosecuted by civilian authorities and never by military authorities.<sup>35</sup>

While constitutional reform is a stated priority for the NLD-led Government, the Tatmadaw wields an *effecto veto* over amendments and strongly resists change.<sup>36</sup>

#### *Case: Military impunity for rights violations in Karen state*

One of the largest recent offensives by the military, widely condemned internationally, occurred in Myanmar's southeastern states from 2005 to 2008. A team of researchers from Harvard Law School documented human rights violations by the military from 2005 to 2006 in one specific township affected by the campaign.<sup>37</sup> Researchers conducted 11 missions to the

<sup>30</sup> Article 20(b) of the Constitution establishes that "The Defence Services has [sic] the right to independently administer and adjudicate all affairs of the armed forces".

<sup>31</sup> According to Articles 201 and 342 of the Constitution, the Commander-in-Chief is appointed by the 11-member National Defence and Security, of which six members are appointed by the military.

<sup>32</sup> 2008 Constitution, Articles 293, 319 and 343(b). See ICJ, "Right to Counsel: the Independence of Lawyers in Myanmar", 2013, p. 13, at URL <https://www.icj.org/myanmar-lawyers-still-face-restrictions-despite-increased-independence-2/>.

<sup>33</sup> Article 445.

<sup>34</sup> Report of the Special Rapporteur on the situation of human rights in Myanmar, UN Doc A/HRC/22/58 (2013), para 76.

<sup>35</sup> For example, see: Updated Set of Principles on Impunity, above note 18, Principle 29; Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc E/CN.4/2006/58 (2006), Principle 9; and Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/68/285 (2013), para 106.

<sup>36</sup> Articles 74, 109 and 141 of the Constitution, respectively, reserve 110 of 440 total seats in the Lower House of Parliament, and 56 of 224 total seats in the Upper House for Defence Services personnel nominated by the Commander-in-Chief. Article 436 requires a 75 per cent majority to ratify any amendment to the Constitution, *de facto* giving the military a veto.

<sup>37</sup> International Human Rights Clinic at Harvard Law School, "Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar", November 2014.

area and collected witness testimonies. The report compiles information that its authors say is of an evidentiary standard sufficient for future prosecutions against the senior military officers named in the report as being responsible for war crimes and crimes against humanity within the meaning of the Rome Statute of the International Criminal Court (to which Myanmar is not a party).<sup>38</sup>

Three generals are among the officers allegedly responsible for these alleged crimes, including Major General Ko Ko who was serving in the powerful position of Minister of Home Affairs at the time of the report's publication in 2014. The immunity provisions granted in the 2008 Constitution covers their alleged crimes such that there are no legal avenues for domestic prosecution.

b) *1959 Defence Services Act*

Section 72 of the 1959 Defence Services Act stipulates that military personnel on active service who commit serious crimes are to be tried by courts martial rather than by ordinary courts: "A person subject to this Act who commits an offence of murder against a person not subject to military law, or of culpable homicide not amounting to murder by court against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried-by a court-martial, unless he commits any of the said offences: (a) while on active service, or (b) at any place outside the Union of Burma, or (c) at a frontier post specified by the President by notification in this behalf."

The broad definition of 'active service' under section 3(a) of the Act has the effect that military personnel, who are subject to the Act, would in most instances be considered to be on active service and therefore subject to trial by courts-martial rather than ordinary courts, for the crimes of murder, culpable homicide and rape. Articles 293(b), 319 and 343(b) of the Constitution provide for the establishment of permanent military tribunals, in respect of which the Commander-in-Chief exercises appellate power and ultimate authority, with no right of appeal to the Supreme Court or other civilian body. The consequence is that military personnel are subject to the jurisdiction of courts-martial instead of ordinary courts, and no other individual or State institution may appeal decisions from such courts. Under this arrangement, members of the Tatmadaw generally enjoy impunity for the perpetration of criminal offences.<sup>39</sup>

c) *2016 Presidential Security Act*

The Presidential Security Act provides former presidents with legal immunity from prosecution for crimes committed during their terms of office. The Act was promulgated by the outgoing Union Solidarity and Development Party-led Government, following its defeat in 2015 national elections and prior to its handover to the NLD-led Government.<sup>40</sup>

By allowing immunity for acts by former presidents, the Act removes an important deterrent to future perpetrators and constitutes a serious breach of international law, which forbids the granting of amnesties and immunities for persons accused of international crimes including gross human rights violations.<sup>41</sup> Chapters 2 and 4, which provide immunity from prosecution for former

<sup>38</sup> Ibid, p. 1.

<sup>39</sup> See: Kachin Women's Association Thailand, "Justice Delayed, Justice Denied: seeking truth about sexual violence and war crime cases in Burma", January 2016, pp. 47-50.

<sup>40</sup> Following the 2015 elections, there was a five-month interim period, from November 2015 until 31 March 2016, during which the outgoing Government continued to enact legislation.

<sup>41</sup> ICJ 2016 Implementable Action Plans to the New Parliament and Government, above note 1.

presidents, systematize and perpetuate the impunity that enables perpetrators to evade accountability for gross human rights violations.

d) *1995 Myanmar Police Force Maintenance of Discipline Law*

The application of the Myanmar Police Force Maintenance of Discipline Law by the Myanmar Police Force (MPF) has effectively enabled police officers to avoid criminal prosecution for crimes committed during service. This Law and its application are also inadequate on the culpability and responsibility of superiors.

Violations of this Law are categorized as 'offences' rather than as 'crimes'. For offenses punishable under the 1995 Law, officers may be prosecuted in a Police Court, which is adjudicated by 'gazetted officers' of the MPF rather than ordinary judicial officers.<sup>42</sup> Procedures for police courts are detailed in Chapter 9 of the Law. Offences deemed less serious may be heard by summary trial.<sup>43</sup> Offences eligible for prosecution under this law include, for example: threatening witnesses, unlawful detention, willful suppression of facts and false allegations.<sup>44</sup>

Where human rights violations are allegedly committed by police officers, it is understood that these are generally prosecuted under procedures of the Maintenance of Discipline Law, rather than under criminal law.<sup>45</sup> Whilst the Law applies punitive sanctions, offences are not clearly classified as crimes, and punishments can be weaker than in criminal law. For example, the Law prescribes a maxim punishment of one year imprisonment for threatening a witness,<sup>46</sup> whilst in the Penal Code criminal intimidation attracts a penalty of up to seven years.<sup>47</sup>

The Maintenance of Discipline Law undermines the accountability of police by empowering the MPF to establish its own courts to review the actions of its officers, including for actions that may constitute criminal acts under the Penal Code. The investigation and prosecution of police under this Act, potentially including in instances of human rights violations, is neither independent nor impartial and thus may enable perpetrators to evade accountability. It may also involve the imposition of penalties, where responsibility is found, that fail to comply with international standards calling for penalties that are commensurate with the seriousness of the crime.

*Case: Non-commensurate penalties for police assaults in Rakhine state*

In December 2016, a video emerged of uniformed police officers assaulting ethnic Rohingya boys and men in Rakhine state. The case was widely publicized following the emergence of the video on Facebook. The MPF promptly detained four police officers,<sup>48</sup> and the President's Office released a statement pledging that 'measures are being taken to take action against those who violated police force rules'.<sup>49</sup> The officers were reportedly tried in a police tribunal.<sup>50</sup> Police sources told media that two

<sup>42</sup> 1995 Myanmar Police Force Maintenance of Discipline Law, Chapter 7. See also 1997 Law Amending the Myanmar Police Force Maintenance of Discipline Law.

<sup>43</sup> 1995 Myanmar Police Force Maintenance of Discipline Law, Chapter 6.

<sup>44</sup> Articles 13(c), 17(c) and 19(a) respectively.

<sup>45</sup> Asian Legal Resource Centre, Written statement to the UN Human Rights Council, UN Doc A/HRC/29/NGO/44 (2015), para 3.

<sup>46</sup> Article 13(c).

<sup>47</sup> Penal Code, Articles 503 and 506.

<sup>48</sup> Mike Ives, "Myanmar Holds Officers After Video Purports to Show Police Beating Rohingya", *New York Times*, 3 January 2017.

<sup>49</sup> Republic of the Union of Myanmar President's Office, "Action to be taken against police abuse in video clip", January 2017.

<sup>50</sup> ICJ and 12 other organizations, "Letter to Permanent Representatives of Member and Observer States of the United Nations Human Rights Council Re: UN-mandated international Commission of Inquiry or similar international mechanism to investigate serious human rights violations in Rakhine State, Myanmar", 3 March 2017.

junior officers were given a two-month sentence, to be served in a jail for police, for failing to follow police procedures.<sup>51</sup> Another three senior officers were demoted, ostensibly for failing to maintain discipline. The penalties imposed are significantly lighter than those that are likely to have been imposed if the case was effectively administered in a criminal court rather than in a police tribunal.

e) *Torture and ill-treatment*

Myanmar's Penal Code criminalizes torture, prohibiting its use by police during interrogations.<sup>52</sup> Maximum penalties range from seven to ten years imprisonment, with no mandatory minimums, and the prospect of an undefined financial penalty in addition to imprisonment.<sup>53</sup> However, torture is not specifically designated as a grave crime.<sup>54</sup> Furthermore, the Penal Code definition only considers acts undertaken for the purpose of compelling a response from the victim of torture, such as a confession or payment. The Penal Code does not cover other acts that constitute torture according to international law and standards, nor does it cover other forms of ill-treatment, and is therefore inconsistent with international law. This is notwithstanding the fact that the use of torture in prisons and detention facilities has been documented extensively.

In 2015 the draft Prisons Law, developed to replace colonial-era laws, was tabled in the Union Parliament. A legal analysis by Amnesty International found that the draft, whilst in some ways an improvement on current laws, overall lacks clear legal safeguards against torture and ill-treatment in prisons and other places of detention.<sup>55</sup> For instance, the draft does not include a prohibition on the use of torture, despite this being included in the Penal Code. It is understood that the draft Prisons Law is currently under review by the quasi-parliamentary Commission for the Assessment of Legal Affairs and Special Issues.<sup>56</sup>

f) *Sexual violence*

The Penal Code has restrictive definitions on crimes involving sexual violence, including the crime of rape, which is inconsistent with the CEDAW, to which Myanmar is party.<sup>57</sup> A Bill on the prevention of violence against women has been drafted but not yet enacted and there is a lack of available information on the status of its development and progress.<sup>58</sup>

Perpetrators of sexual violence who are members of the military enjoy impunity.<sup>59</sup> Successive UN Special Rapporteurs have noted that, despite the Government apparently adopting a zero-tolerance approach to sexual misconduct in the military, cases are referred to military courts that lack transparency and rarely

<sup>51</sup> Agence France-Presse, "Police in Rohingya abuse video get reprimand, 'didn't intend to harm'", 8 February 2017.

<sup>52</sup> Penal Code, Articles 330 and 331.

<sup>53</sup> Ibid, Articles 330 and 331.

<sup>54</sup> See Bo Kyi and Hannah Scott, "Torture, political prisoners and the un-rule of law: challenges to peace, security and human rights in Burma", Association for the Assistance of Political Prisoners, 2010, p. 12.

<sup>55</sup> Amnesty International, "Bring Rights to Prisons: Amnesty International's Recommendations on the Draft Prisons Law", 2016.

<sup>56</sup> Htoo Thant and Ei Ei Toe Lwin, "Thura U Shwe Mann appointed to head own legislative commission", *Myanmar Times*, 8 February 2016.

<sup>57</sup> Myanmar has also endorsed the 2013 Declaration of Commitment to End Sexual Violence in Conflict.

<sup>58</sup> Committee on the Elimination of All Forms of Discrimination Against Women, "Concluding observations on the combined fourth and fifth periodic reports of Myanmar," UN Doc CEDAW/C/MMR/CO/4-5 (2016), para 26.

<sup>59</sup> For documentation and analysis of cases, see Women's League of Burma, "If they had hope, they would speak.' The on-going use of state-sponsored sexual violence in Burma's ethnic communities", November 2014.

prosecute perpetrators of rape from within its ranks.<sup>60</sup> Sexual violence committed against women by military and armed groups continues to be widespread, particularly against ethnic women in conflict areas.<sup>61</sup> Women and girls are generally reluctant to report sexual violence, particularly in ethnic areas where fear of reprisal is a consideration. If reported, it is rare for these cases to be duly investigated. Low rates of prosecution related to sexual violence are worse still where members of the military or armed groups have committed crimes.<sup>62</sup>

The UN Secretary General has urged the Government to take action to ensure the prosecution of security personnel who are accused of crimes of sexual violence.<sup>63</sup>

### 2.3 National institutions and investigations

#### a) *Myanmar's military, the Tatmadaw*

Soldiers and their superiors are rarely charged for crimes and generally enjoy impunity for human rights violations. When soldiers are charged, prosecution occurs almost exclusively through military courts. Courts-martial constitutionally exercise judicial power to adjudicate cases concerning military personnel, and almost exclusively deal with any prosecutions related to human rights violations.<sup>64</sup> Court hearings are not open to the public and there is a lack of transparency regarding proceedings and their outcomes. However, there have been rare and inexplicable reports of members of the public being permitted to view some proceedings of military courts.<sup>65</sup>

There are rare instances in which military personnel have been prosecuted in regular courts in cases involving civilians. In November 2014, for example, a soldier was convicted and sentenced to 13 years imprisonment for the kidnapping and rape of a disabled ethnic Kachin girl. The soldier had been transferred to the regular court following trial for a lesser charge in military court.<sup>66</sup> It is not clear why the transfer was permitted by the military in this rare and selective example.

In another instance, in June 2017, police reportedly filed murder charges against members of a Tatmadaw battalion in Kachin state.<sup>67</sup> Locals accuse the soldiers of killing three Kachin IDPs in May 2017.<sup>68</sup> The military is reportedly also investigating the deaths.<sup>69</sup> The ICJ is monitoring this case.

Where prosecutions are referred to regular courts, the process still cannot be considered impartial and independent, because the military and the executive continue to exercise political influence over the judiciary. Many senior judges are

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<sup>60</sup> United Nations, "Conflict-related Sexual Violence: Report of the Secretary General", UN Doc S/2015/203 (2015), para 42. The report notes the rare instance of a prosecution in 2014.

<sup>61</sup> Report of the Secretary General on Conflict-related Sexual Violence, *ibid*, para 41; CEDAW Concluding Observations on Myanmar, above note 58, para 26.

<sup>62</sup> CEDAW Concluding Observations on Myanmar, above note 58, para 26.

<sup>63</sup> Report of the Secretary General on Conflict-related Sexual Violence, above note 60, para 43.

<sup>64</sup> Constitution, Articles 293(b) and 319.

<sup>65</sup> In 2016 it was reported that families of civilians killed in Shan state were permitted to view a court martial for soldiers prosecuted in relation to the killings: see Ko Kan Thar, "Myanmar Soldiers Admit to Killing Villagers During Court Martial in Shan State", *Radio Free Asia*, 11 August 2016.

<sup>66</sup> Aileen Thomson, "Civilian justice trumps military impunity in Myanmar", *Open Democracy*, 11 December 2014.

<sup>67</sup> Lawi Weng, "Police Open Case Against Army Battalion in Kachin IDP Deaths", *The Irrawaddy*, 5 June 2017.

<sup>68</sup> Zarni Mann, "Burma Army Accused of Torturing, Killing Three Kachin Civilians", *The Irrawaddy*, 29 May 2017.

<sup>69</sup> Nan Lwin Hnin Pwint, "Burma Army Investigates Kachin State Deaths", *The Irrawaddy*, 31 May 2017.



former military officers, as is the Attorney General and senior staff in judicial and law offices, and as is also the case with many Union-level ministries.

Rules of engagement and command structures have also facilitated and or permitted gross human rights violations and there has been a chronic lack of accountability for persons committing or contributing to these crimes. The military has historically issued different rules of engagement based on color designations for geographical areas: black for areas controlled by non-State armed groups; brown for contested areas; and white for government-controlled areas. Soldiers in black areas have few constraints and may be permitted to employ lethal force indiscriminately, including against civilians; rules of engagement for soldiers in brown areas are more constrained yet nonetheless facilitate abusive practices not permissible in white areas.<sup>70</sup> Actions committed by soldiers in brown and black areas, which have been documented by researchers, and likely amount to war crimes, include: intentionally attacking civilians; displacing and forcibly transferring civilians; pillage; murder and extrajudicial execution; enslavement; torture and other ill-treatment; rape; and persecution.<sup>71</sup>

*Case: 2016 'clearance operations' in Northern Rakhine state*

There are credible allegations of systematic human rights violations by the military during 'clearance operations' carried out in Northern Rakhine state from October to December 2016, triggered by armed attacks on border police in October. The military blocked access to the area, keeping away journalists, aid workers and international monitors. Around 27,000 Rohingyas fled to Bangladesh. Satellite imagery suggests that soldiers burned at least 1,500 buildings.<sup>72</sup> Soldiers are said to have deployed live fire from helicopter gunships, with numerous concerns about extrajudicial killings.<sup>73</sup> The UN High Commissioner for Human Rights stated the operations may amount to collective punishment and reprisals against already vulnerable Rohingya Muslims. At the time, the Government denied all such allegations through state media and press releases, dismissing many of them as fabrications.<sup>74</sup>

Statements from the Information Ministry and Office of the State Counselor sought to foretell the findings of the Investigation Committee commissioned by the President. In March, state media reported that a separate internal military inquiry had interviewed 3,000 villagers and found that allegations reported in the February report of the UN Office of the High Commissioner for Human Rights (OHCHR) were incorrect or fabricated. The report noted that as a result of the investigation three police officers had been imprisoned for minor offences, including theft of a motorbike. In April 2017, senior government and military sources reportedly told journalists that a senior military officer was among those being questioned in relation to alleged abuses, indicating that a military

<sup>70</sup> Harvard Human Rights Clinic Memorandum, above note 37, p. 28.

<sup>71</sup> Ibid, pp. 47-57. See also: Human Rights Watch and Karen Human Rights Group, "Dead Men Walking: Convict Porters on the Front Lines in Eastern Burma", 2011; and Katya Cengel, "Rape is a weapon in Burma's Kachin State, but the women of Kachin are fighting back", *Time*, 11 February 2014.

<sup>72</sup> Human Rights Watch, "Burma: Military Burned Villages in Rakhine State. Witnesses and Satellite Imagery Reveal Pattern of Burnings", 13 December 2016.

<sup>73</sup> Feliz Solomon, "Violence Escalates in Western Burma As Army Launches Air Strikes Near Rohingya Villages", *Time*, 14 November 2016; ICJ, "ICJ Memo: Access to Justice in Northern Rakhine State", December 2016.

<sup>74</sup> For example, Aung San Suu Kyi's Office dismissed allegations of sexual violence as 'fake rape': see Union of Myanmar State Counselor Office, "Information Committee Refutes Rumors of Rape", 26 December 2016. See also Jonah Fisher, "Hounded and ridiculed for complaining of rape", *BBC News*, 11 March 2017.

inquiry may have continued.<sup>75</sup> Separately, media reports state that police are investigating the deaths of two Rohingya men who were detained in August 2016.<sup>76</sup> Other deaths of persons detained during clearance operations, including children, have been reported but apparently not investigated.<sup>77</sup>

The Government had likely prejudiced the findings of its own Investigation Committee by consistently and publically dismissing allegations of human rights violations throughout the campaign. Details of the internal military inquiry were not made public. No prosecutions have been undertaken in relation to the allegations. The inability or unwillingness to establish facts and hold perpetrators accountable forms the basis of the rationale for the Human Rights Council's decision to commission a fact-finding mission in Myanmar.<sup>78</sup>

b) *Myanmar Police Force*

The MPF has limited institutional independence. As one of four departments of the Ministry of Home Affairs, its command structure ultimately comes under authority of the Tatmadaw Commander-in-Chief. A Code of Conduct for Police Officers was introduced in 1999 and colonial-era police manuals were amended and reissued in 2000 and 2001.<sup>79</sup>

In more recent years the MPF has indicated some appetite for reform. In a 2012 interview, the Chief of Police welcomed advice on the implementation of civilian oversight procedures.<sup>80</sup> The force has participated in crowd management training initiated by the EU following the 2012 Letpadaung crackdown by MPF officers, discussed below (section 3.2.3(e)).<sup>81</sup> The UN International Children's Emergency Fund (UNICEF) and the UN Office for Drugs and Crime (UNODC) are providing support linked to international standards.

In carrying out investigations and prosecutions, the MPF is deferential to the military, particularly in areas of armed conflict.

*Case: Murder of Kachin school teachers in Northern Shan state*

In January 2015, two young ethnic Kachin school teachers were raped and murdered in Northern Shan state. On the night of the attack, a Myanmar military column of around 50 soldiers were positioned at a temporary base inside the village. Some of the soldiers reportedly departed early the following morning. Police examined the crime scene, where an army-issued belt and foot prints were reportedly found, before transferring the

<sup>75</sup> Wa Lone, "Command structure of the Myanmar army's operation in Rakhine", *Reuters*, 25 April 2017.

<sup>76</sup> Shwe Yee Saw Myint and Yimou Lee, "Exclusive: Myanmar probing police 'cover-up' of deaths of two Rohingya Muslims", *Reuters*, 21 February 2017.

<sup>77</sup> Global New Light of Myanmar, "Teen-aged suspect died from disease while in police custody", 6 June 2017.

<sup>78</sup> UN Human Rights Council resolution 34/22 (2017), para 11.

<sup>79</sup> Andrew Selth, "Police reform in Myanmar: changes in 'essence and appearance'", in Nick Cheesman and Nicholas Farrelly (eds), *Debating Democratisation in Myanmar* (ANU Press, 2014), pp. 205-228.

<sup>80</sup> International Bar Association Human Rights Institute, "The Rule of Law in Myanmar: Challenges and Prospects", December 2012, p. 30.

<sup>81</sup> European Commission, "Support to Reform of the Myanmar Police Force," Project Description, at URL [https://ec.europa.eu/europeaid/projects/support-reform-myanmar-police-force\\_en](https://ec.europa.eu/europeaid/projects/support-reform-myanmar-police-force_en).

bodies to a regional hospital for autopsies.<sup>82</sup> Examiners confirmed both women had been raped, but failed to collect basic forensics.<sup>83</sup>

A government investigation team was formed comprised of police officers from three of the state's larger towns, along with the state's Minister for Kachin Ethnic Affairs and some locals. Findings of the investigative team do not seem to have been publically reported. The military's daily newspaper stated the military was 'helping' police investigators, including by carrying out DNA tests on troops.<sup>84</sup> Villagers also provided DNA samples but the outcome of DNA tests was never announced.<sup>85</sup> Police investigators had limited access to soldiers for interviews.<sup>86</sup> Local administrators say police feared the soldiers.<sup>87</sup>

Villagers and Kachin church groups claim that military interference also prejudiced the police investigation. They say that Myanmar soldiers were the perpetrators of the crimes.<sup>88</sup> The Tatmadaw's Commander-in-Chief reportedly said it was impossible for the soldiers to have committed the crimes.<sup>89</sup> The investigation appears to have primarily identified local villagers as informants and suspects rather than members of the military column present that night. At one stage the chief investigator named two middle-aged residents of the village, a man and woman, as suspects in the double rape and murder.<sup>90</sup>

In response to perceived problems with the Government investigations, the Kachin Baptist Convention, one of the most influential non-State institutions in the country's largely Christian north, formed its own Truth-Finding Committee.<sup>91</sup> The Union President's office reportedly did not respond to the team's letter requesting approval.<sup>92</sup> Nonetheless, this team conducted an investigation that established culpability of the Tatmadaw and identified problems with the police investigation. Kachin civil society groups also produced a report detailing flaws in the police investigation including with interview methods, forensic collection and the collection of other evidence.<sup>93</sup> A statement by 103 civil society groups identified specific problems with the investigation, including reports of lost evidence, and alleged failures of police to correctly handle evidence in accordance with the Code of Criminal Procedure.<sup>94</sup> More than two years on, police

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<sup>82</sup> Ye Mon, "Military leader to be interviewed over Kachin teachers' deaths", *Myanmar Times*, 18 May 2016.

<sup>83</sup> Lawi Weng, "Army Statement Warns Against Linking Teachers' Murders to Troops", *The Irrawaddy*, 29 January 2015.

<sup>84</sup> Ibid.

<sup>85</sup> Ye Mon, "Kachin murder DNA tests in limbo", *Myanmar Times*, 14 July 2015.

<sup>86</sup> The Irrawaddy, "One Year On, Rights Groups Demand Justice for Rape, Murder of Kachin Teachers", 19 January 2016.

<sup>87</sup> Kachin Women's Association Thailand, "Justice Delayed, Justice Denied: seeking truth about sexual violence and war crime cases in Burma", January 2016, p. 14

<sup>88</sup> Ibid.

<sup>89</sup> Ye Mon, above note 82.

<sup>90</sup> Ye Mon, "Police name local suspects in Kachin teachers' murder", *Myanmar Times*, 1 July 2015.

<sup>91</sup> Lawi Weng, "Kachin group questions government murder probe, forms investigation team", *The Irrawaddy*, 12 February 2012.

<sup>92</sup> Kachin Women's Association Thailand, "Justice Delayed, Justice Denied", above note 87, p. 46.

<sup>93</sup> Ibid.

<sup>94</sup> 103 Civil Society Organizations and 9 Individuals, "Statement on the Unresolved Year-Long Case of the Two Female Teachers of Kawngkhka", *Burma Partnership*, 19 January 2016.

investigators are reportedly still gathering information.<sup>95</sup> There have been no prosecutions of perpetrators.

c) *State-mobilized civilian forces*

Article 128 of the Code of Criminal Procedure authorizes police, as well as magistrates, to acquire the assistance of male civilians who are not members of security forces to disperse public assemblies and to arrest and confine participants. Under Article 127 of the Code, civilian men can be mobilized in this way in instances of unlawful assemblies or assemblies 'of five or more persons likely to cause a disturbance of the public peace'.

A Bill drafted in 2017 by the Ministry of Home Affairs proposes to also authorize General Administration Department officials to mobilize civilian forces in a manner consistent with that provided for in Article 128 of the Code of Criminal Procedure.<sup>96</sup> These officials are accountable to the Minister of Home Affairs, who is one of three ministers constitutionally appointed by the Commander-in-Chief of the Tatmadaw,<sup>97</sup> thus again engaging levels of military influence and control.

Several infamous instances link the mobilization of civilian forces to human rights violations, including the 'Depayin Massacre' in 2003 and the 'Saffron Revolution' in 2007.<sup>98</sup> As recently as March 2015, the Union President's Office cited Article 128 to justify the mobilization of civilians in a crackdown on student protestors in Yangon.<sup>99</sup> In each instance, perpetrators of crimes continue to enjoy impunity.<sup>100</sup> Civilian forces have not been prosecuted in either police or ordinary courts.

*Case: Irregular police in Rakhine state*

In late 2016, the Government enlisted members of the public to join a 'regional police force' in Myanmar's troubled northern Rakhine state, with an unclear legal basis.<sup>101</sup> It came at a time when Northern Rakhine state experienced increased tension and violence including attacks on border police and allegations of human rights violations by security forces, including attacks on Rohingya villages and sexual assaults. Civilians for the force were recruited along ethnic and religious lines, officially excluding Rakhine state's Muslims, most of whom belong to the area's persecuted Rohingya community.

Recruits are reportedly being armed and paid by the border police after undergoing abbreviated training. This civilian regional police force necessarily lacks the adequate training and oversight to perform policing functions in accordance with human rights and professional standards on policing. There is no appropriate accountability mechanism in place to deal with instances of misconduct and human rights abuses.<sup>102</sup>

<sup>95</sup> Nyein Nyein, "Two Years On, Investigation Into Double Murder of Kachin Teachers Has Stalled", *The Irrawaddy*, 19 January 2017.

<sup>96</sup> Draft Township Administration Bill, 20 April 2017.

<sup>97</sup> ICJ, "Analysis of the proposed Township Administration Bill", June 2017.

<sup>98</sup> Ad hoc Commission on Depayin Massacre, "Preliminary Report of the Ad hoc Commission on Depayin Massacre", Bangkok, July 2003.

<sup>99</sup> Article 19, "Myanmar: Crackdown on protests shows Special Rapporteur still needed", 11 March 2015; Aung Zaw, "Junta-Era Thugs Are Back on the Streets", *The Irrawaddy*, 6 March 2015.

<sup>100</sup> For example, see Zarni Mann, "A Decade Later, Victims Still Seeking Depayin Massacre Justice", *The Irrawaddy*, 31 May 2013.

<sup>101</sup> Wa Lone and Simon Lewis, "Myanmar police to arm, train non-Muslims in conflict-torn region", *Reuters*, 2 November 2016.

<sup>102</sup> Mizzima News, "Myanmar: proposed Rakhine 'civilian police force' a recipe for disaster", *Reliefweb*, 9 November 2016; ICJ, "ICJ Memo: Access to Justice in Northern Rakhine State", December 2016.

d) *The judiciary*

The judiciary in Myanmar is not independent and judges are not accustomed to holding the Government accountable. The executive branch, particularly military and police, continue to wield undue influence on the judiciary. This is a major obstacle to the rule of law, and to accountability for crimes including gross human rights violations. This level of influence remains a major impediment to lawyers' ability to practice the profession effectively.<sup>103</sup> Lawyers have told the ICJ that political influence and special interests regularly impact the administration of justice in ordinary courts in both political and criminal cases.<sup>104</sup> For lawyers it remains both difficult and dangerous to litigate in cases that may confront military interests.<sup>105</sup>

Judges often render decisions based on orders coming from government officials.<sup>106</sup> Some judges may feel allegiance to the military and/or police and fail to act impartially and independently. The bulk of Supreme Court justices are military appointees, some of who formerly served in the military. When it comes to political cases, judges can be subject to coercive or implied directions from government officials and institutions, particularly the military and police. Prosecutors are also not free to carry out their duties without improper influence, particularly in special interest cases.

Corruption is prevalent and judges often fail to correct the detrimental role that police can play in the administration of justice, allowing courtroom delays, politically motivated prosecutions and fabrications of evidence.<sup>107</sup>

The judiciary rarely adjudicates in prosecutions of police and military personnel due to the special arrangements these institutions have which effectively enables them to manage their own judicial affairs separate to ordinary courts. At the same time, the lack of independence and impartiality of the judiciary, and the tendency of interference in judicial proceedings, shows that referring prosecutions of military and police to civilian courts would by itself be insufficient to substantially improve the administration of justice and enable accountability.

e) *Government-commissioned inquiries*

Since 2011, the Government has commissioned several inquiries into allegations of human rights violations. Their formation has been ad hoc in nature, with investigators given limited standing powers and little to no authority or capacity to implement recommendations. In many instances, key members of the investigation team have been neither independent nor impartial. Three high profile inquiries of this kind illustrate their inadequacy as mechanisms for redress or accountability.

- Investigation Commission on Sectarian Violence in Rakhine state

The Investigation Commission on Sectarian Violence in Rakhine state was established by Presidential Notification to investigate the 2012 communal violence in Rakhine state and provide recommendations on future Government policy.<sup>108</sup> Chaired by a retired senior civil servant, the Commissions' mandate did not include human rights, despite this being of

<sup>103</sup> ICJ, "Myanmar: end practice of appointing military officers to judiciary", 16 September 2016, at URL <https://www.icj.org/myanmar-end-practice-of-appointing-military-officers-to-judiciary/>.

<sup>104</sup> ICJ, "Right to Counsel", above note 32, p. 2.

<sup>105</sup> Ibid, p. 19.

<sup>106</sup> ICJ, "Handbook on Habeas Corpus in Myanmar", 2016, p. 20, at URL <https://www.icj.org/myanmar-writ-of-habeas-corpus-can-help-protect-human-rights/>.

<sup>107</sup> ICJ, "Right to Counsel", above note 32, p. 19.

<sup>108</sup> Republic of the Union of Myanmar, President Office Notification No. 58/2012, 17 August 2012.

significant concern internationally after media and rights groups presented credible evidence of gross human rights abuses and violations.<sup>109</sup> The report produced critiqued historical claims to Rohingya identity and recommendations included strengthening family planning for Muslim women and bolstering security forces in Rakhine state. The report did not directly address human rights and accountability for possible violations and abuses. No prosecutions were recommended as a result of the investigation.

- Rakhine state Investigation Committee

In December 2016, the NLD-led Government established an Investigation Committee whose tasks include establishing facts and identifying violations of law related to armed attacks on government security forces in Rakhine state in October 2016, and into allegations of human rights abuses and violations by security forces during subsequent 'clearance operations'.<sup>110</sup> U Myint Swe, who serves as the military-appointed Vice President, was appointed to chair the Committee. Chief of the Myanmar Police Force is also a Committee member. In its first meeting, Myint Swe referred to the international organizations monitoring developments in Rakhine state, and said the Committee work quickly to 'reduce their worries'.<sup>111</sup> Its 13 members include two women and reportedly includes no representatives from the Muslim community.<sup>112</sup>

Its interim report released in January 2017 dismissed allegations of sexual violence, including rape by security forces, made by Rohingya women.<sup>113</sup> But the allegations were subsequently said to be credible by investigators from the OHCHR who interviewed 220 people who had recently crossed from Myanmar into Bangladesh.<sup>114</sup> When a delegation of Committee members visited a refugee camp in Bangladesh, they reportedly dismissed refugees' accounts of recent atrocities in Rakhine state.<sup>115</sup>

- Letpadaung Taung Investigation Commission

The Letpadaung Taung Investigation Commission was formed in 2012 by Presidential Notification,<sup>116</sup> in response to outcries over an incident in which police used excessive use of force against protestors in middle Myanmar's Sagaing Region. Chaired by Daw Aung San Suu Kyi, soon after her release from imprisonment, the Commission included members of parliament, ministers and a representative of the company operating the copper mine. The Commission, however, had only advisory powers. A committee to implement its recommendations was formed but has not fully carried out this mandate.

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<sup>109</sup> Human Rights Watch, "The Government could have stopped this: sectarian violence and ensuing abuses in Burma's Arakan State", August 2012.

<sup>110</sup> Republic of the Union of Myanmar, President Office Notification No. 89/2016, 1 December 2016.

<sup>111</sup> Union of Myanmar President's Office, "Vice President to Rakhine commission: The world is waiting", 9 December 2016.

<sup>112</sup> President Office Notification No. 89/2016, op. cit; Nyan Lynn Aung, "New investigation commission on Rakhine holds initial meeting", *The Myanmar Times*, 9 December 2016.

<sup>113</sup> Wai Mar Tun, "Myanmar Investigation Commission Says it Cannot Verify UN Report on Rakhine Violence", *Radio Free Asia*, 14 February 2017.

<sup>114</sup> Report of OHCHR mission to Bangladesh, above note 5.

<sup>115</sup> Abdul Aziz, "Rohingya refugees claim Myanmar delegation dismissed tales of violence", *Dhaka Tribune*, 20 March 2017.

<sup>116</sup> Republic of the Union of Myanmar, President Office Notification No. 92/2012, 1 December 2012.

*Case: Impunity for violations at Letpadaung*

In November 2012, riot police used toxic white phosphorous incendiary munitions against local residents peacefully protesting against operations of the Letpadaung copper mine in middle-Myanmar. These munitions caused severe burns to residents occupying the protest camps, including Buddhist monks.<sup>117</sup> The Union President's Office responded to the public outcry by issuing a formal apology to monks injured in the attack, and by appointing Daw Aung San Suu Kyi to chair a Commission to investigate the incident.<sup>118</sup> This government-backed Commission verified that white phosphorus was used, and recommended that police receive riot training, but did not call for officers to be punished.<sup>119</sup> No one has been prosecuted.

In December 2013, police at Letpadaung again used excessive force, on this occasion opening fire on a group of residents seeking to stop workers from Wanbao, the Chinese mine operator, from fencing off land for the development. A local woman, Daw Khin Win, was shot dead and around ten others were injured.<sup>120</sup> Daw Khin Win's family launched a court action demanding accountability for the killing, but township-level law officers reportedly suspended the case after interventions by township administration authorities and local police.<sup>121</sup> A group of monks filed a suit against the Minister of Home Affairs, who has oversight over the MPF, but it is unclear how this progressed.<sup>122</sup> Separately, months after the events, a murder charge was filed against a police officer but this was reportedly put on hold and further details and progress of the case are also unclear.<sup>123</sup>

An initial investigation by the Myanmar National Human Rights Commission ruled that the police were responsible for the shooting of Daw Khin Win and recommended unspecified legal action. The Commission called for an official investigation into the shooting but there has been no proper inquiry. In contrast, six human rights defenders were prosecuted and convicted of violating peaceful assembly provisions in the course of staging protests in Yangon in which they called for accountability for the shooting.<sup>124</sup>

In response to both incidents at Letpadaung, there were prompt investigations involving the verification and public disclosure of facts. However the investigating actors, in one instance an ad hoc Commission and in the other the National Human Rights Commission, who were somewhat independent and impartial, did not have the adequate capacity and resources to thoroughly investigate the facts with a view to

<sup>117</sup> Amnesty International, "Open for Business? Corporate crime and abuses at Myanmar copper mine", 2015, pp. 41-47.

<sup>118</sup> Phyo Wai Kyaw and Than Naing Soe, "Myanmar makes apology to monks over copper mine crackdown", *Myanmar Times*, 24 December 2012; Zarni Mann, "Lack of Transparency to Blame for Mine Conflict: Suu Kyi", *The Irrawaddy*, 12 December 2012.

<sup>119</sup> Ei Ei Toe Lwin, "Fury over Letpadaung copper mine report", *Myanmar Times*, 18 March 2013.

<sup>120</sup> Zarni Mann, "Police Kill Villager in Copper Mine Standoff", *The Irrawaddy*, 22 December 2014; Associated Press, "Aung San Suu Kyi support for copper mine outrages Burmese activists", 12 March 2013.

<sup>121</sup> Wa Lone, "Rights commission urges charges against Sagaing police", *Myanmar Times*, 19 January 2015.

<sup>122</sup> Nyein Nyein and Andrew Kasper, "Monks File Case Against Senior Minister Over Letpadaung Crackdown", *The Irrawaddy*, 16 March 2015.

<sup>123</sup> Vani Sathisan and Hayman Oo, "Letpadaung convictions taint the legal system", *Myanmar Times*, 22 May 2015; Eleven Media, "Letpadaung death case on hold", 22 December 2015.

<sup>124</sup> ICJ, "Myanmar: Letpadaung convictions grossly unfair", 15 May 2015, at URL <https://www.icj.org/myanmar-letpadaung-convictions-grossly-unfair/>.

prosecuting those responsible. The institutions empowered to undertake criminal investigations and prosecutions of these acts have not done so. Security forces appear to have interfered in the administration of justice, such as when law officers, formally accountable to the Union Attorney General, seem to have withdrawn a case due to intervention from military-linked administrative officials at the township level. Perpetrators have not been prosecuted, nor subjected to judicial or administrative sanctions.

f) *Transitional institutions*

No transitional laws, truth commissions or other transitional justice mechanisms have been established for the investigation of human rights violations and abuses during the five-odd decades of direct military rule. Discussion about accountability for past violations of national and international law are glaringly absent from reforms. At present, the NLD-led Government appears to have little appetite for this given concerns about aggravating the military, which retains significant political, economic and coercive power.

g) *International inquiries*

- International Fact-Finding Mission of the UN Human Rights Council

In response to credible reports of gross human rights violations, particularly but not limited to those occurring between October 2016 to January 2017 in Rakhine state, and the lack of credible investigation by the Government, the UN Human Rights Council resolved to dispatch an international fact finding mission to Myanmar. Its mission includes establishing 'the facts and circumstances of the alleged recent human rights violations by military and security forces... with a view to ensuring full accountability for perpetrators and justice for victims'.<sup>125</sup> In June, officials from the Government's Ministry of Foreign Affairs said they had instructed immigration officials to refuse visas to members of the mission.<sup>126</sup>

- Rakhine Advisory Commission

Chaired by former UN Secretary General, Kofi Annan, the Rakhine Advisory Commission includes international and national members who have been tasked by the Government to identify recommendations for peace and development in Rakhine state. The Commission has no mandate to investigate human rights violations and abuses. Its final report, due to be presented in August 2017, is expected to include recommendations linked to economic, social and cultural rights as well as potential legal reforms required to the 1982 Citizenship Law which has been used to disenfranchise Muslim residents. The Commission will not be involved in recommending implementation mechanisms.<sup>127</sup>

## 2.4 Summary: investigating and prosecuting human rights violations

Responsibility for the investigation of sensitive criminal cases, particularly in areas of armed conflict, tends to be shared between the military and police.<sup>128</sup> Cases involving allegations against soldiers or police officers are generally investigated and prosecuted, if at all, within the respective institution. Criminal prosecution for human rights violations is rare in these circumstances.

<sup>125</sup> UN Human Rights Council resolution 34/22 (2017), para 10.

<sup>126</sup> Simon Lewis, "Myanmar says it will refuse entry to U.N. investigators probing Rohingya abuses," Reuters, 30 June 2017.

<sup>127</sup> ICJ communication with Rakhine Advisory Commission, March 2017.

<sup>128</sup> Andrew Selth, above note 79, pp. 212.



Prosecutions and investigations appear to be pursued selectively, and the impartiality of prosecutions is undermined by the use of special courts.

Soldiers are tried in military courts and police are tried in police courts. At times military and police investigations related to the same case are known to take place concurrently, although there appears to be no clear legal or other procedures for reconciling these investigations and any resulting prosecutions. Military and police courts generally impose low or meaningless sanctions on conviction that are wholly inconsistent with the sanctions that would apply if the prosecution was successfully pursued in an independent and impartial civilian court adjudicating on charges under the Penal Code.

Special inquiries commissioned by the Government generally fail the test of independence and impartiality or are severely undermined by inadequate resources and/or restricted mandates. For instance the Rakhine Commission is chaired by the military's constitutionally appointed Vice President and also includes the Chief of the MPF as a member. These, and other members, cannot reasonably be said to be free of preconceptions or bias and certainly cannot provide the appearance of independence and impartiality. Often, the membership composition is also discriminatory, as women and people who are not of Bamar ethnicity are excluded. For instance, the Rakhine Investigation Committee, discussed above, was formed in 2016 to investigate allegations of crimes against Muslims, including but not limited to sexual violence against Muslim women, but counted only two women and no Muslims among its 13 members.

A lack of independence and impartiality of investigations is demonstrated by the pattern of regular statements emanating from inquiry members and government officials that predetermine outcomes of the investigation.

Truth in reporting and the public disclosure of facts are compromised when investigations touch highly contentious religious and race issues, as demonstrated in findings of the two inquiries in Rakhine state. Due to political considerations or the lack of sufficiently broad and practical mandates, inquiries commissioned by the President have not recommended prosecution, even where crimes were verified. No perpetrators of rights violations have been subject to prosecution as an outcome of such an inquiry.

### **3 Access to effective remedies and reparation for victims of gross human rights violations**

#### **3.1 International law and standards on remedies and reparation**

Every person who is a victim of a human rights violation, whether amounting to a 'gross' human rights violation or otherwise, has the right to effective remedies and reparation. Broadly speaking, this entails the right of victims to defend their rights, to obtain recognition of a violation(s), to cessation of any continuing violation(s) and to adequate reparation. It requires that rights-holders have equal and effective access to justice mechanisms, including through access to judicial bodies that have the competence to adjudicate and provide binding decisions as to the remedies and reparation to be granted to victims.<sup>129</sup> It should be recalled that, where appropriate, such as in cases of the unlawful killing of a person, a 'victim' includes "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to

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<sup>129</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 29, paras 3 and 11; and ICJ Practitioners Guide No 2, above note 27, especially chapter III.

prevent victimization".<sup>130</sup>

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation recall that adequate, effective and prompt reparation is intended to promote justice by redressing gross human rights violations, requiring reparation to be proportionate to the gravity of the violation(s) and the harm suffered.<sup>131</sup> Full and effective reparation entails:<sup>132</sup>

- Restitution, aimed at re-establishing, to the extent possible, a victim's situation as it was before the violation was committed;
- Compensation, calling for fair and adequate monetary compensation (including for medical and rehabilitative expenses, pecuniary and non-pecuniary damage resulting from physical and mental harm caused, loss of earnings and earning potential and for lost opportunities such as employment and education);
- Rehabilitation, aimed at enabling the maximum possible self-sufficiency and functioning of the victim, involving restoring previous functions affected by the violation and the acquisition of new skills that may be required as a result of the changed circumstances of the victim resulting from the violation;
- Satisfaction, including through the cessation of any continuing violation(s), justice in the form of the holding to account of the perpetrator(s) of the violation, and truth in the form, amongst other things, of the verification and full and public disclosure of facts, the search, recovery and identification of direct victims and public apology and commemorations; and
- Guarantees of non-repetition, geared towards the combatting of impunity and adoption of measures to prevent the commission of further acts amounting to gross violations of human rights, including through monitoring of State institutions (including civilian oversight of military and security forces), training of law enforcement and other officials, the adoption and dissemination of codes of conduct for public officials, law, policy and institutional reform, the protection of lawyers and human rights defenders representing the interests and rights of victims, and the strengthening of the independence and effectiveness of judicial mechanisms.

### 3.2 National laws and institutions

#### a) *National laws*

Relevant authorities routinely violate national laws that prescribe procedures for the conduct of criminal investigations and prosecutions as it pertains to victims. Whilst antiquated and not aligned with international standards, the Code of Criminal Procedure does provide procedural protections for complainants, witnesses and suspects. However these procedures and protections, such as for pre-trial rights, are regularly flouted, as are, willingly or unwittingly, the Code of Civil Procedure and the Evidence Act. Justice actors who violate national laws generally do so because they lack independence from interference by politically powerful groups including the military, because there is a lack of accountability for these transgressions and or due to a lack of understanding of correct legal

<sup>130</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 29, para 8.

<sup>131</sup> Ibid, para 15.

<sup>132</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 29, paras 15-23; and ICJ Practitioners Guide No 2, above note 27, especially chapters V, VI and VII.

procedures (see section 4 below). National laws, in particular the Penal Code and the Code of Criminal Procedure, are available in theory to facilitate the provision of remedies and reparation but in practice do not do so due to non-compliance by authorities and a lack of accountability for non-compliance.

The prevalent use of military courts and police courts, which follow their own procedures and laws, has also contributed to a situation in which relevant national laws related to human rights violations are often not applied in the prosecution of perpetrators of human rights violations. Laws governing military and police acts are inadequate for victims of human rights violations because they do not contemplate the provision of remedies and reparation. These laws do not provide mechanisms or processes to ensure the cessation of violations and to allow for the public disclosure of facts. They do not guarantee non-repetition or satisfaction and do not provide for restitution, compensation or rehabilitation for victims of human rights violations. This means that the laws that are applied, such as the MPF Maintenance of Discipline Act, do not consider appropriate remedies or reparation and therefore impede access to effective remedies and reparation for victims of human rights violations.

Myanmar's Penal Code has also been used to harass victims of human rights violations, their families, and their lawyers, where they have publically sought remedy or reparation either through the courts or through other mechanisms.

*Case: the prosecution of U Khaing Myo Htun*

An ethnic Rakhine civil society activist was arrested following publication of an April 2016 statement in which a political party to which he was aligned alleged the Tatmadaw was involved in human rights violations against Rakhine civilians.<sup>133</sup> The following month a Tatmadaw officer filed charges of sedition and incitement charges against U Khaing Myo Htun, and in July police arrested him on these charges.<sup>134</sup> Bail has repeatedly been refused, despite his ill health, and the trial is ongoing one year on. Around April 2017, complaints from a well-connected private citizen led to the filing of new and additional charges against U Khaing Myo Htun, for criminal intimidation. His lawyer says the new charges amount to government harassment of the activist.<sup>135</sup> No government investigation has been conducted into U Khaing Myo Htun's allegations of Tatmadaw rights violations. His lawyer has unsuccessfully sought to have the allegations reviewed by the court.<sup>136</sup>

b) *National courts*

Access to justice for victims of human rights violations has been severely curbed in Myanmar during decades of military rule. Most of the population has been consistently denied access to the courts and effective remedies as a result of unfair and discriminatory laws and poor court decisions. Individuals, civil society groups and lawyers throughout Myanmar have told the ICJ that national courts are not considered to be an option to access remedy or redress for human rights violations.<sup>137</sup> The judiciary in Myanmar lacks independence and accountability

<sup>133</sup> See: Earth Rights International, "ERI Condemns Decision to Deny bail to Khaing Myo Htun", 26 August 2016; Fortify Rights, "Myanmar: Investigate Forced Labor of Rakhine Buddhists in Western Myanmar", Press Release, 15 March 2016. Note that the Arakan Liberation Party is a member of the National Ceasefire Agreement and its members therefore may have recourse to a government commitment that its members may be free from prosecution of this nature.

<sup>134</sup> The charges include Section 505 of the Myanmar Penal Code.

<sup>135</sup> ICJ communication with a Rakhine lawyer close to the case, June 2017.

<sup>136</sup> ICJ communication with a Rakhine lawyer close to the case, March 2017.

<sup>137</sup> For example, see: Vani Sathisan and Sean Bain, "Myanmar: authorities, courts complicit in eroding rule of law in Kachin State", *Myanmar Times*, 3 June 2017.

(see section 4 below). As evident in the case studies discussed throughout this report, Myanmar's courts tend to not intervene where human rights violations are occurring nor do they guarantee non-repetition where they have occurred.

Most people in Myanmar avoid interaction with the courts, particularly in cases where there is a grievance with the State, such as a human rights violation. Among the public there is a prevailing fear that authorities are likely to view such claims as a provocative action, for which an informal or formal criminal sanction may be applied toward the complainant. This fear is somewhat validated by some of the case studies included in this report, whereby persons seeking redress have been successful in their claim and in many instances experienced judicial harassment including through proceedings. Furthermore, the courts have rarely provided access to remedies or reparation. Instead, measures of redress are likely to be negotiated privately, or with administrative officials, or not pursued at all. For these reasons, Myanmar's national courts are generally not considered a viable option by victims of human rights violations who seek remedies and reparation. The general lack of independence and accountability in the administration of justice by national courts (see section 4 below) impedes the provision of effective remedies and reparations.

c) *Myanmar National Human Rights Commission*

The National Human Rights Commission was initially formed in 2011 and then reconstituted in 2014 when an enabling law was passed to institutionalize its mandate.<sup>138</sup> Under this 2014 Law, its duties and powers include monitoring and promoting compliance with human rights law,<sup>139</sup> and investigation functions including visiting crime scenes and making enquiries, while acting independent of other actors.<sup>140</sup> Generally the Commission is obliged to investigate complaints submitted to it.<sup>141</sup>

The Commission may address a complaint by facilitating conciliation between the parties and is empowered to do so where possible.<sup>142</sup> Where enquiries have been conducted, and there is credible evidence that human rights violations have occurred, the Commission is required to submit recommendations to relevant government authorities.<sup>143</sup> These must address concerns related to remedies and redress, although the Commission is not authorized to pursue the enforcement of its findings. Because conciliation by the Commission has rarely if ever been effective in Myanmar, and due to the limited powers its members have to pursue recommendations, the Commission can play only a limited role in the guarantee of redress. Beyond conciliation, the Commission's powers are limited to recommending pathways for remedies and reparation facilitated by other government actors.

The National Human Rights Commission Law directs the Commission to refrain from inquiring into complaints that have come before the judiciary, either at the pre-trial or post-trial stage.<sup>144</sup> As indicated through the case studies in this report, many significant human rights cases come before the courts in one way or another, and even if this often takes the form of judicial harassment of victims

<sup>138</sup> Myanmar National Human Rights Commission Law, No. 21/2014, Art. 37.

<sup>139</sup> Ibid, Art. 22(b).

<sup>140</sup> Ibid, Articles 22(c), 22(d) and 22e.

<sup>141</sup> Exceptions to this rule are outlined in the National Human Rights Commission Law, above note 138, Art. 32. For instance, there is a broad 'good faith' requirement on part of the complainant.

<sup>142</sup> National Human Rights Commission Law, above note 138, Art. 34.

<sup>143</sup> Ibid, Articles 38, 39 and 40.

<sup>144</sup> Ibid. Article 37 states that: "The Commission shall not inquire into the complaint which violates any of the following: (a) cases under trial before any court, cases under appeal or revision on the decision of any court; (b) cases that have been finally determined by any court."

rather than addressing a complaint, the hearing of a case in court may exclude the Commission from making enquiries.<sup>145</sup> This means that in many cases the Commission may not be legally empowered to consider the possibility of making recommendations on remedies and reparation for human rights violations.

In practice, the Commission is not yet compliant with the Paris Principles on National Human Rights Institutions. Its members have received heavy criticism at the domestic level for a perceived selective approach to interventions and for a lack of capacity or willingness to undertake investigations independently and impartially.<sup>146</sup> Its members have appeared unwilling to investigate or comment in human rights cases where allegations are directed against Myanmar's military, even when there is credible evidence to support claims.<sup>147</sup> For instance, when a Kachin man was prosecuted for defamation, at the instigation of a military officer, over an open letter to the MNHRC, its members made no representations on his behalf (see below).

This lack of engagement in human rights cases linked to the military suggests there is a lack of will to investigate allegations impartially and properly, possibly linked to its lack of independence. The botched and much-derided intervention of Commissioners in negotiating a settlement between a Yangon tailoring shop and enslaved teenage maids also indicates its members have a lack of understanding of their mandate.<sup>148</sup> None of the Commission's investigations have resulted in prosecutions of perpetrators of human rights violations, which might have at least met the reparation element of satisfaction.

*Case: murder of journalist Ko Par Gyi*

In September 2014, Myanmar soldiers in the southeastern Mon state arrested journalist Aung Kyaw Naing, better known as Ko Par Gyi, who had been covering violent clashes between the military and an ethnic armed group, Democratic Karen Benevolent Army. He was shot dead on October 4 while in military custody. Three separate investigations were undertaken into the death.

On 30 October, with local and international criticism mounting, then-President U Thein Sein ordered an investigation into the death, reportedly by phoning the Myanmar National Human Rights Commission and requesting they investigate.<sup>149</sup> On 2 December, apparently unaware of military court proceedings underway in tandem, the Commission issued a report calling on the accused soldiers to be tried before a civilian, not a military, court.<sup>150</sup> The victim's lawyers and family, who attended the body's exhumation from a shallow grave, criticised the report for not addressing their claims that Ko Par Gyi's body showed signs of torture.<sup>151</sup> There were other glaring problems with the report: investigators

<sup>145</sup> Ibid, Articles 43 and 45. Note the Commission does have powers to inspect prisons and places of detention.

<sup>146</sup> Sam Yamin Aung, "National Human Rights Commission Strongly Criticized by Lawmakers", *The Irrawaddy*, 29 July 2016; Yen Saning, "NGOs Slam Performance of National Human Rights Commission", *The Irrawaddy*, 25 September 2014.

<sup>147</sup> Burma Partnership and Equality Myanmar, "Burma: All the President's Men", September 2014.

<sup>148</sup> Shoon Naing and Ye Mon, "MNHRC defends itself against public outrage in child torture case", 22 September 2016.

<sup>149</sup> Naw Say Phaw Waa, "Mounting fears of interference in Ko Par Gyi investigation", *Myanmar Times*, 11 June 2015; Myanmar Now, "Burma's human rights commission fights for government respect", 13 March 2016.

<sup>150</sup> Min Hein Htet, "Ko Par Gyi case 'should be heard by civil court'", *Mizzima*, 3 December 2014.

<sup>151</sup> Min Hein Htet, "Excavated body of journalist covered with injuries: witnesses", *Mizzima*, 6 November 2014.

acknowledged Ko Par Gyi had broken ribs but did not address the cause;<sup>152</sup> ten of its 16 pages discussed the conflict that Ko Par Gyi had been covering, rather than addressing details of the case.<sup>153</sup>

Meanwhile two soldiers had been charged before a military tribunal with murder, for Ko Par Gyi's death. They were acquitted on November 27 2014; the proceedings lasted less than one month.<sup>154</sup> The military court found Ko Par Gyi was a member of the DKBA and that he was shot while trying to escape custody.<sup>155</sup> This decision of the military court was not made public until 5 May 2015.

Separate civil court proceedings were initiated in Mon state, with the Kyaikmayaw Township Court ordering a civilian inquest into Ko Par Gyi's death in May 2015. Only at this time it emerged publically that the military court had acquitted two soldiers in November 2014. The victim's family had initially expressed optimism that proceedings would move forward without influence from the military court,<sup>156</sup> but by June there were concerns about interference in the case.<sup>157</sup> The Kyaikmayaw Township Court ultimately concluded that Ko Par Gyi died in military custody from a gunshot wound but made no determination as to who was responsible for his death. An investigation by police apparently continued until 21 March 2016 when they announced that the case had been dropped.<sup>158</sup>

This case is noteworthy as the President himself called for an investigation into Ko Par Gyi's death, and two soldiers were subsequently arrest and charged, albeit by a military court. Questions remain as to the independence and impartiality of the military court that held the criminal proceedings. Notably, the military court acquitted the two accused less than a month after they were charged in summary proceedings, calling into question the thoroughness of the proceedings, as well as the actual intent to hold anyone responsible for Ko Par Gyi's death. The lack of transparency of the proceedings further calls the acquittals into question, with the proceedings being held in secret, without the presence of Ko Par Gyi's family or any legal representation.<sup>159</sup>

There were also basic procedural and mandate-related issues with the investigations of the Myanmar National Human Rights Commission and the Township Court. The mix of secret and ad hoc investigations conducted in a non-systematic manner, all of which were commissioned by different government bodies, undermined the pursuit of truth and the administration of justice in this instance. No perpetrators have been successfully prosecuted for the killing of Ko Par Gyi and his family has no formally recognised version of events, nor access to effective remedies or reparations.

<sup>152</sup> Aung Hla Tun and Paul Mooney, "Lawyer raps report on Myanmar journalist's death, demands new inquiry", *Reuters*, 2 December 2014.

<sup>153</sup> Burma Partnership, "As the Burma Army Fires Live Rounds, the MNHRC Fires Blanks", 9 December 2014.

<sup>154</sup> Nobel Zaw, "Two soldiers acquitted in Military Trial over Journalist's killing", 12 May 2015.

<sup>155</sup> Zarni Mann, "Case closed in Par Gyi Inquiry, Widow vows to Appeal", *The Irrawaddy*, 23 June 2015; Yola Verbruggen, Naw Say Phaw Waa and Lun Min Mang, "Military acquittal raises fresh doubts about civilian inquest", *Myanmar Times*, 12 May 2015.

<sup>156</sup> Hnin Yadana Zaw, "Wife of Myanmar journalist killed by army puts hope in civilian court", 12 May 2015.

<sup>157</sup> Naw Say Phaw Waa, "Mounting fears of interference in Ko Par Gyi investigation", *Myanmar Times*, 11 June 2015.

<sup>158</sup> IPI, "Myanmar shelves investigation into journalist killings", *Mizzima*, 6 April 2016.

<sup>159</sup> Nobel Zaw, "Two Soldiers Acquitted in Military Trial Over Journalist's Killing", *The Irrawaddy*, 12 May 2015.

d) *General Administration Department*

The General Administration Department (GAD) forms much of Myanmar's civil service, particularly at the state/region and township levels. The GAD is established in subnational governance, forming much of the civil service for state and regional governments while also providing administrative functions for districts and townships.<sup>160</sup> This department reports to the Ministry of Home Affairs, whose Minister is constitutionally appointed by the military.

For most people in Myanmar, interaction with the State tends to be through the Ward/Village Tract or Township offices managed by the General Administration Department (GAD). The District Administrator of GAD has significant formal and informal powers in terms of oversight and control over government departments operating within the district, often regardless of their formal accountability line to the civilian-led government. Political interference with police and judicial affairs is also understood to be common.

The GAD typically arbitrates local-level disputes rather than the judiciary. For instance, disputes and rights violations related to land are arbitrated through formal non-judicial mechanisms at township level. These bodies are staffed by officials from the GAD, which also manage land acquisitions.<sup>161</sup> A conflict of interest and lack of impartiality exists in the arbitration of such disputes, including those entailing impacts on human rights. For example, the GAD is responsible for carrying out the procedure of land acquisition, and also serves the function of reviewing complaints about land acquisition, so in each case the GAD is reviewing its own decisions. For this reason – the lack of independence and impartiality of the adjudicator – complainants rarely if ever receive appropriate remedies or reparation when land acquisition is implemented unlawfully.<sup>162</sup>

As the GAD sits in the Ministry of Home Affairs, which under constitutional arrangements reports to the military, the GAD is not in a position to act as an independent and impartial arbitrator of disputes involving the military, or involving the MPF.

Many persons in administrative positions as well as in the community appear to have an understanding that the administrative decisions of statutory bodies are final, such as GAD-chaired committees that review land disputes. This is legally incorrect because the Constitution guarantees the jurisdiction of national courts. Nonetheless, this perception has added a barrier against the public willingness to utilize the courts to seek remedies and reparation.<sup>163</sup>

Whilst it plays a central role in hearing disputes and complaints at township and district levels of government, the GAD rarely provides access to effective remedies or reparation for human rights violations. In any case, the GAD is not an independent and impartial adjudicator of disputes, and it does not have clear procedures for challenging decisions, and therefore it is not in a position to provide access to effective remedies or reparation. Few administrative disputes are referred to the courts in Myanmar, including those related to human rights.

<sup>160</sup> Kyi Pyar Chit Saw and Matthew Arnold, "Administering the State in Myanmar: An Overview of the General Administration Department", October 2014, Myanmar Development Resource Centre and The Asia Foundation, Discussion Paper No. 6.

<sup>161</sup> ICJ, "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights", pp. 22, 31 and 72, at URL <https://www.icj.org/myanmar-amend-special-economic-zones-law-to-protect-human-rights-new-icj-report/>.

<sup>162</sup> 1894 Land Acquisition Act, Article 3(c); 1945 Lower Burma Land Revenue Manual, Appendix 1, Article 2(2); ICJ, "Myanmar: amend Special Economic Zones Law to protect Human Rights", 27 February 2017, pp. 28-29, at URL: <https://www.icj.org/myanmar-amend-special-economic-zones-law-to-protect-human-rights-new-icj-report/>.

<sup>163</sup> Ibid, pp. viii and 65.

A Bill proposed in 2017 seeks to establish Township Administration Bodies, chaired by the GAD, and transfer certain judicial powers to the executive.<sup>164</sup>

### 3.3 Barriers to remedies and reparation

#### a) *Lack of trust in the judiciary*

As discussed throughout this report, there is a chronic lack of public trust in the judiciary and the legal profession, linked to its lack independence from the executive and military. This means that the public rarely utilizes national courts to seek remedies and reparation. This lack of trust and unwillingness to engage with the judiciary is heightened in the case of victims of human rights violations, as these cases tend to be politically sensitive and thus almost inevitably subject to interference by the executive, military or other special interests.

#### b) *Lack of practical pathways to seek remedy and reparation*

Under the Myanmar legal system, victims of gross human rights violations, as with other victims of crime, can decide whether to join criminal proceedings and claim compensation before the criminal courts or to pursue a separate civil claim against the alleged perpetrator in the civil courts. Yet in practice, prosecutors rarely if ever accept petitions from victims of gross human rights violations to initiate criminal proceedings. Courts rarely if ever allow a civil claimant to bring such a case before a judge. Most of the population in Myanmar has been denied access to the courts due to unfair or discriminatory laws and practice as well as poor court decisions (see above, 2.2).

When a complaint is filed, the lack of independence of prosecutors frequently prevents an investigation being undertaken, as does the lack of independence of the courts (see below, 4.2). As a result, the filing of a criminal complaint rarely leads to an investigation and prosecution, particularly in instances of human rights violations. Therefore despite legal processes existing for persons to request or initiate criminal or civil proceedings, in practice this is only a theoretical option to pursuing remedies and reparation.

Myanmar also does not have administrative courts or a body of administrative law. In practice, Myanmar's courts rarely adjudicate disputes between individuals and the public administration. Such disputes are generally referred to informal dispute-resolution processes adjudicated by local leaders, or are reviewed by the GAD, as discussed above. Victims of crime, including human rights violations, do not have the option of bringing a claim before an Administrative Court.

There is very limited precedent or established practice for the provision of effective remedies or reparation for victims of criminal acts in Myanmar, particularly when such crimes involve human rights violations by State actors. Relevant and responsible State institutions therefore do not have practical examples of effective redress being carried out in Myanmar and this acts as a barrier to remedies and reparation in two key ways: 1) government institutions lack practical best practice examples to follow and this erodes their confidence and motivation to provide redress; and 2) an attempt by a government institution to effectively address a human rights violation in terms of redress is likely to be viewed by other government actors as a relatively radical move for which negative institutional consequences are imagined but unknown, for example there could be significant political backlash from powerful institutions such as the military.

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<sup>164</sup> ICJ, "Analysis of the Proposed Myanmar Township Administration Bill", (unpublished), June 2017.



c) *Judicial harassment*

The judicial harassment of victims of human rights violations is commonplace in Myanmar when victims, their families or lawyers seek remedies or reparation through the courts or other mechanism. Defamation and unlawful assembly laws are commonly used against persons who seek redress. For instance, in the case of the murder of two Kachin women, discussed above, both the military and the executive threatened legal action against anyone who alleged that soldiers were culpable in the crimes.<sup>165</sup> When peaceful protesters called for an investigation into the death of Daw Khin Win at Letpadaung, they were prosecuted and convicted on charges of unlawful assembly (see above). Furthermore, when Rohingya Muslims alleged gross human rights violations were committed by State security forces in Rakhine State, they were reportedly detained and charged,<sup>166</sup> likely for the Penal Code charge of furnishing false information.<sup>167</sup> Judicial harassment is used as against persons who call for investigations into human rights violations.

*Case: the prosecution of Brang Shawng*

On 13 September 2012, in a rural village of Kachin state, Brang Shawng's 14 year-old daughter Ja Seng Ing died from gunshot wounds sustained when Tatmadaw soldiers fired indiscriminately into the village, in the chaos following the detonation of a bomb by the Kachin Independence Army (KIA). Although 16 witnesses corroborate this version of events,<sup>168</sup> the military investigation found that the KIA bomb had fatally wounded Ja Seng Ing, not shooting by the Tatmadaw.

The following month Brang Shawng, himself shot in the hip during the incident, sent open letters to the Union President's Office and the National Human Rights Commission. The letters detailed his account of events and called for a proper investigation. In February 2013 an officer of the Tatmadaw submitted a complaint to the Hpakant Township Court alleging that these letters included false and defamatory allegations. Brang Shawng, who resided in a government-controlled part of Kachin state, was charged with making 'false charges' and appeared in court more than 45 times.<sup>169</sup> During his defense, a government doctor who had treated Ja Seng Ing was reportedly struck from the witness list, the presiding judge was replaced,<sup>170</sup> whilst Brang Shawng's lawyer claimed that armed Tatmadaw troops had intimidated her in court.<sup>171</sup>

The extended length of his prosecution, which itself amounts to a form of punishment, was due to repeated absences of the key prosecution witness, the Tatmadaw officer who filed the complaint.<sup>172</sup> This

<sup>165</sup> Lawi Weng, above note 83; Fortify Rights, "Myanmar: Prosecute Perpetrators, Not Human Rights Defenders. Authorities Threaten Media & Critics for Implicating Military in Kachin Killings", 3 February 2015.

<sup>166</sup> Simon Lewis, "Rohingya villagers tell media of abuses during army crackdown," Reuters, 15 July 2017.

<sup>167</sup> Myanmar Penal Code, Article 203. ICJ communication with journalist who visited Northern Rakhine State in July 2017, 18 July 2017.

<sup>168</sup> Truth Finding Committee of Ja Seng Ing's Death, "Who Killed Ja Seng Ing?", December 2014, p. 8.

<sup>169</sup> Myanmar Penal Code, Article 211; Truth Finding Committee of Ja Seng Ing's Death, "Who Killed Ja Seng Ing?", December 2014, pp. 6.

<sup>170</sup> Fortify Rights, "Myanmar: Overturn Wrongful Conviction of Brang Shawng", Press Release, 18 February 2015.

<sup>171</sup> Bill O'Tolle, "Calls to free Kachin man facing charges over rights complaint", *Myanmar Times*, 19 December 2014.

<sup>172</sup> ICJ communication with journalist close to the case, June 2017.

adjournment tactic is one frequently employed by prosecutors in Myanmar's courts, and permitted by judges.<sup>173</sup>

After 18 months of hearings Brang Shawng was found guilty of the charges.<sup>174</sup> To avoid a prison sentence he chose to pay a fine, but maintains that he is innocent.<sup>175</sup> An appeal to the Union Supreme Court for a reduction in the charges had been rejected.<sup>176</sup> The National Human Rights Commission did not make any representations on his behalf.<sup>177</sup> Nor did the Commission respond to the request for an investigation into his daughter's death. Nobody has been held accountable for the killing of Ja Seng Ing.

## 4 Independence and accountability of justice actors

### 4.1 The role of justice actors and institutions in the pursuit of redress and accountability

The equal administration of justice for all without fear or favour is essential to the ability of a State to discharge its obligations to hold perpetrators of gross human rights violations to account and to provide effective remedies and reparation to victims.<sup>178</sup> In turn, the equal administration of justice relies on several factors, including:

- The operation of independent judicial mechanisms comprised of judges whose independence is protected from interference by the executive branch or third parties (including, for example, as a result of dismissal or disciplinary action initiated on the basis of judicial decisions that are unfavourable to the executive, or other forms of interference or intimidation, or threats from police, security forces or private actors);
- The impartial adjudication by judges of cases, which may be negatively influenced, for example, by appointment processes for judges, the internal allocation of cases and/or corruption;
- The accountability of judges and prosecutors, including for corruption or lack of adherence with fair trial standards;
- The competence of judges and prosecutors, for example including as a result of adequate training and knowledge of international law and standards, particularly concerning obstacles to redress accountability and the available means to overcome such challenges;
- The knowledge and skills of lawyers and human rights defenders that act to pursue accountability or redress for victims; and
- The ability of such lawyers and other representatives to act free from

<sup>173</sup> ICJ, "Right to Counsel: the Independence of Lawyers in Myanmar", 2013, p. 39, at URL <https://www.icj.org/myanmar-lawyers-still-face-restrictions-despite-increased-independence-2/>.

<sup>174</sup> Saw Yan Naing and Andrew Kasper, "Kachin Man Accusing Army of Killing Daughter Found Guilty of Defamation", *The Irrawaddy*, 17 February 2015.

<sup>175</sup> Fortify Rights, "Myanmar: Overturn Wrongful Conviction of Brang Shawng", above note 175.

<sup>176</sup> Fortify Rights, "Myanmar: Drop Charges against Father of Slain School-Girl", 18 December 2014.

<sup>177</sup> The Commission's deputy chairperson at the time denied any knowledge of the much-publicized case: see Bill O'Tolle, "Calls to free Kachin man facing charges over rights complaint", *Myanmar Times*, 19 December 2014.

<sup>178</sup> See, for example: Practitioners Guide No 7, above note 20, pp. 318-325; and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 29, para 12.

external interference, undue influence or persecution.

## 4.2 The judiciary and the executive

### a) *The judiciary*

Myanmar's judiciary is not yet independent, is not accountable to the people, and is not a separate and equal branch of government. Undue influence by powerful political and economic actors continues to undermine the independence and accountability of the judiciary and hampers its push for greater trust and credibility among the general public. State authorities, mainly the executive and military, continue to exert improper influence on politically sensitive cases including those involving allegations of gross human rights violations.

Four decades of brutal authoritarian rule has systematically weakened the independence and integrity of the legal system. While it is the judiciary's responsibility to provide remedy and reparation for human rights abuses and bring perpetrators to justice, Myanmar's judiciary faces continued challenges to assert its independence from the other branches of government that interfere and influence its role. Judges tend to render decisions based on orders coming from government and military officials, in particular local and regional authorities. For some types of cases, there is a presumption of guilt and regular court procedures are not followed.<sup>179</sup>

Many judges in Myanmar lack knowledge of the law and standards on judicial conduct, as well as experience.<sup>180</sup> At all levels, criteria for the appointment of judges does not include requirements to have a law degree or judicial experience.<sup>181</sup> Judges, particularly at the lower rungs of the judiciary, are often unfamiliar with the law and court procedures.<sup>182</sup> Senior Government officials have told the ICJ that judges lack the knowledge and skills to conduct free and fair trials.<sup>183</sup>

A severe lack of resources has also led to structural problems, crippling the legal profession and thereby enabling, or at least failing to correct, the current situation in which judges can be unfamiliar with court procedures and jurisprudence. At all levels of the legal system, from the Supreme Court to the courts in townships, this lack of resources, as well as poor working conditions and low remuneration, contributes to an environment where the temptations of corruption, or outside pressure, undermine judicial independence and impartiality. At present, the Myanmar judiciary does not have the resources to meet increasing demands to provide justice and accountability.

In its Strategic Plan 2015-16, the Supreme Court of Myanmar cited 'judicial independence and accountability' as a key strategy area. The ICJ has heard strong support from all levels of the judiciary for establishing a judicial code of ethics, and continues to provide support to develop this code along with a mechanism for the accountability of judges (see section 2 above).

Other mechanisms undermine the competence and capacity of the judiciary to

<sup>179</sup> For example, lawyers in Rakhine State told the ICJ there is an understanding that guilty verdicts are predetermined for defendants prosecuted for drug-related crimes: ICJ meeting with senior lawyers, August 2016.

<sup>180</sup> International Bar Association's Human Rights Institute, "The Rule of Law in Myanmar: Challenges and Prospects", Report of the IBA's Human Rights Institute, December 2012, p. 58.

<sup>181</sup> ICJ, "Myanmar: Country Profile prepared by the ICJ Centre for the Independence of Judges and Lawyers", June 2014, p. 8, at URL <https://www.icj.org/cijlcountryprofiles/myanmar-introduction/>.

<sup>182</sup> ICJ, "Implementable Action Plans from the ICJ to the new Parliament and Government", above note 1; ICJ, "Right to Counsel", above note 32, p. 40.

<sup>183</sup> See, for example: ICJ, "Right to Counsel", above note 32, p. 40.

administer justice, particularly in cases involving human rights violations, which are generally politically sensitive and tend to come to the attention of State security actors. Cases involving prosecution of members of the military or police force are generally referred to military courts and police courts, so fall outside the jurisdiction of normal courts (see discussion above, at 2.2(a) and (c)). Ad hoc inquiries, such as investigation committees commissioned by the Union President, also have an unclear relationship with the judiciary. The findings of these inquiries have not led to prosecutions in courts.

Challenges to the independence of the judiciary, limitations on its competence and capacity, and restrictions on its jurisdictional reach continue to combine in significantly undermining and limiting the ability of judges to provide for accountability and redress, and to adequately administer justice with respect to victims and perpetrators of human rights violations.

b) *The Attorney General*

A member of the executive branch of government, the Union Attorney General has a powerful role in the judicial system, representing the Government in judicial proceedings and advising the cabinet on the legality of its actions.<sup>184</sup>

Historically, the Union Attorney General's Office has followed the interests of the military and impeded an independent judiciary. It has been criticized for failing to tackle major problems such as corruption and human rights abuses while continuing to prosecute human rights defenders and political opponents.<sup>185</sup>

The Attorney General is, in effect, the minister of justice, and as such has also controlled much of the work of the judiciary. He or she is also the president of Myanmar's only officially recognized Bar Association.<sup>186</sup> The Attorney General leads prosecutors in the country, and thus has the legal authority to select, initiate and undertake investigations into criminal and politically sensitive cases.

Lawyers have told the ICJ that prosecutors and court officials often lack the competency and capacity necessary for the effective administration of justice. At the most basic level, there is a lack of punctuality and dependability on the part of court staff, prosecutors, police and expert witnesses and judges, whether intentionally or simply due to negligence. Prosecutors call for – and are granted as a matter of course – repeated adjournments; witnesses (particularly the police) fail to appear at hearings; and judges are sometimes late by several hours. These delays have a material effect on the administration of justice.<sup>187</sup>

Prosecutors frequently experience interference in cases by members of the executive and military.<sup>188</sup> There is a lack of effective safeguards enabling prosecutors to conduct investigations impartially, according to the law and in a functionally independent manner. Overall, Myanmar's law officers lack the independence, competence and capacity to effectively prosecute acts involving human rights violations.

<sup>184</sup> ICJ, "Myanmar: newly appointed Attorney General should commit to reform, rule of law and human rights", 6 April 2016, at URL <https://www.icj.org/myanmar-newly-appointed-attorney-general-should-commit-to-reform-rule-of-law-and-human-rights/>.

<sup>185</sup> Daniel Aguire and Vani Sathisan, "Rule of law depends on reform of Union Attorney General's Office", *Myanmar Times*, 27 January 2016.

<sup>186</sup> In 2016 the Myanmar Independent Lawyers Association was established as an initiative of the NLD, but is not formally incorporated as a Bar Association.

<sup>187</sup> ICJ, "Right to Counsel", above note 32, p. 39.

<sup>188</sup> For example, lawyers have told the ICJ about law officer being instructed by executive officers, from the General Administration Department, to prosecute charges in accordance with the wishes of police officers: ICJ interview with human rights lawyer in Yangon, March 2017. See also: ICJ, "Right to Counsel", above note 32.

In recent years, the Union Attorney General has undertaken steps toward reform. Its Strategic Plan for 2015-19 acknowledges the public's low confidence in the office and commits the office to the rule of law, human rights, fair trials, prosecutorial ethics and accountability, in accordance with international standards. It establishes important benchmarks for measuring the institution's development. The ICJ continues work toward encouraging and supporting the Attorney General's Office to establish an enforceable code of ethics and accountability for its law officers based on international standards.<sup>189</sup>

### 4.3 Lawyers

The legal profession in Myanmar has low public and professional standing due to a history of eroded respect for the rule of law, the poor state of legal education, political oppression, and endemic corruption.<sup>190</sup> State and security authorities continue to exert improper influence over lawyers through intimidation, harassment, and monitoring. Lawyers also work under fear of reprisals or sanctions from powerful State or private interests.<sup>191</sup>

A 2013 ICJ report, based on interviews with 60 lawyers in practice in the country, found that authorities have significantly decreased their obstruction of, and interference in, legal processes since the country began political reforms in 2011.<sup>192</sup> Yet major challenges remain. Government officials and institutions continue to restrict the independence of lawyers. This is particularly the situation when lawyers are involved in 'political cases': generally, those that challenge the Government, officials or their vested interests. They also include cases (generally criminal) involving human rights defenders or alleged acts involving violations of human rights by authorities; land grabbing by authorities, companies or powerful individuals; grievances of ethnic minority groups; and political activities by high profile individuals. In these cases, the generally applicable challenges to the independent operation of the legal community are intensified and exacerbated, while added to them are monitoring and harassment by State intelligence agents, fabrication of evidence, and pre-trial determination of judgments.<sup>193</sup>

Authorities continue to take action against lawyers, and particularly against those involved in cases that are considered to be politically sensitive, including those involving human rights violations, and in cases in which lawyers are representing individuals charged with criminal offences. Systemic barriers to independence of the legal profession, long veiled by previous military governments' persecution of lawyers, are now apparent and need to be meaningfully addressed. Freedom of association and expression among lawyers is not always respected. Structural and legal impediments prevent lawyers from effectively carrying out their professional functions, which then prevents individuals from accessing justice.<sup>194</sup>

Interference with and intimidation of lawyers, particularly in politically sensitive cases pertaining to human rights violations, plus limitations in the capacity of lawyers, undermine the competence of lawyers to represent clients and pursue effective remedies or reparation in instances of human rights violations.

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<sup>189</sup> Vani Sathisan, "The ICJ meets with the Attorney-General of Myanmar," 4 June 2016, at URL <https://lawhumanrightsbusinessmyanmar.wordpress.com/2016/06/04/the-icj-meets-with-the-attorney-general-of-myanmar/>.

<sup>190</sup> ICJ, "Right to Counsel", above note 32.

<sup>191</sup> ICJ, "Implementable Action Plans from the ICJ", above note 1.

<sup>192</sup> ICJ, "Right to Counsel", above note 32.

<sup>193</sup> Ibid, p. 18.

<sup>194</sup> ICJ, "Implementable Action Plans from the ICJ", above note 1.

## 5 Post-report update

As noted in the preface, since the preparation of this report there has been a rapid deterioration in the human rights situation in Myanmar. More than 650,000 inhabitants of northern Rakhine state have been displaced since 25 August 2017 as a result of security operations commanded by Myanmar's military, the Tatmadaw, which followed attacks on police posts by the Arakan Rohingya Salvation Army (ARSA). This mass movement of people has substantially added to the pre-existing populations of displaced persons from Myanmar both in Rakhine State and in neighboring Bangladesh, resulting in a major humanitarian crisis, amid reports of widespread human rights violations by security forces and human rights abuses by ARSA and non-State actors. The vast majority of persons displaced are Rohingya Muslims, most of whom have crossed to Bangladesh, while tens of thousands remain displaced in Myanmar.<sup>195</sup>

Statements and reporting on this crisis have included the use of both legal and non-legal terminology to assess and describe the situation. The ICJ has in this context published a Questions & Answers briefing note, clarifying some of the applicable national and international law and standards, including those related to: the obligations of State actors in domestic and international law; constitutional arrangements related to the command of security operations; rules governing the conduct of security operations and international standards on the use of force; legal and non-legal terms to describe crimes and acts; legal implications of designating ARSA as a terrorist organization; barriers to accountability and how these can be surmounted; and the responsibilities of Myanmar and its neighbors toward persons affected, including Rohingya refugees.<sup>196</sup>

In the latter half of 2017, journalists reporting on security operations have been subjected to arbitrary arrests and criminal prosecutions linked to investigations in areas where human rights violations are occurring. In September, military officers dropped charges against three journalists working for local media agencies who were detained in Shan State for more than two months in connection with their work investigating security operations. In December, two journalists working for the international news agency Reuters were detained incommunicado for two weeks and currently face charges brought by military officers under the colonial-era Official Secrets Act. The journalists, who had reported from northern Rakhine State, were denied the fair trial rights guaranteed in national and international law. Their treatment threatens freedom of expression and undermines the rule of law, including by potentially dissuading other journalists to investigate the actions of security forces.<sup>197</sup>

In December 2017, the Government of Myanmar barred entry to the Special Rapporteur on the situation of human rights in Myanmar, who since 1992 has been tasked with examining the situation of human rights in Myanmar and to report to the UN General Assembly and its Human Rights Council. This followed a Government decision earlier in the year to not cooperate with the Independent International Fact Finding Mission on Myanmar created by the Human Rights

<sup>195</sup> ICJ, 'Myanmar: Rakhine State crisis demands full government commitment to protecting human rights of all', released on 11 September 2017 and available at <https://www.icj.org/myanmar-rakhine-state-crisis-demands-full-government-commitment-to-protecting-human-rights-of-all/>.

<sup>196</sup> ICJ, 'Myanmar: Questions and Answers on Human Rights Law in Rakhine State', released on 16 November 2017 and available at <https://www.icj.org/myanmar-rule-of-law-must-drive-responses-to-rohingya-crisis/>.

<sup>197</sup> ICJ, 'Reuters journalists detained in Myanmar: respect their rights, end their incommunicado detention', released on 18 December 2017 and available at <https://www.icj.org/reuters-journalists-detained-in-myanmar-respect-their-rights-end-their-incommunicado-detention/>.

Council in 2017. Also in December, the UN Human Rights Council convened a Special Session on Myanmar, outlining key requirements for the protection of the Rohingya minority, including safe and voluntary return of refugees.<sup>198</sup>

As noted in the preface to this report, a Tatmadaw-led inquiry found in January 2018 that Rohingyas had been killed by security forces and civilians in northern Rakhine State in September 2017.<sup>199</sup> This warrants further investigation, likely also prosecution, and should be pursued accordingly through public criminal proceedings. While the summary report from the Tatmadaw-led inquiry is significant – as it is the first admission from a Government institution that acts involving gross human rights violations against Rohingyas were committed by security forces in northern Rakhine State – important questions remain as to when and how redress and accountability will follow, bearing in mind the considerable challenges in law and practice identified in this report.

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<sup>198</sup> ICJ, 'Myanmar: Protection of Rohingya Minority, UN Special Session', 5 December 2017, available at <https://www.icj.org/myanmar-un-special-session/>.

<sup>199</sup> Tatmadaw True News Information Team, 'Tatmadaw investigation team issues statement on findings of discovery of unidentified bodies in Inndin Village cemetery in Maungtaw Township', released on 10 January 2018 and available in English at <https://m.facebook.com/Cincds/posts/1568727529914773>; and in Burmese at <https://www.facebook.com/Cincds/posts/1568080199979506> (cited on 12 January 2018).

## ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES

The aim of this report is to provide a baseline assessment of the situation in Myanmar pertaining to the accountability of perpetrators of gross human rights violations and the access to effective remedies and reparation of victims of such violations; alongside an assessment of the independence and accountability of judges and lawyers and the ability of justice mechanisms and justice actors to provide for accountability and redress. The report is part of the ICJ's Global Redress and Accountability Initiative, currently focused on seven countries (Cambodia, Mozambique, Myanmar, Nepal, Tajikistan, Tunisia and Venezuela) with the aim to combat impunity and promote redress for gross human rights violations. It concentrates on the transformative role of the law, justice mechanisms and justice actors, seeking to achieve greater adherence of national legal and institutional frameworks with international law and standards so as to allow for effective redress and accountability; more independent justice mechanisms capable of dealing with challenges of impunity and access to redress; and judges, lawyers, human rights defenders, victims and their representatives that are better equipped to demand and deliver truth, justice and reparation.

In all regions of the world, perpetrators of gross human rights violations enjoy impunity while victims, especially the most vulnerable and marginalized, remain without effective remedies and reparation. Governments of countries in transition and/or experiencing a wider rule of law crisis often seek to provide impunity for perpetrators of gross violations of human rights, or make no effort to hold them to account, or misuse accountability mechanisms to provide arbitrary, politically partial justice. Yet international law requires perpetrators to be held accountable and victims to be provided with effective remedies and reparation, including truth and guarantees of non-recurrence. This is reinforced by the 2030 Sustainable Development Agenda, which recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice, are based on the rule of law and respect for human rights, and provide for accountability.

Impunity and lack of redress dehumanizes victims and acts as an impediment to the cementing of democratic values and the rule of law. Lack of accountability and claims for justice dominate national debates, frequently leading to a paralysis or reduced functioning of the institutions of the State and detracting from the pursuit of other rule of law and development initiatives. Impunity threatens a nascent democracy by rendering its constitution hollow, weakening its judiciary and damaging the political credibility of its executive. Public institutions often act in ways that bring them into disrepute and undermine the public confidence in them that is required for sustainable transition: through the legislature enacting laws providing for impunity; through law enforcement and the judiciary acting on a selective basis or without independence; and/or through the executive ignoring rule of law based judgments by higher courts. A failure to guarantee redress and accountability has too often also resulted in former structures of power, to the extent that they enjoy impunity, transforming into criminal and hostile elements that may perpetuate violence and conflict.

### Methodology

This report has primarily been developed through legal research and desk review of existing studies, reports and notes of the International Commission of Jurists in Myanmar in the key focus areas of: accountability for human rights violations; access to remedy; and the independence and accountability of justice actors.

Legal and background research is sourced from national and international legal materials, UN documents, reports by civil society and non-governmental



organizations (NGOs), academic writings and media reporting. Also informing this report are ICJ public and internal reports, mission notes and personal communications with key stakeholders in Myanmar over the last several years. The ICJ's first mission to Myanmar was in 1991. In early 2014 an office of the ICJ was established in Yangon. In recent years, ICJ Commissioners and legal teams have facilitated workshops, pursued fact-finding missions, held working meetings and undertaken other activities throughout Myanmar.

Case studies included in this report illustrate and assess the laws, institutions and practices related to the accountability of perpetrators of human rights violations, access to effective remedies and reparation, and the role of judicial actors in administering justice in relation to rights violations in Myanmar.

A limitation of this report is that its scope focuses on the role of national State-sanctioned actors related to accountability and impunity for gross human rights violations. Non-State armed groups and administrative organizations, whilst recognized as critically important actors particularly in non-Government controlled areas of Myanmar, are not included within the scope of this study. This decision was taken in consultation with partners and team members in the interest of focusing on areas of judicial administration where the ICJ has experience, expertise and importantly the capacity to plan interventions within current parameters of the Global Redress and Accountability Initiative. The ICJ otherwise takes the position that all perpetrators of gross human rights violations or abuses, irrespective of their governmental or other nature, must be held to account and that victims of such violations and abuses be entitled to effective remedies and reparation. The ICJ expects to be engaging more in mixed administrative areas in the future, and it is anticipated that the experience and relationships developed through these activities may inform future work engaging with non-State actors under the Initiative.



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