



**Supplement to the
International Protocol on
the Documentation and
Investigation of Sexual
Violence in Conflict:**

Myanmar

**MYANMAR-SPECIFIC GUIDANCE FOR PRACTITIONERS
MARCH 2018**



Institute for International
Criminal Investigations

REDRESS

Ending Torture, Seeking Justice for Survivors



**Supplement to the
International Protocol on
the Documentation and
Investigation of Sexual
Violence in Conflict:**

Myanmar

**MYANMAR-SPECIFIC GUIDANCE FOR PRACTITIONERS
MARCH 2018**



ACKNOWLEDGEMENTS

This Supplement was written on behalf of REDRESS by Sarah Fulton, with extensive research support from Naomi Barker. Sections relating to Burmese law were reviewed by L. Khun Ring Pan. A number of other individuals who would like to remain anonymous reviewed and provided input into the Supplement and their assistance is also gratefully acknowledged. REDRESS's Head of Law and Policy, Jürgen Schurr, and the Institute for International Criminal Investigations' ("IICI") Programme Director, Gabriël Oosthuizen, also reviewed the Supplement. The development of this Supplement has been made possible by the generous support of the Foreign & Commonwealth Office of the UK government.

COPYRIGHT IN THIS SUPPLEMENT, AND NOTE ABOUT ADAPTING THIS SUPPLEMENT

IICI and REDRESS own the copyright in this Supplement. However, the Supplement is intended to be a living document and tool. All users are free to use, update, correct and otherwise adapt this Supplement for their own purposes as they wish. No approval needs to be secured from IICI, REDRESS, the authors of this Supplement or from the FCO for any such changes. However, please give due acknowledgment to this Supplement when adapting it.

DISCLAIMER

IICI and REDRESS are not and will not be responsible for if and how this Supplement or the document which it complements, the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, are used and/or adapted by others, or for any related consequences. Every user of the mentioned documents is responsible for assessing the suitability and safety of using and/or putting into practice their content.

The Supplement may contain inadvertent errors, as explained in Chapter 1 of this Supplement. Users must check for themselves whether the content is up to date and otherwise correct.

ABOUT IICI

The Institute for International Criminal Investigations specialises in building and strengthening the capacity of international, national, civil society and other investigators and practitioners to document and investigate war crimes, crimes against humanity, genocide and grave human rights violations. Its course offerings include training on the investigation of conflict-related sexual and gender-based violence. More information on IICI can be found at www.iici.global.

ABOUT REDRESS

REDRESS is an international human rights non-governmental organisation based in the United Kingdom and The Netherlands with a mandate to assist survivors of torture and related international crimes to seek justice and other forms of reparation, hold accountable the governments and individuals who perpetrate torture, and develop the means of ensuring compliance with international standards and securing remedies for victims. More information on REDRESS can be found at www.redress.org.



TABLE OF CONTENTS

Note that chapter and section numbering largely mirror those in the second (March 2017) edition of the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (“IP2”) for easy cross-referencing, though not all IP2 chapters are included for further country-specific elaboration.

ACRONYMS	v
PART I: USING THE INTERNATIONAL PROTOCOL IN MYANMAR	1
CHAPTER 1: Introduction	1
PART II: WHAT IS SEXUAL VIOLENCE?	3
CHAPTER 2: Understanding Sexual Violence in Myanmar	3
A. Contextualising sexual violence in Myanmar	3
1. The military and non-international armed conflict	3
2. Rise of extreme nationalist Buddhist movements	4
Box 1. Ethnic cleansing of Rohingya Muslims	4
3. Reports of CARSV	5
4. Military and police impunity	5
B. Forms of CARSV in Myanmar	6
1. Rape	6
2. Sexual violence in detention as a form of torture and sexual slavery	7
3. Forced abortion and forced miscarriage	7
4. Forced marriage and forced pregnancy	7
5. Sexual harassment, threats of rape and forced nudity	7
6. Sexual and gender-based violence associated with forced displacement	7
C. Conflict and Atrocity-Related Sexual Violence	7
1. Motivations	7
2. Under-reporting of sexual violence	8
3. Victims	8
4. Perpetrators	9
5. Indicators of sexual violence	9
D. Impact of CARSV in Myanmar	9
PART III: ACCOUNTABILITY AVENUES AND REMEDIES	13
CHAPTER 3: Overview of Accountability Avenues and Remedies Relating to Myanmar	13
A. Myanmar’s legal landscape	13
B. Limited role of the courts	14
Box 2. Avoiding the courts in Myanmar	14
C. Overview of accountability avenues and remedies for victims	14
1. Domestic avenues (in Myanmar)	14
Box 3. Reprisals against complainant to NHRC	16
2. Regional human rights mechanisms	16

3. International accountability mechanisms	16
4. Investigative and fact-finding bodies	17
Box 4. The UN Independent International Fact-Finding Mission on Myanmar	17
5. International and hybrid courts and tribunals	17
6. Proceedings in third countries – extra-territorial jurisdiction including universal jurisdiction	17
D. Table of accountability avenues	18
CHAPTER 4: Individual Criminal Responsibility under Burmese Law	20
A. Legal framework	20
Box 5. The illegality of military trials for grave human rights violations	21
B. Sexual violence crimes under Burmese law	21
1. Crimes relevant to CARSV under Burmese law	21
Box 6. Limitations of using “ordinary” crimes	25
2. Modes of liability	26
3. Defences and excuses and other grounds for excluding criminal liability	27
Box 7. No good faith defence where manifestly unlawful order	28
4. Child offenders	28
5. Prescription	28
6. Immunities and amnesties	28
D. Rules and practice on procedure and evidence	29
1. Consent	29
2. Corroboration	29
3. Prior and subsequent sexual conduct	29
4. Standard of proof	29
5. Procedure	29
6. Protective measures	30
PART IV: DOCUMENTATION IN PRACTICE: PREPARATION	31
CHAPTER 7: Do No Harm	31
A. Potential sources of harm to victims and witnesses	31
B. Informed consent	32
C. Mitigating harm	32
1. Threat and risk assessments	32
2. Coordination	32
Box 8. Mandated actors	33
3. Confidentiality	33
4. Referrals	34
CHAPTER 8: Safety and Security	35
A. Introduction	35
B. Managing risks to practitioners	35
Box 9. Addressing vicarious trauma	36

C. Managing risks to information36

D. Managing risks to victims and witnesses.....36

CHAPTER 10: Types of Evidence of Sexual Violence in Myanmar37

A. Introduction37

B. Testimonial evidence37

C. Documentary evidence.....37

 Box 10. Concerns about collection of physical evidence in teachers' rape and murder.....37

D. Physical evidence.....37

ENDNOTES.....39



ACRONYMS

AA	Arakan Army
ABSDF	All Burma Students' Democratic Front
ALP	Arakan Liberation Party
ARIF	Arakan Rohingya Islamic Front
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
CARSV	Conflict and Atrocity-Related Sexual Violence
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CNF	Chin National Front
CRC	Convention on the Rights of the Child
CrPC	Criminal Procedure Code
CRPD	Convention on the Rights of Persons with Disabilities
DKBA	Democratic Karen Buddhist/Benevolent Army
EAOs	Ethnic Armed Organisations
FIR	First Incident Report
HaY	Harakah al-Yaqin
HREIB	Human Rights Education Institute of Burma
HRW	Human Rights Watch
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	International Criminal Court
ICJ	International Commission of Jurists
IDP	Internally displaced people/person
IED	Improvised explosive device
IICI	Institute for International Criminal Investigations
IP2	International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (Second edition, March 2017)
KA	Karenni Army
KIO/KIA	Kachin Independence Organisation/Army
KNLA	Karen National Liberation Army
KPC	Karen National Liberation Army Peace Council
KNU	Karen National Union
KNWO	Karenni National Women's Organisation

KWAT	Kachin Women's Association Thailand
KWO	Karen Women's Organisation
LAN	Legal Aid Network
MN-DAA	Myanmar National Democratic Alliance Army
NCA	National Ceasefire Agreement
NHRC	Myanmar National Human Rights Commission
NHRC Act	Myanmar National Human Rights Commission Act 2014
NMSP	New Mon State Party
NSPA	National Strategic Plan for the Advancement of Women
OHCHR	UN Office of the High Commissioner for Human Rights
PNLO	Pa-O Peoples' National Liberation Organisation
PTSD	Post Traumatic Stress Disorder
SLORC	State Law and Order Restoration Council
SSA-South	Shan State Army South
SPDC	State Peace and Development Council
SWAN	Shan Women's Action Network
TWO	Ta'ang Women's Organisation
TNLA	Ta'ang National Liberation Army
RSO	Rohingya Solidarity Organization
RCSS	Restoration Council of Shan States
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
UNFFM	United Nations Independent International Fact-Finding Mission on Myanmar
UNHCHR	United Nations High Commissioner for Human Rights
UPR	UN Universal Periodic Review
UWSA	United Wa State Army
WCRP	Woman and Child Rights Project
WLB	Women's League of Burma

PART I /

USING THE INTERNATIONAL PROTOCOL IN MYANMAR

CHAPTER 1 / INTRODUCTION

The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, now in its second edition (hereafter referred to as “IP2”) is a “set of guidelines setting out best practice on how to document, or investigate, sexual violence as a war crime, crime against humanity, act of genocide or other serious violation of international criminal, human rights or humanitarian law”.¹ It is a tremendous resource for practitioners, covering theoretical, legal and very practical aspects of documentation.

As IP2 makes clear, documentation is highly context-specific, and each conflict situation and country will have individual legal and practical considerations that must be considered as part of and alongside the best practice guidelines. This Supplement is intended as a companion to IP2, filling the gap with country-specific information relevant to documenters in Myanmar. It does not generally repeat the content of IP2 and cannot be used as a stand-alone document. Instead, it addresses the context for and characteristics of Conflict and Atrocity-Related Sexual Violence (“CARSV”)² most apparent in Myanmar, the landscape for legal avenues for justice within Myanmar and at the international level, specific evidential and procedural requirements and practical issues that may arise when documenting CARSV in the country.

This Supplement focuses on the documentation of CARSV as defined in IP2: “sexual violence as a war crime, crime against humanity, act of genocide or other serious violation of international criminal, human rights or humanitarian law”.³ Particular attention is paid to crimes of sexual violence committed within the context of internal armed conflict in the country (and which may amount to war crimes) and crimes that may potentially amount to crimes against humanity or the crime of genocide (which do not require an armed conflict context, but can also be committed in such a context). It does not include specific consideration of sexual violence as a form of torture where this

is not connected to conflict, although such violence could also amount to crimes against humanity or genocide and other grave human rights violations.

Users of this Supplement should note that laws can be changed and all legislative provisions set out here should be checked against up-to-date law in Myanmar. There are ongoing discussions about how to promote accountability for such crimes. It is very possible that new mechanisms and laws, including new definitions of crimes and new rules of evidence and procedure, may be created.

The Supplement is aimed at both local and international practitioners, regardless of whether they document or investigate current CARSV or CARSV committed long ago.⁴ It is relevant to documentation within the country and outside the country, although the practical issues discussed in Part IV (Documentation in Practice) are aimed at documentation within Myanmar itself.

This Supplement, and a Burmese translation, are available online at the websites of REDRESS (www.redress.org) and IICI (www.iici.global). The FCO may also in due course post the Supplement in both languages on its website.



PART II /

WHAT IS SEXUAL VIOLENCE? CHAPTER 2 / UNDERSTANDING SEXUAL VIOLENCE IN MYANMAR

Sexual violence – particularly against women and girls – is a feature of everyday life in Myanmar.⁵ As elsewhere, “[t]raditional and customary practices, coupled with patriarchal and gender discriminatory attitudes, create an environment where [gender-based violence] is condoned and normalized.”⁶ Survivors of sexual violence are widely discriminated against socially and legally, and encounter many, often insurmountable, barriers to justice.

CARSV committed by state and non-state actors in the context of long-running armed conflicts and attacks and other campaigns against civilian populations is a particularly grave and brutal aspect of this violence. Investigations and accountability of those responsible is almost non-existent.

A. Contextualising sexual violence in Myanmar

1. The military and non-international armed conflict

Following a brief period of parliamentary democracy following independence from British colonialism, Myanmar was under military rule almost continuously from 1962 to 2011. This rule extended to complete military control of the courts and legal system.⁷ While the military junta was officially dissolved in 2011, and democratic elections installed a civilian government in 2015, the military is not under civilian control and is still the most powerful actor in Burmese politics – a position entrenched in the 2008 Constitution which provides it with 25% of the seats in the Parliament and control of three powerful ministries.⁸ It maintains direct influence on the courts, and has complete independence in criminal matters concerning its personnel.⁹ In addition, in a state of emergency, the Constitution gives the military the power to dissolve the civilian government and rule alone.¹⁰

The borders of Myanmar are based on the boundaries of the British empire rather than any pre-existing cultural or ethnic group,¹¹ and it is one of the most ethnically diverse countries in Asia.¹² Some of these areas have never been under central control since independence in 1948.¹³ The Citizenship Law of 1982 “recognizes eight major “national ethnic groups”: Bamar¹⁴ (ap-

proximately two thirds of the population), Chin, Kachin, Kayah, Kayin, Mon, Rakhine and Shan”. The government breaks these eight groups down further into 135 recognised “national ethnic groups”.¹⁵ A number of other ethnic groups do not receive official recognition.

Following independence, the “imagined community” of Myanmar “became a land of civil war where almost every minority group rebelled against the Burman-controlled regime”,¹⁶ whether fighting for independence or for federalism.¹⁷ Although “ethnic factors originally shaped these skirmishes, issues related to the exploitation of natural resources, land use, the development of infrastructure projects and the narcotics trade” have also played an increasing role.¹⁸ Many of the majority ethnic group (the Bamar) also sought to resist military rule in favour of the restoration of democracy.¹⁹ Widespread non-violent protests against military rule in 1988 were crushed by the army, with an estimated 3,000 – 10,000 civilians killed and many more imprisoned without trial.²⁰

In this context, a myriad of armed non-state actors, known as Ethnic Armed Organisations (“EAOs”) have emerged – most demanding a high level of autonomy and recognition of identity rights.²¹ A key function of the military since that time has been to maintain territorial integrity and central government control by force. Broadly, “this has meant the waging of war against the minority groups who refuse to submit to the regime’s authority. The strategy has involved massively increasing the armed forces and the acquisition of much military hardware including tanks. Scorched earth and counter-insurgency tactics have been used against the guerrilla warfare practiced by the remaining armed resistance groups.”²²

As part of its tactics, the military has employed what it terms the “Four Cuts” strategy, targeting civilian populations to isolate guerrilla armies from their main links with families and local villages who may provide them with support. Forced internal relocation of much of the population “has constituted a major military tactic.”²³ The military “designate large areas as Forced Relocation Zones into which whole clusters or tracts of villag-

es are moved so as to cut insurgent groups off from supplies. Non-compliant villages are burnt to the ground and credible rumours abound of diseased livestock thrown by the military into village water supplies to eradicate populations thought to be directly aiding liberation armies.²⁴ Accompanying the strategy are attacks on civilians and widespread use of forced labour, extrajudicial executions, sexual violence, torture, beatings and other ill-treatment, and destruction of civilian property.²⁵ In the 1990s it was estimated that each year, for more than forty years, approximately 10,000 people had died as a result of the fighting.²⁶

Through this process the military “pacified” most groups and signed ceasefire agreements with them, although some of those later broke down (notably in Kachin) or in some cases hostilities continued regardless (for example in Northern Shan State).²⁷ In “pacified” areas, “the strategic use of political violence create[d] and maintain[ed] terror”.²⁸

On 15 October 2015, following the election of the National League for Democracy Government, a National Ceasefire Agreement (“NCA”) was signed by eight EAOs and the central government.²⁹

However, some of the largest EAOs were prevented from signing by restrictions imposed by the government. Four EAOs operating in Kachin and Northern Shan remain formally outside the NCA and open hostilities continue with the military, increasing in intensity since 2016 with the use of artillery by both sides and air strikes by the military.³⁰ In addition, implementation of the NCA with those who have signed has been uneven and slow, and armed clashes have occurred in 40 of the 94 townships in which EAO signatories are present.³¹

In 2017, four separate non-international armed conflicts were being fought in Myanmar between the military and various EAOs: (1) Kachin (against Kachin Independence Organisation/Army (“KIO”/“KIA”)); (2) Northern Shan State (multiple EAOs:

KIA, Ta’ang National Liberation Army (“TNLA”³²), Myanmar National Democratic Alliance Army (“MN-DAA”) and Arakan Army (“AA”)); (3) Rakhine (against the Arakan Rohingya Salvation Army (“ARSA”) or Harakah al-Yaqin (HaY)); and (4) Kayin (Karen) (against Democratic Karen Buddhist Army (“DKBA”)).³³

2. Rise of extreme nationalist Buddhist movements

A more recent development important to understanding the context of CARSV, particularly in Rakhine State, is the rise of extreme nationalist Buddhist movements within Myanmar, and growing narratives within the country that “construct Muslims as an existential threat, in which Buddhism is vulnerable and needing protection lest Islam supplant it as the majority religion”.³⁴

This development was spearheaded in part by the “969 Movement”, led by a number of monks who broadcast extreme views about the alleged rise of Islam and encouraged a boycott of Muslim businesses, gaining prominence after the political liberalisation of 2011.³⁵ Following an effective ban in late 2013, the movement evolved into the more formalised Association for the Protection of Race and Religion, popularly known as *MaBaTha*.³⁶

MaBaTha successfully lobbied for the enactment of four race and religious laws in 2015 – concerning population control, marriage of Buddhist women to non-Buddhists, religious conversion and monogamy.³⁷ These laws have been strongly criticised as being discriminatory and appearing to target Muslims.³⁸ In addition, although there are some among *MaBaTha* who oppose anti-Muslim rhetoric and hate speech, other “prominent monks and laypeople within *MaBaTha* espouse extreme bigoted and anti-Muslim views, and incite or condone violence in the name of protecting race and religion”.³⁹ This has contributed to an atmosphere where tense intercommunal relations have the potential to erupt into major communal violence.⁴⁰

Box 1. Ethnic cleansing of Rohingya Muslims

One group not formally recognised as one of the country’s ethnic groups but which has been repeatedly targeted by military action is the Rohingya Muslim community in Rakhine State. Tensions and violence between the majority Buddhist Rakhine population and minority Rohingya Muslims date back at least as far as British colonial rule.⁴¹ Many Rakhine “contest the claims of the Rohingya to a distinct ethnic heritage and historic links to Rakhine State, viewing the Rohingya as “Bengali” (connoting them as non-indigenous or “illegal immigrants”), with no cultural, religious or social ties to Myanmar”.⁴²

Rohingya have faced “decades of discrimination and repression under successive Burmese governments, including restrictions on movement and access to education and health services” and were effectively stripped of their citizenship under the Citizenship Law 1982.⁴³

In 1978, more than 200,000 Rohingya fled to Bangladesh to escape violence and repression, and 250,000 more left in 1991-1992.⁴⁴ Many of these were later forcibly repatriated by Bangladesh.⁴⁵ According to Human Rights Watch (“HRW”), “[t]he abuses against the Rohingya were very different in character from those occurring during this period against other ethnic minority populations. Elsewhere the Burmese army was engaged in often long-running armed conflicts with ethnic armed groups, and the unlawful attacks on those civilian populations grew out of those conflicts. In the case of the Rohingya, non-state armed groups called the Rohingya Solidarity Organization (“RSO”) and the Arakan Rohingya Islamic Front (“ARIF”) were established in northern Arakan [Rakhine] State in 1982 and 1987, respectively, but these groups and others never posed a serious threat to the Myanmar military state, their principal target, nor to Burmese society. ... Instead, the Burmese security forces committed widespread abuses targeting the Rohingya population in an apparent effort to force their relocation.”⁴⁶

Large scale inter-communal violence has continued periodically. In 2012, inter-communal violence resulted in the deaths of at least 192 people (134 Rohingya and 58 Rakhine), and widespread destruction of property, approximately 86% of which belonged to Rohingya. The violence resulted in approximately 140,000 internally displaced persons (“IDPs”), more than 95% of them Rohingya.⁴⁷

Another upsurge in violence and mass displacement in the north of Rakhine State began in October 2016 following a series of attacks on border police stations in Maungdaw and Rathedaung townships by ARSA. Attacks by ARSA in November 2016 and August 2017 led to a further escalation of “clearance operations” by the Myanmar military, affecting Muslim communities, and the displacement of more than six hundred thousand Rohingya to Bangladesh.⁴⁸ A United Nations Flash Report released in March 2017 (hereinafter “UN Flash Report”) detailed widespread extrajudicial executions and other unlawful killings, including killing of children, enforced disappearance, rape, including gang rape, and other forms of sexual violence, torture and other cruel, inhuman or degrading treatment or punishment, burning of homes and other properties, destruction of food and food sources, looting and ethnic and religious discrimination.⁴⁹

The United Nations High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, described the attacks as “a textbook example of ethnic cleansing,”⁵⁰ and UN Flash Report concluded it was “very likely” that the crimes committed amounted to crimes against humanity.⁵¹ In December 2017, the High Commissioner stated that members of the military as well as the civilian government in the country may be liable for genocide,⁵² and in February 2018 the UN Special Rapporteur on the Situation of Human Rights in Myanmar (“UN Special Rapporteur on Myanmar”), Yanghee Lee, said that the military operation in Rakhine State bears “the hallmarks of a genocide.”⁵³ An ongoing United Nations Independent International Fact-Finding Mission (“UNIFFM”) is currently investigating whether these crimes may amount to crimes against humanity and genocide.⁵⁴

3. Reports of CARSV

While sexual violence is committed by a range of actors in Burmese armed conflict situations and other contexts within which international crimes and grave human rights violations are committed (see further below Section 4(c)), the military is reportedly responsible for the majority of such violence.⁵⁵

Widespread rape and other forms of sexual violence have been carried out by the military for decades; however, the last decades have seen increased reporting of this form of violence, including from UN bodies.⁵⁶ These violations are generally concentrated in the ethnic minority conflict zones (currently Rakhine State, Northern Shan State, Kachin State, Kayin (Karen) State, and Kayah (Karenni) State) where the military is most active, and target particularly the women and girls of those ethnic groups.⁵⁷

In 2016, civilians in Kachin, Rakhine, Kayin (Karen), and Northern Shan States all saw a drastic increase in military violence, including sexual violence, culminating in further mass displacements.⁵⁸ In Rakhine State, this sexual violence has re-

portedly been perpetrated by the Myanmar military, along with border police, and state-backed civilians.⁵⁹

Sexual violence is also reported to be used to some extent by EAOs, however published details of such violence are scarce.⁶⁰ In one recent case, made public in October 2017, two members of the TNLA were accused of raping a school headmistress in Northern Shan State.⁶¹ The TNLA admitted that the suspects were members of the organisation and detained them pending investigation by its own processes. Other references to such violence include, for example, a report submitted to the Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) for its review of Myanmar in 2016, that “[a]rmed groups coerced women from rural areas to have sex with them” and do not take responsibility for resulting pregnancies.⁶²

4. Military and police impunity

Grave violations committed by the Myanmar military and police have been allowed to continue almost entirely unchecked by Myanmar’s legal system due to the Constitutional en-

trenchment of separate military courts not subject to civilian oversight, and the practice of dealing with alleged crimes by police in separate Police Courts. These issues are considered in more detail in Chapter 4 (Individual Criminal Responsibility Under Burmese Law), Part A.

B. Forms of CARSV in Myanmar

The forms of CARSV documented in Myanmar are both extensive and in many cases extremely brutal.⁶³ Although some differences may exist between the sexual violence inflicted in different parts of the country (most notably against the Rohingya), there are also many patterns that have been repeated across decades and against different ethnic groups.⁶⁴ Provided evidence can be secured for all the legal elements, such conduct may amount to war crimes, crimes against humanity and/or genocide, and may also constitute human rights violations.

1. Rape

Non-governmental organisations and UN bodies have consistently documented the widespread use of rape in conflict areas in Myanmar over a period of at least decades.⁶⁵ In 1994, the UN Special Rapporteur on Myanmar detailed how he “continued to receive information from many sources indicating that rape occurs on a wide scale”, predominantly against ethnic minority women.⁶⁶

In 1998, the UN Special Rapporteur on Myanmar expressed the view that the serious violations committed by the armed forces in ethnic minority areas, including rape, were “so numerous and consistent over the past years as to suggest that they are not simply isolated or the acts of individual misbehavior by middle- and lower rank officers but are rather the result of policy at the highest level, entailing political and legal responsibility”.⁶⁷

Reports by subsequent Special Rapporteurs and a number of women’s organisations reveal similar patterns of the systematic use of rape across Myanmar, in both ethnic minority and urban areas, during the following decades.⁶⁸ Women and girls from different ethnic minority groups reported “similar stories of rape, including gang rape; rape and murder; sexual slavery; and forced ‘marriage’”.⁶⁹ Some were held in detention and raped over a period of days or weeks.⁷⁰

These patterns of rape have been repeated in the ongoing conflict in Rakhine State, where relevant documentation demonstrates the widespread use of rape, often with dangerous objects. The UN Flash Report on the Rohingya crisis men-

tions that penetration by objects such as rifles or bamboo sticks has been alleged in second hand accounts.⁷¹ Another UN report in September 2017 mentioned reports of a knife being used to penetrate a female victim during a gang rape.⁷²

Gang rape (where a victim is raped consecutively by several different perpetrators) is widely documented in Myanmar.⁷³ In a 2004 report of sexual violence in Kayin (Karen) State 40% of the rapes reported were gang rapes,⁷⁴ a pattern echoed in other reports from the same period.⁷⁵ Documentation of the rapes of 104 women and girls in Kachin, Shan and Kayin (Karen) States from 2010-2014 recorded that 47% were gang rapes.⁷⁶ Gang rape has also been reported as a “widespread and occasionally systematic” practice against Rohingya women during 2016-2017.⁷⁷

Group rape or ‘mass rape’ refers to when soldiers have gathered victims together in groups and then gang raped or raped them.⁷⁸ This form of sexual violence has been documented as part of the current violence against the Rohingya; it was reported, for example, by the UNFFM in an interim report to the Human Rights Council in 2017.⁷⁹ HRW has documented six such ‘mass rapes’ by the Myanmar military, five during the “clearance operations” that began on 25 August 2017.⁸⁰

Rape with additional brutality, including subsequent or simultaneous human rights abuses such as **public humiliation, torture, mutilation or killing**, is also a feature of CARSV in Myanmar. In 2002 in Shan State, for instance, Shan Women’s Action Network (SWAN) documented women and girls being killed after having been raped, “by being shot, suffocated, beaten, stabbed or burned to death”, in approximately 25% of the cases of rape recorded.⁸¹

Victim testimony of the violence in Rakhine State against the Rohingya has included beatings,⁸² suffocation, stabbing,⁸³ burns,⁸⁴ scalding with hot water, jeering,⁸⁵ threats,⁸⁶ and other physical mutilations, including biting the victims’ breasts.⁸⁷ Similarly, the UNFFM reported hearing testimony of women “having their throats slit or being burnt to death after being raped, or simply gang-raped to death”.⁸⁸

The UN Flash Report describes acts of humiliation alongside the sexual violence, including the taking of photographs of naked girls following rape,⁸⁹ and display of naked women in front of their neighbours.⁹⁰

Forcing family members to watch rape of their relative is another common feature of the sexual violence perpetrated by the military in ethnic minority states. The UN Flash report details multiple reports of Rohingya Muslims– including very

small children – being forced to watch the rape and murder of their family members (also often children).⁹¹ Accounts also include parents forced to watch the gang rape of their 14 and 17 year old daughters.⁹²

Reports from the past fifteen years up to today also record how family members – often small children and the elderly – may be beaten or killed in front of the victim during the rape.⁹³

2. Sexual violence in detention as a form of torture and sexual slavery

CARSV (including rape) in detention has been reported as a form of torture used not just against women, but also against men. Although reports of the use of such violence against men are limited (see further Part C(3) below), a case decided by the UN Working Group on Arbitrary Detention in 2014 recorded allegations that a Kachin man arrested by the Myanmar military from an IDP camp and accused of being a member of the KIA had been held in incommunicado detention and “made to have sex with another male, ethnic Kachin prisoner; and [had] his genitals burned with candle fire”.⁹⁴

Sexual slavery – in which minority women are detained in military captivity or forcibly conscripted by the military into situations of forced labour such as portage, kept separately from men overnight and repeatedly raped over a period of time (from rotations of 24 hours, to months) – has also been repeatedly documented in conflict areas in the North and East of the country.⁹⁵

3. Forced abortion and forced miscarriage

There have been a number of reports of forced abortion and forced miscarriage through rape during the 2016-2017 violence in Rakhine State. A September 2017 report of the OHCHR’s Mission to Cox’s Bazar, Bangladesh, mentions, from an “extremely credible source”, that one pregnant victim had her stomach split open during the rape and her unborn baby pulled out of her body and killed with a knife. Her nipples were then cut off.⁹⁶ Other reports detail women in late-term pregnancy suffering miscarriages or stillbirths shortly after brutal gang rapes.⁹⁷

4. Forced marriage and forced pregnancy

Forced marriage to Burmese soldiers has also been reported in ethnic minority areas including Kachin, Kayin (Karen) and Rakhine States, where women and girls are either abducted from their families or otherwise coerced (including by rape)

into “marriage” to Burmese soldiers.⁹⁸ As reported by the Special Rapporteur on Myanmar as early as 1994, children born in such marriages are considered to have Burmese (rather than ethnic minority) nationality.⁹⁹ Such marriages may also result in the crime forced pregnancy.¹⁰⁰

5. Sexual harassment, threats of rape and forced nudity

Sexual harassment or bullying, including threats of rape and forced nudity, is a common feature of the hostility and violence rural communities face, either as part of or as a pre-cursor to further violence.¹⁰¹ The UN Flash Report on the experience of Rohingya fleeing Myanmar recorded that invasive body searches during round-ups or house checks were particularly common, even of toddlers. Women frequently reported that during such searches “the military would press their breasts very hard, pinch their nipples, press on their nipples with rifle butts, beat or slap those who did not want to remove their clothes and in some cases even put hands inside their vaginas to search for any objects they may be hiding”.¹⁰²

6. Sexual and gender-based violence associated with forced displacement

Forced displacement related to armed conflicts or attacks and campaigns against civilian groups also results in structural conditions that increase vulnerability to sexual and gender-based violence such as trafficking,¹⁰³ prostitution and family violence.¹⁰⁴ While the sexual violence itself may not amount to CARSV it may be caused or exacerbated by actions of the armed forces such as forcible transfers of population, the blocking of humanitarian aid or attacks on IDP camps which may themselves, in some circumstances, amount to war crimes, crimes against humanity and genocide.¹⁰⁵ They may also in themselves be crimes under national law and human rights violations for which there may be other forms of accountability.

C. Conflict and Atrocity-Related Sexual Violence

1. Motivations

Although denied by the Burmese government, sexual violence is widely considered to be used as a weapon of war – and, in regards to the violence committed at least against the Rohingya, potentially a tool of genocide – by the Myanmar military.¹⁰⁶ This is demonstrated by the widespread and very public nature of the acts, the words used by perpetrators, the fact that they are committed and ordered by officers, and the widespread impunity for such crimes.

Sexual violence is used to as a tool to **terrorise, humiliate and demoralise certain ethnic communities**. Rapes and other forms of sexual violence are often performed publicly, with extreme brutality, in front of relatives or the wider community, to send a message to the entire community.¹⁰⁷

Sexual violence is also used as a **form of punishment** for individuals and communities for perceived support of EAOs. Women are often accused of being the wife of a member of EAOs before being raped.¹⁰⁸ The timing of violence, for example during 2017 in Rakhine State, also suggests that it is often retributive – a form of punitive retaliation against an ethnic minority community for the activities of insurgent individuals. This is confirmed by the words perpetrators use. The UN Flash Report stated that: “[t]he accounts of those who understand Burmese or who were assaulted by perpetrators who also used, at least in part, words they could understand suggest that the women were targeted as a punishment for: (a) not revealing or knowing where their male relatives and/or the ‘insurgents’ were hiding or (b) allegedly supporting the ‘insurgents’ e.g. cooking for them or (c) simply for being Rohingya”.¹⁰⁹ This also demonstrates sexual violence being used as a form of torture.¹¹⁰

Rape is also explicitly used as a **means to destroy certain ethnic groups**. It has been reported that some ethnic minority women’s reproductive freedom within their own communities is limited by ideas about their role in increasing dwindling ethnic minority populations by producing children.¹¹¹ On the other side, “Burmese soldiers are taught that by impregnating women from ethnic minorities they will be leaving Burmese blood in the villages, which will end the rebellion. Perhaps unique to the case of Burma, and indicative of the combined domination of state apparatus and patriarchy, is the belief that rape provides the opportunity for soldiers to give women ‘pleasure’ and so persuade them into a marriage that would diffuse Burmese ‘blood’ and diminish the minority population”.¹¹² In Rakhine State, the use of rape has been explicitly referred to as a method of ethnic cleansing.¹¹³

2. Under-reporting of sexual violence

The 2017 Report of the UN Secretary General on Conflict-Related Sexual Violence states that “[s]exual violence continues to be underreported in Myanmar owing to entrenched discrimination, fear of retaliation, limited access to services, and a lack of trust and confidence in the police and judicial system”.¹¹⁴ An additional reason for potential underreporting include logistics and security challenges for documenters

trying to access victims.¹¹⁵ These issues are discussed further in Chapters 3 (Overview of Accountability Avenues), 7 (Do No Harm) and 8 (Safety and Security).

3. Victims

As detailed above, CARSV has been reported against ethnic minority women and girls in all past and current ethnic minority conflict zones (Rakhine State, Northern Shan, Kachin State, Kayin (Karen) State, Mon State, Chin State, Shan State, and Karenni State). It has been carried out both in rural and urban areas.¹¹⁶

CARSV targets women and girls of all ages, with numerous reports of rape of children, including girls as young as five.¹¹⁷ Although the majority of reports of rape, sexual slavery and forced marriage involve women in their teens, 20s and 30s, rapes of women in their 40s, 50s and 60s have also been reported.¹¹⁸

Sexual violence against men and boys is generally not reported, although UN documents and other sources do mention some cases of rape¹¹⁹ and researchers are anecdotally aware of a limited number of cases.¹²⁰ However, such violence is often even more hidden than sexual violence against women. Reports of the use of sexual violence as a form of torture in detention against political prisoners in Myanmar (such as enforced nudity, beating of genitals, threat of rape, and the use of dogs to attempt to rape prisoners¹²¹) suggest that such violence may occur either in detention settings or elsewhere in conflict contexts. One such case, for example, concerning an ethnic Kachin man accused of belonging to the KIA (alleging forced intercourse with another male Kachin prisoner and burning of genitals), was reported to the WGAD in 2014 (see above p. 7).¹²² As noted throughout IP2, documenters should be aware of properly enquiring about and documenting CARSV against men and boys.

Child soldiers are also often the victims of sexual violence.¹²³ Ten years ago Myanmar had the highest number of forcibly conscripted child soldiers in the world (in 2007 it was estimated that approximately 70,000 children made up a fifth of Myanmar’s army).¹²⁴ Although those numbers have now significantly reduced, recruitment and use of child soldiers continues.¹²⁵ There are accounts of these children witnessing acts of sexual violence and being forced to commit these acts themselves.¹²⁶ These child soldiers will often be the victims of gang rape, as a method of ‘bring them to heel’ within the military structure and ensuring their obedience.¹²⁷ Child soldiers

are also recruited and used by EAOs.¹²⁸ On sexual violence and child soldiers see further IP2, page 248.

4. Perpetrators

CARSV is extensively perpetrated by members of the Myanmar military during their campaigns in ethnic minority areas. Perpetrators include rank-and-file soldiers as well as high-ranking officers.¹²⁹ One survey of 173 rapes in Shan State reported that the vast majority (83%) of those documented were committed by officers, usually in front of their own troops.¹³⁰ Victims were then often passed on to the troops for gang rape or to be killed.¹³¹

In some cases – particularly the 2016-2017 attacks against Rohingya Muslims in Rakhine State – Border Guard Police, regular police and civilians “acting alongside and in apparent coordination with government security forces” have joined with the Myanmar military in perpetrating this

violence.¹³² The UN Flash Report documented evidence that Rakhine villagers from the area had recently been given weapons and uniforms.¹³³ This is against the background of the widespread existence of civilian militias in Myanmar, most of which are aligned to the military.¹³⁴

As stated above, sexual violence is also reported to be committed by EAOs, although details of such violence are limited.¹³⁵ This information gap ought to be examined. All CARSV, regardless of who the perpetrators are and to which communities victims belong, should be documented.

5. Indicators of sexual violence

Many of the “red flags” that may indicate that sexual violence is imminent or ongoing listed in Chapter 2: Understanding Sexual Violence, Part II, Section C of IP2 (page 24, Box 5) are apparent in certain parts of Myanmar. These include:

Red flags

Incidents and situations that may indicate that sexual violence is imminent or ongoing

Military / security	<ul style="list-style-type: none"> • forced recruitment and abduction • forced separation of men and older boys from women and younger children • house raids • school raids • looting and rampage • retaliatory attacks • checkpoints • detention; interrogation; torture
Political / legal	<ul style="list-style-type: none"> • propaganda and hate speech, including demeaning and dehumanising speech regarding females • ethnic divisions
Social / humanitarian	<ul style="list-style-type: none"> • refugee and IDP flight and displacement • poor security and infrastructure in displacement settings • armed control of camps • reported presence of unauthorised civilian women and children in military camps, police stations or barracks

D. Impact of CARSV in Myanmar

Most of the impacts detailed in Chapter 2: Understanding Sexual Violence, Part II, Section D of IP2 (pages 25-27, Box 5) also apply in Myanmar. There are some specific impacts worth highlighting due to the legal, cultural and social

norms, and context in Myanmar. The table below highlights some of the more prevalent Myanmar-specific impacts of sexual violence. More information regarding risks and threats to survivors can be found below in Chapter 7 (Do No Harm).

Examples of Impacts of Sexual Violence in Myanmar

Physical			
All Victims	Female Victims	Male Victims	Child Victims
	<ul style="list-style-type: none"> » Injury often leading to death » Unwanted pregnancy » Premature birth, miscarriage or stillbirth (in cases of rape of pregnant woman) » Children born of rape or complications of unsafe abortions (abortion is in most circumstances illegal in Myanmar¹³⁶) » Urinary and vaginal infections due to untreated injuries » Sexually transmitted infections (including HIV, chlamydia, gonorrhea, syphilis, herpes, and human papillomavirus (HPV)) 		<ul style="list-style-type: none"> » Higher risks of increased physical damage » Higher risks of physical damage and complications/mortality in pregnancies/births for girls under 16
Psychological			
All Victims	Female Victims	Male Victims	Child Victims
	<ul style="list-style-type: none"> » Shame, blame » Depressed, sad, afraid » Post-traumatic stress disorder (“PTSD”) » Cultural-specific feelings of thwarted femininity, such as feelings of being ‘dishonored’ as women and girls » Substance abuse (e.g. opium) 	<ul style="list-style-type: none"> » Self-isolation and withdrawal 	<ul style="list-style-type: none"> » Can impact formative development stages, leading to behavioural and relationship difficulties – including regression » Shame, blame, self-worth » Increased risk of disorder and psychological problems in adulthood
Social			
All Victims	Female Victims	Male Victims	Child Victims
<ul style="list-style-type: none"> » High levels of social stigma 	<ul style="list-style-type: none"> » Considered “spoiled” and bringing shame on entire community » Woman may be expelled from village to “cleanse” the community (e.g. Karenni/Karen, Shan communities) » Disrupted relationships, leading to abandonment or domestic violence by spouse » Impact on marriage or marriageability, or pressure to marry where rape leads to pregnancy » Migration for own safety 	<ul style="list-style-type: none"> » Very high levels of stigma surrounding male victims of sexual violence » Cultural assumptions/myths around masculinity and sexuality 	<ul style="list-style-type: none"> » Higher rates/risks of re-victimisation » Interrupted education

Socio-Economic and Legal			
All Victims	Female Victims	Male Victims	Child Victims
	<ul style="list-style-type: none"> » Law criminalises sexual intercourse outside marriage and ‘adultery’ (regardless of consent). » Abortion illegal. » Costs of treatment usually borne by survivor’s family. » Women and their families may face cost of a “cleansing” ceremony to be allowed to return to their community (Kayah (Karenni) State) 	<ul style="list-style-type: none"> » Law criminalises anal sexual intercourse (regardless of consent). 	
<p>See further: UNFPA, ‘Powerful Myths Hidden Secrets’, (2017), http://myanmar.unfpa.org/sites/default/files/pub-pdf/PowerfulMythsHiddenSecrets_EDITED.pdf; HRW (2017), ‘All of My Body Was Pain’; UN Flash Report (2017); SWAN (2002), ‘Licence to Rape’, pp. 21-25; Women’s League of Burma (“WLB”), ‘Shadow Report for the 2016 UN Committee session on the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)', (2016), http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24233_E.pdf; WLB, ‘Girls Bear the Shame: Impediments to Justice for Girl Children who have Experienced Sexual Violence in Burma’, (2017), p. 2, https://progressivevoicemyanmar.org/wp-content/uploads/2017/11/GirlsBeartheShame_WLBBriefingPaper_Eng.pdf; Gender Equality Network, ‘Behind the Silence: Violence Against Women and their Resilience, Myanmar: Briefing paper’, (October 2015), http://www.themimu.info/node/61566.</p>			



PART III /

ACCOUNTABILITY AVENUES AND REMEDIES CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES RELATING TO MYANMAR

This chapter provides a brief overview of the accountability avenues that may be available, at least in theory, at the national and international level for victims of CARSV in Myanmar. At the present time, except in unusual circumstances, options for effective justice within Myanmar are very limited; impunity for CARSV is almost universal. There are also currently no regional options open to victims. However a number of potential non-judicial options exist at the international level. Criminal prosecutions abroad using universal jurisdiction is a further promising option, although most countries require the presence of the alleged perpetrator on their territory.

Nevertheless, it is possible that in the future additional accountability and reparation mechanisms at both the domestic and international levels may become available, whether judicial or non-judicial. Importantly, evidence collected in accordance with – and which meets – international criminal law and best practice standards (set out, for example, in IP2) is likely to have value regardless of the forum.

Before turning to the overview of accountability avenues the following sections will briefly address overarching issues concerning the legal landscape in Myanmar.

A. Myanmar's legal landscape

Myanmar's legal landscape is complex: the fractioning brought about by its political complexity and fiercely divided ethnic regions is compounded by overlapping jurisdictions and a plural legal system. Many citizens operate under a complex mix of informal local law (that can differ radically between states and even between villages, often informed by the overarching religion of the area) and formal national law.

Customary law

Many ethnic minority regions operate almost entirely outside of the formal legal system, with customary law continuing to govern many aspects of life in practice.¹³⁷ It is these informal

legal mechanisms that women in ethnic minority areas most commonly turn to when seeking legal resolution, although not necessarily by choice.¹³⁸ This informal legal system involves the use of local advisors and village administrators – often groups of men made up of the heads of local families – who act as local authorities, tasked with keeping peace within their jurisdiction through the application of customary local law. These administrators “frequently take on the responsibility of either dismissing the claims (often citing “lack of evidence”), or settling what is seen as a dispute between the parties”.¹³⁹ This system presents a number of significant barriers particularly to rural and ethnic minority women seeking justice for sexual and gender-based violence generally, including insensitive procedures, pressure on women to drop cases, pressure to marry the perpetrators (in lieu of compensation), and inadequate negotiated redress settlements, often for the benefit of the woman's family.¹⁴⁰ Such practices are seen too in CARSV cases, where the only “justice” may be provided in the form of a negotiated or offered compensation payment of a limited amount from the soldier or battalion responsible.¹⁴¹ This system also presents formidable barriers to male victims of CARSV (and sexual and gender-based violence generally).

Self-administered zones and areas

A number of self-administered zones, established under the 2008 Constitution, have certain legislative powers.¹⁴² In practice, a number of other areas are also administered by alternative authorities.

Other strongholds of territory in mountainous and border areas held by armed resistance organisations “are typically governed entirely by armed groups, who provide basic services, justice and security, while depending on local communities for taxation and recruitment”.¹⁴³ In other areas where they do not hold stable claims to territory but enjoy close relations with the communities, “communities continue to have established relations

Box 2. Avoiding the courts in Myanmar

According to a 2018 report from the International Commission of Jurists (“ICJ”): “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. 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 ... impedes the provision of effective remedies and reparations”.¹⁵²

with the administrative departments of armed groups”, but are potentially subject to overlapping administration systems.¹⁴⁴

Formal legal system

Many of Myanmar’s laws, including the Penal Code, Code of Criminal Procedure and Civil Procedure Code, were inherited from British-era Indian laws at independence and remain largely unaltered. During the period of military rule a system of socialist courts was established but this was replaced from 1988 with the reinstatement of the Supreme Court and High Court. The courts formally follow English common law as interpreted by Burmese caselaw.¹⁴⁵ However, judges are generally poorly trained and notoriously subject to corruption and executive interference.¹⁴⁶

For criminal prosecutions concerning military matters, as discussed further in Chapter 4 (Criminal Responsibility under Burmese Law), the 2008 Constitution establishes permanent courts martial and removes jurisdiction and oversight from civilian courts.

B. Limited role of the courts

The complete control of criminal proceedings against military officials by the military itself is a huge barrier to justice in Myanmar. However, a number of other significant barriers exist, leading to a situation where victims of human rights violations tend to avoid the courts altogether (see further Box 2, above).

These barriers include:

- justified fears of retaliation against complainants and their lawyers by agents of the state for raising complaints of human rights violations, including physical attacks, judicial harassment or loss of registration (see further Chapters 7 (Do No Harm) and 8 (Safety and Security));¹⁴⁷

- police unwillingness to register complaints or carry out investigations into conduct of the security forces, and prosecutorial; unwillingness to take prosecutions forward;¹⁴⁸

- grave lack of independence of the judiciary, which is subject to corruption and executive interference;¹⁴⁹

- untrained judges with limited knowledge and experience of the law and standards on judicial conduct;¹⁵⁰ and

- prohibitive costs of funding legal proceedings, including the costs of travelling and lost earnings to participate in proceedings.¹⁵¹

C. Overview of accountability avenues and remedies for victims

1. Domestic avenues (in Myanmar)

The following are potential legal avenues for accountability and remedy for CARSV in Myanmar, subject to the significant limitations of judicial remedies outlined in the previous sections.

a. Judicial

i. Criminal

» A **criminal complaint** can be initiated by any person with information about the offence¹⁵³ and investigated by police before being sent for trial. Depending on the maximum penalty of the crime alleged it may be tried in a Township Court (up to 7 years imprisonment), District Court, or (in special circumstances) High Court.

» Cases concerning the Myanmar military will be heard by **court martial** (except where crimes were not committed “on active service”, as determined by the military court itself) (see further Chapter 4).¹⁵⁴

» Amnesty from criminal prosecution is provided by section 445 of the 2008 Constitution to members of the previous ruling military councils and members of the previous government for crimes committed in the course of their duties during the period of military rule (to 31 January 2011) (see further Chapter 4).

» Cases concerning police officers will in practice often be heard by **Police Courts** (see further Chapter 4).

ii. Civil

» In **civilian criminal proceedings, the court may award compensation** “to any person... for any loss or injury caused by the offence” from the proceeds of a fine imposed on the convicted perpetrator if, in the court’s opinion such compensation would have been recoverable in a civil court.¹⁵⁵

» Sexual violence would also give rise to a **civil claim for the tort of battery**, for which the victim could claim monetary compensation. Where the alleged perpetrator is a state official the state will also be vicariously liable. However, such actions are rarely, if ever, taken in practice.

» Failure by public officials to investigate, prosecute and punish a perpetrator of sexual violence could in theory also give rise to a civil negligence suit for **nonfeasance** or, depending on the circumstances, **malfeasance**.

iii. Constitutional

» Some individual rights are guaranteed in the 2008 Constitution, and Article 377 appears to provide a basis on which victims of fundamental rights violations may apply directly to the Supreme Court to enforce those rights.¹⁵⁶ However, it is not known whether this avenue has been used in practice; according to Burmese lawyers cases are more likely to be settled by negotiation with the relevant government agency rather than approaching the Supreme Court directly, due to the factors outlined above at Part B (Limited Role of the Courts).¹⁵⁷ The Constitution does not contain a prohibition of sexual violence or of torture, although other relevant rights such as the right to life and personal liberty and freedoms from slavery and forced labour are covered.¹⁵⁸

» **Traditional common law** writs are also available under the 2008 Constitution,¹⁵⁹ except where a state

of emergency has been declared.¹⁶⁰ Procedures for filing writs were codified in the Application of Writs Act 2014.¹⁶¹ In CARSV cases the most useful writ is likely to be that of *habeas corpus*, allowing judicial review of detention and release if unlawful. In connection with such detention, they could also be used to challenge discrimination¹⁶² and threats to the “life and personal freedom” of an individual held.¹⁶³ Such *habeas corpus* applications have been brought, for example, by a number of people from Kachin and Shan States on behalf of family members they allege are unlawfully detained by the military.¹⁶⁴ However, since its reintroduction in 2011 no known examples of *habeas corpus* proceedings have been successful¹⁶⁵ and a number of lawyers and victims who have brought such applications have faced retaliatory action by state authorities.¹⁶⁶ This is seen to be due to the lack of independence of the judiciary, with the “most problematic cases [being] those that challenge the government, officials or their vested interests”.¹⁶⁷

b. Quasi-judicial and non-judicial

» The **Myanmar National Human Rights Commission** (“NHRC”) was established in 2011 and enshrined in national law in 2014.¹⁶⁸ It is not considered fully independent and is not compliant with the Paris Principles on the Status of National Institutions.¹⁶⁹ 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”.¹⁷⁰ On some occasions, those who have submitted complaints have been subject to reprisals (see Box 3).¹⁷¹ The NHRC has the power to:

» Investigate individual complaints, including by visiting prisons, jails and detention centres, and to make recommendations.¹⁷²

» Summon persons to produce documents or evidence, except if “the release of [those documents or evidence] would affect the security and defence of the State” and documents that are classified.¹⁷³

» Recommend provision of compensation and legal action against perpetrators.¹⁷⁴ If recommendations are ignored it does not have any powers to promote enforcement.

Box 3. Reprisals against complainant to NHRC

On 13 September 2012, 13-year-old Ja Seng Ing, a female student, was allegedly shot and injured in an attack against civilians by a group of soldiers in Kachin State. She died the same evening.

The military established an investigation tribunal, which concluded that the girl had died in a bomb explosion allegedly by the KIA. Her father, U Bran Shaung, filed a complaint with the NHRC, requesting an investigation and subsequent prosecution of the suspected perpetrators. The military became aware of the complaint and filed a counter-complaint against U Bran Shaung.¹⁷⁵

He was tried under section 211 of the Penal Code for filing a false charge of offence made with intent to injure. His trial was beset by significant delays, the striking from the list of a key defence witness (a government doctor who had treated Ja Seng Ing), the replacement of the presiding judge and intimidation of U Bran Shaung's lawyer by the military in court. Finally, 18 months later he was convicted, and while protesting his innocence, opted to pay a fine to avoid being sent to prison. The NHRC did not launch an investigation into the alleged crime against his daughter, or make any representations on his behalf in the proceedings against him.¹⁷⁶

» In place of criminal investigations, various **military-, police- and government- established inquiries** are formed to investigate particular alleged human rights violations. They are formed under internal rules or government ordinances rather than any specific piece of legislation, and are often heavily criticised as “lack[ing] independence, impartiality and credibility”¹⁷⁷ and as being committed to maintaining government denials of human rights violations.¹⁷⁸ In addition, a number of previous high-profile commissions have failed to consider sexual violence at all or to a very limited extent in light of the available evidence of such violence.¹⁷⁹

» Traditionally, remedies have been sought by public campaign statements signed by multiple civil society organisations, or citizens sending letters to **military officials, ministers, ministries and members of parliament**, with authorities treating complaints as “an essentially administrative problem”.¹⁸⁰ Given the weakness of and lack of trust in the judicial system and other institutions this practice continues widely today, although complainants in this manner may still face the risk of reprisals.¹⁸¹

2. Regional human rights mechanisms

Asia does not have a functioning regional human rights oversight mechanism. Myanmar is a member of the Association of Southeast Asian Nations (“ASEAN”), which adopted the ASEAN Human Rights Declaration in 2012. However this Declaration has been widely criticised, and has no enforcement mechanism.¹⁸²

3. International accountability mechanisms

Myanmar is not a party to many of the major human rights treaties, including the International Covenant on Civil and

Political Rights and the Convention Against Torture. It is, however, party to **CEDAW**, the **Convention on the Rights of the Child** (“CRC”) and its second protocol (it has signed but not ratified the first, on Children in Armed Conflict), the **International Covenant on Economic, Social and Cultural Rights** (“ICESCR”), and the **Convention on the Rights of Persons with Disabilities** (“CRPD”).

a. Judicial

» No judicial human rights courts exist at the supra-regional level.

b. Quasi-judicial

» Myanmar has not accepted the individual complaints mechanisms of any of the human rights treaties to which it is a party.

» One of the UN Human Rights Council's special procedures, the UN Working Group on Arbitrary Detention, does, however have a quasi-judicial procedure that may be accessed by or on behalf of victims of CARSV who are held in arbitrary detention.¹⁸³

c. Non-judicial

» Myanmar has not accepted the inquiry procedures under any of the UN human rights treaties to which it is a party.

» Myanmar must however present periodic reports to the Committees monitoring implementation of the UN human rights treaties to which it is party. This provides an opportunity for non-government sources to provide information to the Committee, that the Committee may question the state on in its dialogue on human rights issues.

» Individual ‘urgent appeals’ and ‘allegation letters’ can be submitted to any of the Special Rapporteurs and Working Groups processes. These apply automatically without the need for ratification of a particular treaty or acceptance of a particular procedure (for further information on these procedures see further IP2, page 35).

» The UN Human Rights Council provides other forums for scrutiny of the actions of the Myanmar government, through its universal periodic review (“UPR”) process, reporting of the UN Special Rapporteur on Myanmar, and the convening of special sessions on Myanmar in October 2017 and December 2017. The UN Human Rights Council also has a confidential complaints procedure to address “consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms”. Complaints can be submitted by “individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations”.¹⁸⁴

4. Investigative and fact-finding bodies

» The strongest possibility for international accountability provided to date has been the creation by the Human Rights Council of a UN Independent International Fact-Finding Mission on Myanmar (see Box 4 below). Although the Commission does not have powers to hold Myanmar legally accountable, its mandate is worded “with a view to ensuring full accountability for perpetrators and justice for victims”.¹⁸⁵ It can draw conclusions as to state and individuals’ responsibility for human rights violations, and make recom-

mendations to the international community for action.

5. International and hybrid courts and tribunals

» Myanmar is not a state party to the Rome Statute of the **International Criminal Court** (“ICC”). In order to trigger ICC jurisdiction, Myanmar would need to ratify the Rome Statute (although that ratification would not enable the ICC to prosecute crimes committed prior to the date on which the Rome Statute enters into force for Myanmar, that is, ratification will not apply retrospectively), the UN Security Council would need to refer the situation to the Office of the Prosecutor (which referral can have retroactive effect until 1 July 2002 when the Rome Statute entered into force), or Myanmar would have to make an Article 12(3) Rome Statute declaration accepting jurisdiction over crimes committed in Myanmar or over alleged Myanmar perpetrators (which declaration can have retroactive effect until 1 July 2002).

» Another route to jurisdiction of the ICC may be if an alleged perpetrator is a national of a third country. If that third country is a state party or files an Article 12(3) declaration in relation to alleged crimes committed from 1 July 2002 by the alleged perpetrator in Myanmar, the ICC would have jurisdiction to investigate and prosecute that individual.

6. Proceedings in third countries – extra-territorial jurisdiction including universal jurisdiction¹⁸⁸

» Given the almost complete impunity within Myanmar, **universal jurisdiction** provisions in other countries may be used to try to initiate criminal proceedings against al-

Box 4. The UN Independent International Fact-Finding Mission on Myanmar

In March 2017 the UN Human Rights Council adopted Resolution 34/22, which resolved to urgently send an independent international fact-finding mission to Myanmar. Its mandate is “establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims”. The UNFFM has clarified that it considers its mandate to extend to investigating violations in other parts of the country aside from Rakhine State, in particular Kachin and Northern Shan States.¹⁸⁶ The UNFFM’s secretariat includes an expert gender advisor, who focusses on sexual and gender-based violence.

The UNFFM’s mandate was extended in September 2017 and it will deliver an interim report in March 2018, with its final report in September 2018.

To date, the Myanmar government has not cooperated with the UNFFM or allowed it access to its territory, so investigations have been carried out outside the country, including by interviewing victims who have fled Myanmar.¹⁸⁷

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES RELATING TO MYANMAR

leged perpetrators outside Myanmar, although most countries require the presence of the accused on their territory.

For example, in 2002, six Burmese victims of human rights violations including forced labour at the hands of the Myanmar military filed criminal complaints in Belgium and France against directors of a subsidiary of French oil and gas company TOTAL that operated in Myanmar. They alleged that the subsidiary was involved in a pipeline project through which it cooperated closely with the Myanmar military battalions responsible for “frequent and systematic human rights violations”, providing them with “moral, financial, logistical and military support”.¹⁸⁹ Following a change in jurisdictional requirements the Belgian proceedings were closed in 2008. The French proceedings were dismissed in 2006, following a ruling that forced labour is not an offence under French law.¹⁹⁰

In 2015 a symbolic criminal complaint was filed in Switzerland against Lieutenant-General Ko Ko, Myanmar’s Minister for Home Affairs and Minister for Immigration and Population, alleging command responsibility for war

crimes, crimes against humanity and torture.¹⁹¹ As head of Myanmar’s delegation to the UN Human Rights Council UPR, Lt-Gen Ko Ko was protected by absolute immunity from criminal prosecution while on Swiss territory, so the complaint could not be acted upon.

» Similarly, in jurisdictions that provide for extraterritorial jurisdiction in civil matters, **civil claims** may be brought against entities responsible for or complicit in CARSV. In this respect claims against companies operating in conflict areas or other areas in which international crimes and human rights violations are being committed may prove particularly fruitful. For example, in 1996 a group of Burmese who alleged they were victims of human rights violations including forced labour, murder, rape and torture by the Myanmar military brought proceedings against Unocal in the United States under its Alien Tort Claims Act. The parties reached an out of court settlement in which “Unocal agreed to compensate the plaintiffs and provide funds for programmes in Myanmar to improve living conditions and protect the rights of people from the pipeline region”.¹⁹² The case was closed in 2005.

D. Table of accountability avenues

Domestic level		
Individual Responsibility	State responsibility	Both
<p>Judicial</p> <p>Criminal court – in Myanmar (but does not apply to military) – or third country exercising universal jurisdiction</p> <p>Military court</p> <p>Police court</p> <p>Non-judicial</p> <p>Customary law/negotiated settlements</p>	<p>Judicial</p> <p>Article 377 application to Supreme Court to enforce rights guaranteed by the 2008 Constitution</p> <p>Constitutional writ of <i>habeas corpus</i></p>	<p>Judicial</p> <p>Civil claim in tort in Myanmar or civil claim in third country exercising extraterritorial jurisdiction</p> <p>Quasi-judicial and non-judicial</p> <p>Myanmar National Human Rights Commission</p> <p>Commissions of Inquiry</p> <p>Letters to military, ministers, ministries and parliamentarians</p> <p>Public campaign statements by civil society organisations</p>
International level		
Individual Responsibility	State responsibility	Both
<p>Judicial</p> <p>International Criminal Court (UN Security Council referral, self-referral (though highly unlikely), or referral by another state for investigation in relation to one of its nationals or dual nationals)</p>	<p>Judicial</p> <p>International Court of Justice (inter-state case)</p> <p>Quasi-Judicial and non-judicial</p> <p>UUN Special Procedures (special rapporteurs and working groups, including special rapporteur on Myanmar)¹⁹³</p>	<p>Non-judicial</p> <p>International commissions of inquiry and fact-finding missions (including current UNFFM)</p>

ACCOUNTABILITY AVENUES AND REMEDIES CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES RELATING TO MYANMAR

Individual Responsibility	State responsibility	Both
	State party reporting to CEDAW, CRC UN Human Rights Council Universal Periodic Review UN Human Rights Council special sessions on Myanmar UN Human Rights Council complaints procedure	
Internationalised and hybrid courts and tribunals		
Individual Responsibility	State responsibility	Both
Judicial Potential for international or hybrid criminal court (unlikely at present)		

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER BURMESE LAW

Despite the current significant barriers to achieving individual criminal accountability in Myanmar (see Chapters 2 and 3), some – exceptional – cases of CARSV have been prosecuted under domestic law. The following section briefly details the position under civilian domestic criminal law and highlights a number of shortcomings in light of international standards. This serves two purposes: (i) as an agenda for legislative reform, and (ii) in case in the future circumstances change allowing for greater accountability. Note that laws do change and the current legal position should be checked carefully.

A. Legal framework

Although it is a party to the 1949 Geneva Conventions, Burmese law does not criminalise war crimes. Burmese law also does not criminalise crimes against humanity or genocide. Torture is not specifically criminalised, although sections 330 and 331 of the Penal Code (Voluntarily causing hurt/grievous hurt to extort confession, or to compel restoration of property) can be used to prosecute certain aspects of this crime.

As flagged above at Chapter 2 (Understanding Sexual Violence in Myanmar), the 2008 Constitution provides a number of significant barriers to accountability of the military for crimes of CARSV.

First, Article 445 of the 2008 Constitution grants amnesty from prosecution to members of former military regimes, the State Law and Order Restoration Council (“SLORC”) and the State Peace and Development Council (“SPDC”), and members of the government, for all crimes committed in the course of their duties during the period of their rule (which officially ended on 31 January 2011).¹⁹⁴

Second, for alleged violations since that time, the 2008 Constitution mandates that any crimes by military personnel “are to be dealt with through courts martial in the military justice system,¹⁹⁵ and that in such matters “the decision of the Commander-in-Chief of the Defence Services is final and conclusive”.¹⁹⁶ The Constitution also provides that “[t]he Defence Services has the right to independently

administer and adjudicate all affairs of the armed forces”.¹⁹⁷ There is therefore no oversight of military justice by the Supreme Court.

Under the Defence Services Act 1959 crimes including murder, culpable homicide and rape are to be tried by court martial if they were committed “on active service”, while outside Burma or at a specified frontier post notified by the President.¹⁹⁸ “Active service” is given a very wide definition, including: “the time during which such person is attached to, or forms part of, a force which is engaged in military operations against an enemy”.¹⁹⁹

Technically therefore, transfer to a civilian court for these crimes is possible where the military hierarchy are of the view it is expedient to treat the soldier as not having been “on active service”.²⁰⁰ In its report to the CEDAW Committee in May 2016 the Burmese government reported that 37 cases of sexual violence committed by military personnel between 2011 and January 2016 were transferred to civilian courts, after sentencing for military offences.²⁰¹ This happened, for example, in 2014 in the high-profile case of rape of a disabled 14 year old Kachin girl by a soldier in Shan State following significant public pressure.²⁰² However, this only happens in exceptional circumstances:²⁰³ a wide definition of “active service” means that such crimes will almost always be dealt with by court martial, and the Constitution entrenches the right of the military to make the final determination of the active service question.²⁰⁴

Such courts martial are neither independent nor impartial, have opaque procedures often carried out in secret, rarely inform victims of proceedings, have a record of failing to hold alleged perpetrators to account and perpetuate state officials’ belief that they are above the law.²⁰⁵

Likewise, alleged violations by police are usually dealt with under the Myanmar Police Force Maintenance of Discipline Law as “offences”, rather than as crimes under the general criminal law.²⁰⁶ Officers are tried by a Police Court, which is made up of “gazetted officers” of the Myanmar Police Force. Such courts are “neither independent nor impartial

Box 5. The illegality of military trials for grave human rights violations

Numerous international human rights bodies have ruled that military personnel accused to have committed human rights violations against civilians should be tried in civilian courts.²⁰⁸ According to the UN Human Rights Committee, “wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel ... contribute[s] to the impunity which such personnel enjoy against punishment for serious human rights violations”.²⁰⁹

This is reflected in the UN’s Updated Impunity Principles which provide that “[t]he jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court”.²¹⁰

and thus may enable perpetrators to evade accountability”. The penalties applied under the Act may also be weaker than those provided for under the Penal Code.²⁰⁷ Although such cases should be transferred to civilian courts following police discipline procedures, in practice police officers will often “negotiate” to withdraw the case.

B. Sexual violence crimes under Burmese law

The sexual violence crimes captured in the Myanmar Penal Code differ greatly from the international law set out in relevant treaty and customary international law. As domestic crimes, there is no requirement to prove any of the common or contextual elements of international crimes. In addition, many of these domestic crimes are gender specific and reflect social attitudes and values in relation to gender norms; as a result, unlike some but not all international law sources, many of the domestic crimes do not apply to both male and female victims or perpetrators equally – leading to the decriminalisation of certain crimes against male victims, or by female perpetrators. Examples of how Burmese law de-

parts from international law and best practice (in relation to CARSV) are set out below.

Note that a Bill on the Prevention and Protection of Violence Against Women was developed by the Department of Social Welfare, Ministry of Social Welfare, Relief and Resettlement and published in December 2014. This Bill has gone through a number of review processes, but is yet to be put before Parliament,²¹¹ and the current version was not public as at February 2018. Passage of the Bill has in part been complicated in part by opposition from nationalist Buddhist movements, which see it as potentially undermining the race and religion laws passed in 2015 (see above Chapter 2 (Understanding Sexual Violence in Myanmar), Part A).²¹²

If passed, the law would strengthen the legal protections for women and girls and address some, although not all, of the issues under the Penal Code (for example, criminalising marital rape and raising the age of consent to 18 years). However, previous versions retained a very limited definition of rape and did not address sexual violence in conflict.

1. Crimes relevant to CARSV under Burmese law

Note that references are to provisions in the Penal Code unless otherwise specified.

Sexual Violence

Section 375: Rape

“A Man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:- (i) against her will; (ii) without her consent; (iii) with her consent, when her consent has been obtained by putting her in fear of death or of hurt; (iv) with her consent, when the man know that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; (v) with or without her consent, when she is under sixteen years.

Explanation—penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception—sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”.

Note: The law provides protection only for women and girls against rape, but not for men, and the law does not contemplate female perpetrators. Sexual intercourse is not defined but legal precedent suggests that only penetration of the vagina with the penis would amount to “sexual intercourse” (rather than penetration with another object or a finger);²¹³ it also does not cover other forms of non-consensual penetration such as oral sex. These offences would instead be covered by the much lesser crime of “assault with intent to outrage modesty”. The marital rape exemption is also contrary to international standards, and – in the context of CARSV – particularly problematic in cases of forced marriage.

Section 354: Assault with intent to outrage modesty

“Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty...”

Note: In Myanmar “outraging modesty” is gender specific and can only be committed by a man against a woman.²¹⁴ Despite the low penalty (two years imprisonment or a fine or both), this crime covers other forms of rape, such as oral rape, anal rape of a woman or rape with an object, that are not covered by Section 375. The prosecution must prove use of criminal force as well as the specific requirements of Section 354; in practice, cases involve actual touching, rather than threats of force.²¹⁵ Caselaw has considered the following to fall within this section: hugging or kissing a woman,²¹⁶ grabbing a woman in a sexual manner²¹⁷ and touching the genitals of a four year old girl.²¹⁸ The age of consent for this crime is 12 years of age.²¹⁹

Section 277: Carnal intercourse against the order of nature

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal...”

Notes: “Carnal intercourse against the order of nature” is not defined further but certainly covers penetration of a person’s anus (man or woman) with the penis, even if consensual.²²⁰ The criminalisation of homosexual sex is a significant barrier to reporting for male victims of sexual violence, who may fear prosecution if lack of consent is not proved.

Section 366: Kidnapping, abducting or inducing woman to compel her marriage, etc

“Whoever kidnaps or abducts any woman with intent that she may be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse...; and whoever, by means of criminal intimidation as defined in this Code or abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person”.

Section 509: Word, gesture or act intended to insult the modesty of a woman

“Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes on the privacy of such woman”.

Sexual Violence Against Children

Statutory Rape – see Section 375 above: consent to sexual intercourse is irrelevant if girl is under sixteen years of age.²²¹

Note: Male victims are not covered by this provision.

Assault with intent to outrage modesty – see Section 354 above: the age of consent for this crime is 12 years old.

Note: Male victims are not covered by this provision.

Section 366A: Procurement of minor

“Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person”.

Section 372: Selling minor for purposes of prostitution

Section 373: Buying minor for purposes of prostitution

“Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose”.

For the purposes of this section “illicit intercourse” means: “sexual intercourse between persons not united by marriage, or by any union tie which, though not amounting to marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, as constituting between them a *quasi*-marital relation”.

Child Law 1993, Section 65: Employing a child to perform work which is harmful to the child’s moral character

Child Law 1993, Section 66: Permitting a child to engage in prostitution or using in child pornography

It is a crime for anyone (among other things) to permit someone within their guardianship to engage in prostitution, willfully mistreat a child, or use a child in pornography.

Other Relevant Crimes

Penal Code forms of Murder and Unlawful Killing

Section 299: Culpable Homicide

Section 300: Murder

Section 301: Culpable Homicide by causing death of person other than person whose death was intended

Section 304A: Causing death by negligence

Section 314: Death caused by act done with intent to cause miscarriage. If act done without woman’s consent

Penal Code forms of Assault

Section 319: Hurt

Section 320: Grievous hurt (Note: grievous hurt includes (1) castration; (2) permanent blinding; (3) causing permanent deafness; (4) removal of any joints or limbs; (5) destroying or permanently impairing the use of any joint or limb; (6) permanent disfiguration of the head or face; (7) fracture or dislocation of a bone or tooth; (8) any hurt which puts a person’s life at risk or causes them severe bodily pain or the inability to carry out their daily routine for at least 20 days).

Section 321: Voluntarily causing hurt / Section 322: Voluntarily causing grievous hurt

Section 324: Voluntarily causing hurt by dangerous weapons or means / Section 326 (grievous hurt)

Section 327: Voluntarily causing hurt to extort property, or to constrain to an illegal act

Section 328: Causing hurt by means of poison etc., with intent to commit an offence

Section 329: Voluntarily causing grievous hurt to extort property, or to compel restoration of property

Section 330: Voluntarily causing hurt to extort confession, or to compel restoration of property / Section 331 (grievous hurt)

Section 332: Voluntarily causing hurt to deter public servant from his duty / Section 333 (grievous hurt)

Section 334: Voluntarily causing hurt on provocation / Section 335 (grievous hurt)

Section 336: Act endangering life or personal safety of others

Section 337: Causing hurt by act endangering life or personal safety of others / Section 338 (grievous hurt)

Section 352: Punishment of assault other than on grave provocation

Section 353: Assault or criminal force to deter public servant from discharge of his duty

Section 355: Assault or criminal force with intent to dishonor person, otherwise than on grave provocation

Section 356: Assault or criminal force in attempt to commit theft of property

Section 357: Assault or criminal force in attempt wrongfully to confine a person

Section 358: Assault or criminal force on grave provocation

Penal Code Provisions relating to Unlawful Detention

Section 341: Punishment for wrongful restraint

Section 342: Punishment for wrongful confinement (s. 343 for three or more days; s. 344 for ten or more days)

Section 345: Wrongful confinement of person for whose liberation writ has been issued

Section 346: Wrongful confinement in secret

Section 347: Wrongful confinement to extort property, or constrain to illegal act

Section 348: Wrongful confinement to extort confession, or compel restoration of property

Penal Code Provisions relating to Kidnapping, Abduction, Slavery and Forced Labour

Section 361: Kidnapping from lawful guardianship (see below under “Relating to Children”)

Section 362: Abduction (“Whoever by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person”)

Section 364: Kidnapping or abducting in order to murder

Section 365: Kidnapping or abducting with intent secretly and wrongfully to confine person

Section 366: Kidnapping, abducting or inducing woman to compel her marriage, etc (see above under Sexual Offences)

Section 367: Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

Section 368: Wrongfully concealing or keeping in confinement kidnapped or abducted person

Section 370: Buying or disposing of any person as a slave

Section 374: Unlawful compulsory labour (“Whoever unlawfully compels any person to labour against the will of that person”)

Relating to Children

Section 317: Exposure or abandonment of child under twelve years, by parents or person having care of it

Section 361: Kidnapping from lawful guardianship (“Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian is said to kidnap such minor or person from lawful guardianship”)

Section 369: Kidnapping or abducting child under ten years with intent to steal from its person

Forced abortion or miscarriage

Section 313: Causing miscarriage without woman's consent

Section 315: Act done with intent to prevent child being born alive or to cause it to die after birth

Section 316: Act causing death of quick unborn child by doing act likely to cause death of pregnant woman

Relating to marriage

Section 497: Adultery (a man can be convicted of adultery for sexual intercourse not amounting to rape with another man's wife without that man's consent or connivance. The wife is not to be punished as an abettor.)

Section 498: Enticing, or taking away or detaining with criminal intent a married woman

Relating to religion

Section 295A: Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs

Section 298: Uttering words, etc; with deliberate intent to wound religious feelings

Criminal intimidation

Section 506: Punishment for criminal intimidation. If threat be to cause death or grievous hurt, etc. (Section 503: "Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation").

Box 6. Limitations of using "ordinary" crimes

Many of the sexual violence crimes recognised under Burmese law would, if committed in the context of and linked to an armed conflict (in the case of war crimes), if linked to and forming part of a widespread or systematic attack directed against a civilian population (in the case of crimes against humanity) or if committed with the intent to destroy an ethnic, religious, national or racial group, in whole or in part (in the case of genocide), constitute international crimes. However, as explained above, prosecution of these international crimes – as such – in Myanmar is not possible unless they are specifically criminalised with retroactive effect under domestic law. This is problematic for a number of reasons.

First, the definition of many crimes under Burmese criminal law is not in accordance with the definitions recognised under international criminal law. For example, under Burmese law rape can only be committed if the perpetrator is a man and the victim a woman, and refers only to penile penetration of the vagina. This very restrictive definition departs from the definition of rape under international criminal law (see further IP2, page 44).²²² Therefore an act that would constitute rape as an underlying element of a crime against humanity or a war crime would not necessarily be characterised as rape under Burmese law.

Second, ordinary sexual offences under Burmese law do not recognise the specific context in which these crimes were committed, be it, for example, the context of an armed conflict in relation to war crimes or that of a widespread or systematic attack directed against a civilian population in relation to crimes against humanity. This is problematic because international and ordinary crimes are not only different in nature, they also protect different values.²²³ As such, the prosecution of CARSV as international crimes also "lies precisely in stigmatizing conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole [...]"²²⁴ Prosecution of these crimes as ordinary crimes fails to recognise the gravity of the crimes and that they may have been committed as part of a policy, fails to recognise the link between these crimes and other related international crimes, and may make it more difficult to link senior officials at the top of the chain of command to the crimes.²²⁵ This may also make it more difficult to prevent future crimes by missing opportunities for wider reform.²²⁶

2. Modes of liability

The Penal Code provides two main modes of secondary liability that are relevant to the prosecution of CARSV: (1) abetment and (2) joint liability. For joint liability, the Penal Code employs three separate mechanisms of responsibility, each of which overlap: “First the doctrine of common intention under s 34 imposes liability on all members of the enterprise for any offence committed by any of them which is within the scope of what was commonly intended. Secondly, the ‘col-

lateral abetment’ provisions extend the liability of an abettor beyond the offence abetted to offences which are a probable consequence of the abetment (s 111) or which the abettor knew to be likely to happen (s 113). Thirdly, the device of ‘common object’ under s 149 fixes all members of an unlawful assembly (essentially a joint criminal enterprise with 5 or more persons) with liability for anything done in prosecution of the common criminal object.”²²⁷ More than one type of joint liability may apply to a particular set of facts.²²⁸

Mode of liability	Relevant sections	Description
<p>Abetment (analogous to aiding and abetting and soliciting/inducing. May also be considered for indirect perpetration and ordering)</p>	<p>107 (Definition), 108 (knowledge or intention), 109 (where offence carried out same punishment as principal offence), 114 (presence makes person a principal perpetrator), 115 (punishment where offence is not committed), 116 (where abettor is public servant whose duty it is to prevent the commission of the offence), 119 (concealment of criminal design by public servant)</p>	<p>“A person abets the doing of a thing, who- First – Instigates any person to do that thing; or Secondly, – Engages with one or more other person or person in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order the doing of that thing; or Thirdly – Intentionally aids, by any act or illegal omission, the doing of that thing.” Note: The person must have the same intention or knowledge as the abettor (s. 108), and it is reasonably clear that the abettor must be proven to have known the facts constituting the offence he or she is alleged to have committed.²²⁹ If an abettor is present at the commission of the offence they are considered to have committed the offence and will not be treated as an abettor (s. 114).</p>
<p>Joint Liability (analogous to co-perpetration and common purpose liability. Collateral abetment may also be considered for indirect perpetration and ordering.)</p>	<p>Common intention: 34, 35 Collateral Abetment: 110, 111, 112, 113 Common object during unlawful assembly: 149</p>	<p>Common intention “34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone”. Note: the intent must be “common”;²³⁰ there must be a pre-arranged plan, a prior concert, and a prior meeting of minds (not just independently possessed intentions that are the same). The intention must be to commit the crime charged.²³¹ “35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone, with that knowledge or intention”.</p>

		<p>Collateral abetment</p> <p>“111. When an act is abetted and a different act is done, the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it: provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.”</p> <p>113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.”</p> <p>Common object</p> <p>“149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence.”</p>
--	--	---

In addition, where two or more persons agree to do an illegal act this amounts to **criminal conspiracy**, which is a crime in its own right.²³² This will only amount to a crime if at least one of the parties carries out a further act in pursuance of the plan.²³³

Note: The major gaps between Myanmar’s national law and international criminal law relate to leadership cases – for ordering and command or superior responsibility. Practitioners in Myanmar may have to consider using abetment, collateral abetment or conspiracy when pursuing criminal responsibility against those in leadership positions who may not have been present at crime scenes, including any (military) commanders or (non-military, i.e., civilian) superiors.

3. Defences and excuses and other grounds for excluding criminal liability

Defences under international law are narrowly defined (see, for example, Rome Statute article 31, but note that ICC law

may differ from general international law and the law of other international jurisdictions on aspects of this area of law).

Under Burmese law, a limited number of general defences and excuses may be potentially relevant to (or at least raised in cases of) CARSV crimes. Under the Evidence Act, the accused bears the legal burden of proving a defence or excuse on the balance of probabilities.²³⁴ These include:

- **Duress:** “Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint” (s. 94).

Box 7. No good faith defence where manifestly unlawful order

In the case of *Maung Myat Tha v Queen Empress* (1882) SJLB 164 a superior ordered his constables to arrest people of bad character who were on the road and to shoot them if they resisted. The constables challenged two men and fired and killed one of them when he did not stop. The court held that the order was manifestly illegal and the constables who obeyed it were guilty of culpable homicide.

• **Necessity:** “Nothing is an offence merely by reason of it being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property” (s. 81).

• **Unsoundness of mind:** “Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law” (s. 84).

• **Intoxication:** “Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or against his will” (s. 85). If a person is intoxicated they will be treated as having the intention they would have had sober unless it was administered against the person’s will.²³⁵

In addition, **specific protection is provided to public servants**, which would include military and police personnel. Section 76 of the Penal Code provides that: “Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in **good faith** believes himself to be, **bound by law** to do it”.

This provides protection to public servants as long as “they were exercising, or in good faith believed themselves to be exercising, the powers given to them by the general law”.²³⁶

Very old Burmese precedent has recognised, however, that this provision should not provide protection where an official knows an order is unlawful, but nevertheless carries it out. An 1883 case stated that: “Military discipline, while it regulates the conduct of a soldier in military matters, is made subject to a higher law in favour of public safety, when the act which the military discipline attempts to en-

force or to justify is one which affects the person or property of another”.²³⁷

A further defence to murder is provided by Section 299(2) (C) where a public servant exceeds his powers and kills a person in the course of his duties. As long as the official **believed in good faith that the act was lawful and necessary** for the discharge of his duty, and was carried out without ill-will towards the victim, the official will be convicted of culpable homicide, rather than murder.

4. Child offenders

No minimum age of criminal responsibility exists under international law, because countries differ as to what the minimum age should be.²³⁸ However, the ICRC considers that states should never set the age of criminal responsibility below 12 years old.²³⁹

The age of criminal responsibility in Myanmar is seven years, although a child under 12 will not be treated as responsible if they have “not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion”.²⁴⁰

5. Prescription

There is no prescription period for criminal offences under Burmese law. This is in line with the position under international law for international crimes. Rome Statute article 29 is an example.

6. Immunities and amnesties

As highlighted above in Chapters 2 and 3, amnesty from criminal prosecution is entrenched in the 2008 Constitution for members of the previous military regimes and government for crimes committed in the course of their duties prior to 2011.²⁴¹ Such blanket amnesties for CARSV and other international crimes and grave human rights violations may be outlawed under international law,²⁴² although there are different opinions on this issue.

D. Rules and practice on procedure and evidence

1. Consent

Consent is primarily a substantive, rather than evidential issue, as it goes to the elements of the crime itself, and no rules of evidence exist to protect victims from specific lines of questioning or introduction of specific evidence about consent.

For the crimes of rape and outraging modesty the burden rests on the prosecution to prove a lack of consent. Although Section 375 of the Penal Code (rape) provides a number of variations on consent, in all reported cases defendants have been charged under the second limb (“without her consent”).

Under general common law consent “should only be regarded if it is free, voluntary and informed”.²⁴³ Although some cases from Burmese courts have placed significant weight on the fact that a woman did not struggle or scream,²⁴⁴ others have stressed that a “woman may not scream or struggle because of emotions such as fear, but this does not mean she consented”.²⁴⁵ Similarly, it has been held that a woman did not consent to sexual intercourse simply because she initially followed an accused, and accompanied him into his house.²⁴⁶

The third limb of Section 375 provides that sexual intercourse will amount to rape if consent was obtained “by putting her in fear of death or hurt”. This may be useful to avoid arguments about consent in coercive circumstances such as those apparent in conflict settings.²⁴⁷

Section 90 of the Penal Code also provides a catch-all provision on consent which provides that apparent consent will not amount to consent under the code if it is given (among other things) “by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he has given his consent”, or “under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such . . . misconception”.

Although the notion of consent under Burmese law therefore has some flexibility to recognise the reality of lack of consent in coercive circumstances, lawyers report that in practice these principles are not applied consistently. Judges’ and lawyers’ interpretation of consent is still largely driven by gender stereotypes and traditional norms to infer consent unless there is clear material evidence of struggle.²⁴⁸

2. Corroboration

No specific corroboration for sexual violence crimes is explicitly required by the Penal Code or Criminal Procedure Code.

On the other hand, corroboration is likely in practice to be required. For example, section 375 of the Penal Code provides that “penetration is sufficient” to constitute sexual intercourse for the crime of rape. This means that it is not necessary to prove that the man ejaculated, however, “in practice the police will not pursue complaints where there is no evidence of semen”.²⁴⁹ Similarly, according to lawyers interviewed by REDRESS, in practice police will not usually pursue cases (or will pursue them as “attempts”) if there are no genital injuries mentioned in the medical report, or if the victim cannot provide the clothes and underwear they were wearing at the time of the alleged crime.²⁵⁰

3. Prior and subsequent sexual conduct

No specific evidential rules exist to protect victims from questioning about prior or subsequent sexual conduct, and in practice such questioning is usually included in cross-examination of the complainant.

4. Standard of proof

The standard of proof in criminal trials is “proof beyond reasonable doubt”. However, the application of such a standard is more likely to be seen in higher level courts (State and Divisional High Courts and Supreme Court), rather than district and township courts, where lack of training and corruption are significant problems.²⁵¹

5. Procedure

Procedures for investigating and prosecuting sexual violence are governed by the Criminal Procedure Code (“CrPC”), Police Acts, Police Manual, Attorney General Act and the Court Manual. However, as the ICJ has reported, “[r]elevant 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”.²⁵² In addition, police lack relevant financial and human resources to adequately address cases, and do not

have relevant, clear guidelines on how to appropriately deal with such cases.

Criminal proceedings for serious offences are instituted by the making of a complaint to police by a person with knowledge of the alleged crime.²⁵³ In practice, victims will usually report the crime to their ward or village tract authority, under the General Administrative Department of the Ministry of Home Affairs, and then with the local authority, report it to the police.

The information provided to police is reduced to writing (known as a "First Incident Report" or "FIR"). Following this, police should launch an investigation, and if a suspect is identified, arrest and detain them.²⁵⁴ If the police make a decision that there is no case to be investigated they are required to inform the person who reported the crime.²⁵⁵

As a first step in an investigation, police will normally issue a letter to the local hospital (normally the township level hospital where there is a forensic doctor) for a medical report. For alleged sexual offences against children the medical report must be issued by the district or state/regional hospital. In many cases police will delay issuing this letter.

In practice, the victim is then required to go to the relevant hospital for the completion of a medical examination, at which they will normally be required to explain the details of the incident to the examining doctor. Usually 3-4 days later the hospital will submit the medical report directly to the court (although sometimes it will be submitted by police to the court).

Depending on the maximum sentence of the crime charged, a civilian criminal trial will be held in either a District Court, or Township Court. In special circumstances they may be heard in the State High Court. Judges of Township Courts are specially empowered magistrates who can pass sentences of up to 7 years imprisonment.²⁵⁶ The remaining cases fall within the jurisdiction of the District Courts,²⁵⁷ unless particular circumstances require.²⁵⁸ Note that the Supreme Court issued an order in January 2017 directing all child rape cases to be heard by the District Court.²⁵⁹

6. Protective measures

No specific protective measures exist for victims of sexual violence in court proceedings. Trials are almost always held in open court.²⁶⁰ A victim of sexual violence is required by law to attend the trial of the accused, and may be cross-examined by the accused.²⁶¹ Failure of the victim to attend will result in acquittal of the accused.²⁶² The media does not follow any specific guidelines on reporting of sexual violence trials and usually do not respect the confidentiality of victims testifying. Official court documents are in Burmese, and courts do not offer translations into ethnic minority languages.²⁶³

Although the Child Act provides the possibility of special accommodations for children accused of crimes, there are no specific protections for child victims of crime.²⁶⁴ Lawyers report that requests for testimony to be given in private are usually rejected.²⁶⁵ A lack of support and sensitive procedures means that questioning may be particularly traumatizing for child victims, and undermine prosecutions. For example, one lawyer reported that "in one case, a 10-year old girl was raped by a 60-year old man, and when she [went before] the judge, he asked her [to describe the details of the case] but she couldn't say anything, she was [too] afraid. So the case was dismissed".²⁶⁶ Others have reported how a child victim's own state-appointed lawyer refused to allow interpretation into the child's own local language, requiring her instead to be questioned in Burmese, a language she was not able to understand or express herself in sufficiently, meaning that she could not respond to questions.²⁶⁷

A user-friendly guide with further detailed information on the procedures and practicalities for making a complaint and for the investigation of sexual violence cases aimed at the township and village level is soon to be published by Cord Myanmar. It will be available at: <https://www.cord.org.uk>.

PART IV /

DOCUMENTATION IN PRACTICE: PREPARATION

CHAPTER 7 / DO NO HARM

Chapter 7 of IP2 explains that the key ethical principle at the heart of documentation of CARSV is “Do No Harm”.²⁶⁸ The human rights environment remains particularly difficult in Myanmar and CARSV is a particularly sensitive topic. For this reason documentation of these crimes may expose victims and witnesses to a range of potential harm, which documenters have an ethical responsibility to avoid. As stated in IP2:

“The key ethical principle at the heart of documentation of CARSV is the obligation to, at a minimum, ‘Do No Harm’. This means practitioners must be fully aware of the possible negative impacts of documentation on victims and other witnesses, the wider community and the investigators themselves; be prepared for the harm those impacts may inflict; and put in place measures to prevent or minimize that harm”.²⁶⁹

A. Potential sources of harm to victims and witnesses

The risk of harm to which victims or witnesses of sexual violence are exposed when deciding to document their experience varies greatly depending on their ethnicity and background, on the identity of the perpetrator or the institution he/she belongs as well as the purpose for which their case is being documented. Careful preparation of the documentation plan will assist in making an individualised risk assessment.

Most of the examples of potential harm outlined at page 87 of IP2 are likely to be relevant to documentation of CARSV in Myanmar. Key potential sources of harm particularly relevant in Myanmar include:

• Fear of retribution

In most cases within Myanmar it is very dangerous for victims and witnesses to speak out about sexual violence and other human rights violations they have experienced, especially where the allegations concern state actors. Many have been explicitly warned by perpetrators not to speak about what has happened, and examples are often made of those victims or family members who do complain – with

them being detained, tortured, pursued by false charges or even killed.²⁷⁰ No systems exist for the making of protective orders when victims do report crimes to authorities.

• Stigma

In many if not all of the communities in which CARSV occurs, women who (even against their will) have sex before marriage are considered “spoiled” and as bringing shame on the whole community.²⁷¹ Fear of ostracisation by the community is therefore another important factor inhibiting women from reporting rape.²⁷² (See further Chapter 2 (Understanding Sexual Violence in Myanmar), Part D on the prevalence of rituals such as “cleansing ceremonies” related to this stigma). Cultural and traditional gender norms “instruct women not to speak out about being victims of sexual violence and instead to feel guilty and take blame for the attack”.²⁷³

In refugee camps outside of Burma shame and stigma are the primary reasons that have been given by victims for not reporting their rape or seeking medical care, “even when they were experiencing severe pain”.²⁷⁴

The deep stigma attached to male sexual violence may also be a reason for the marked absence of reports of male rape in documentation of CARSV.²⁷⁵

• Criminal charges

In addition to the stigma attached to sexual violence, the criminalisation of homosexual sex as an “unnatural offence” under the Penal Code also represents a risk for men who wish to report sexual violence perpetrated by other men. The offence applies even if the act is committed with consent of both parties.

• Re-traumatisation and lack of referral services

As discussed further below, Myanmar has a marked lack of formal support services for survivors of sexual violence. Re-traumatisation is a major risk associated with the documentation of sexual violence and with the decision to

seek redress for these crimes. In this respect, best practices outlined at pages 92-102 of IP2 can help mitigate the risk of re-traumatisation during and after the interview (see ‘C. Mitigating Harm’, below). However, very careful planning will be needed to ensure that appropriate referral services can be made available given the paucity of such services, especially in conflict-affected areas.

Survivors may also encounter specific risks when accessing medical treatment. Previously, survivors of rape who sought medical treatment could not be provided with the treatment until they had made a formal complaint to police. The law was changed in 2014 to waive such mandatory reporting, however the practice persists and survivors will sometimes be refused treatment if they are not prepared to make a formal statement.²⁷⁶

B. Informed consent

As stressed in Chapter 7 of IP2, it is a crucial ethical obligation to obtain the informed consent of the victim or witness before commencing the documentation process. However, in the present context in Myanmar, obtaining fully informed consent from victims regarding the use of the information documented in the future may prove difficult. This is because avenues for justice are likely to evolve over the coming years. At this stage, victims are thus unable to make an informed decision regarding participation in future processes.

For example, documentation carried out over the years prior to 2016 is unlikely to have anticipated the creation of a UNFFM to which such documentation could be submitted. It is crucial that documenters have in place measures to securely later seek additional consent for use of the information in any mechanisms that would not have been within the contemplation of the original informed consent.

Ultimately, “the decision to seek justice or to stay silent, to withhold all or part of the truth, or lay oneself open to judicial scrutiny, is a calculated one based on context: perceived power dynamics and the risks posed by disclosure. Some survivors and victims’ families might seek public acknowledgement, apologies, restitution or compensation, while others may demand satisfaction and guarantees of non-repetition that include prosecution of perpetrators. They could seek a combination of any or all of these measures. They may be ready immediately, or may want to hold off disclosure for some time in the future when conditions

might be more conducive to a positive outcome”.²⁷⁷ The wishes of the victim must be fully respected in this respect, while ensuring that they understand the possible consequences of those decisions, for example on potential future prosecutions.

C. Mitigating harm

External risks associated with the documentation of sexual violence crimes can be mitigated through careful planning of the investigation and interviews, ensuring the confidentiality of the information and referring the victims to appropriate organisations that may provide protection or support.

1. Threat and risk assessments

In order to carry out appropriate risk assessments and mitigate external risks to the documentation of CARSV, it is essential to seek out local knowledge. Documenters from outside the relevant area should seek the assistance of vetted local activists and women networks to access victims and witnesses of sexual violence. It is not advisable to attempt to contact victims and witnesses directly as this may expose them to many of the risks described above. It is also essential to seek the expertise of local organisations to carry out individualised risk assessments and individualised mitigation plans for each interviewee.

2. Coordination

Coordination among those carrying out work with survivors/victims of CARSV is crucial to ensure the most efficient use of resources and to avoid harm caused to individuals and communities by repeated documentation processes (see further IP2, page 93). Multiple efforts are often underway in areas where CARSV is believed to be prevalent.

This has reportedly been a particular issue in the North East of the country, where local organisations who have well-established programs of documentation and support to survivors have been bypassed by international agencies establishing their own programs in IDP camps without consultation.²⁷⁸

Please remember that it is not everyone’s role to document CARSV (or other crimes and violations). Sometimes the proper role for lawyers, activists, first responders or those providing survivor support services is to inform sur-

vivors of the risks and benefits of documentation, different types of documenters including the mandated ones, and to ensure the survivor is able to make a fully informed decision about whether they want to document their case and with whom. These people also have a critical role to play in holding documenting actors – including journalists – whom they introduce to survivors to account for the standards and procedures followed in the documentation process.

In the event that you are a non-mandated actor (see definition of “mandated actor” in Box 8 below), if the experience of a survivor (or witness) has not been documented before, properly consider whether referral to a mandated actor may have more benefits for the survivor and their objectives, in which circumstances you can support and guide them in the documentation by the mandated actor and getting the support they need without doing harm.

Especially if you are a non-mandated actor, please also take the time – before and during any accountability-focused documentation or investigation effort – to ask yourself why you wish to document and for what purpose. This assessment should include whether the documentation work will actually benefit victims/survivors and the prospects of justice. Apart from interviews with survivors, what are the alternative sources of information your work may need? Are there survivors and witnesses who have not yet had their experience documented? It should also map out the steps you can take to ensure any documentation you undertake will not actually or potentially undermine or duplicate existing justice efforts (approach, format, use). All too often well-meaning actors document or investigate CARSV without taking the time to work all of this out.

Prior to engaging any survivor of CARSV (and other serious crimes and violations), anyone deciding to embark on accountability-focused documentation should take great care to find out who the mandated and non-man-

dated documentation and investigation and other relevant (such as medical and humanitarian) actors are. They should also find out what work has already been and is already being done and whether (further) documentation is actually needed. At present the UNFFM, police, prosecutors and judges are the key mandated actors; however, additional mandated actors may exist in the future.

For both mandated and non-mandated actors, accountability-focused documentation and investigation efforts should truly prioritise the interests and rights of survivors. An ethical and responsible approach necessitates utmost care to avoid the potential – and more often than not, real – grave consequences of the lack of coordination, and especially of multiple interviews. Unless undertaken by highly experienced and well-resourced multi-disciplinary teams of practitioners, the consequences of uncoordinated documentation and repeated interviews almost unavoidably include causing further harm to survivors (such as re-traumatisation), and accounts of experiences that differ on important issues and end up being discredited and ignored by accountability mechanisms, something which also impacts on survivors.

3. Confidentiality

Given the difficult security situation in Myanmar (see further Chapter 8) practitioners working within the country need to have in place particularly robust confidentiality procedures (see further IP2, pp. 95-97).

Lawyers within Myanmar do benefit from legal professional privilege, however in the context of weak justice institutions there is little to protect communications covered by this privilege from interference by state authorities.

There is no legislation in place to protect the confidentiality of victims of sexual violence in Myanmar, and a general lack of awareness among many institutions and service providers about ethical obligations concerning confidentiality.

Box 8. Mandated actors

For this Supplement, “mandated actor” means a person or body granted official government powers or mandate to act in a law enforcement, investigation, expert witness, prosecution and/or adjudicative function. This mandate can be given directly by, for example, a government, through national law, through an agreement with a government, through the UN Security Council acting under its Chapter VII powers, or through another body with the power to grant such official mandate.

This should be carefully considered in interactions with others concerning cases.

4. Referrals

Whenever additional assistance is necessary to ensure the support or the protection of victims and witnesses, referral to other institutions or organisations may be appropriate. Depending on the cases, referral for medical assistance, physical rehabilitation or psycho-social support may be necessary.

Formal systems of support for victims of sexual violence are extremely limited within Myanmar, and especially so in conflict zones.²⁷⁹ Reports of interviews with Rohingya victims of sexual violence stated that “[m]any of the women and girls we met had little or no history of contact with health services in Burma. They often did not know that medical care is strongly recommended for survivors of rape. Women and girls also said they thought that they would have to pay for the care, for which they had no money.”²⁸⁰

Medical services provided for victims of sexual violence through the state health system are limited and women’s groups report that the provision of such services is not responsive to victims’ needs.²⁸¹ Hospitals may not have specific protocols for dealing with victims of rape, and most of the Township Medical Officers that victims have contact with are male. Emergency contraceptives and post-exposure prophylaxis are not generally available.²⁸² Transport to such facilities may also be extremely difficult, with some villages only accessible on foot.²⁸³

In areas where EAOs have more influence than the government, parallel health systems may operate, such as those run by EAOs. In Kayah (Karenni) State, for example, non-state health actors provide medical services through a network of approximately 20 mobile clinics and 48 backpacker teams supported by six EAOs. The level of support provided to rape survivors varies among the teams, with some having specific post-rape treatment kits.²⁸⁴ The teams will provide referral to state-run hospitals in serious cases however.

The government has committed to operationalise a National Strategic Plan for the Advancement of Women (“NS-PAW”), including the “drafting of national gender-based violence standard operating procedures, as well as localised standard operating procedures for gender-based violence in Kachin, Rakhine and Shan States.”²⁸⁵ The Myanmar National Women Committee has a working committee formed

to monitor progress on implementation of the NSPAW, and the government’s Development Assistance Coordination Unit (“DACU”) also has a coordination group to support its effective implementation.

In 2017 the UN Special Rapporteur on Myanmar noted that Ministry of Social Welfare Relief and Resettlement has established telephone lines for survivors of gender-based violence but that “there is limited capacity, with only 30 staff at national level, and reports that calls go unanswered.”²⁸⁶ Even if such formal referral systems are established and improved, careful consideration will need to be given in cases of CARSV to whether they are appropriate referral mechanisms if they predominantly involve referral to government agencies.

In the absence of formal support mechanisms strong networks of informal support structures for victims of sexual violence have emerged. Women’s organisations (such as WLB, Women Organization Network, Gender Equality Network, Karenni National Women’s Organisation (“KNWO”), Kachin Women’s Association Thailand (“KWAT”), SWAN and Ta’ang Women’s Organisation (“TWO”)) and religious institutions including the Baptist Church have played a crucial role in assistance and protection. A well-coordinated and dedicated network of actors have provided – and continue to provide – protection for victims and witnesses, including options for safe housing, as well as a wide variety of assistance measures including psychosocial counselling and legal support. Depending on the specifics of each case, this may remain the best option for efficient protection and support.

More options for support and referral are likely to exist within IDP camps (although humanitarian access has regularly been blocked to these) and refugee camps outside Myanmar. Again, coordination with local support networks is key to ensure the services they have already established are not undermined or duplicated by provision of international support.

For detailed information on services available by sector in Kayah (Karenni) State, Kayin (Karen) State and Mon State, see UNFPA Myanmar, ‘Powerful Myths, Hidden Secrets’, (2017), http://myanmar.unfpa.org/sites/default/files/pub-pdf/PowerfulMythsHiddenSecrets_EDITED.pdf.

CHAPTER 8 / SAFETY AND SECURITY

A. Introduction

Chapter 8 of IP2 explains how “[s]afety and security considerations are of paramount importance and both concepts are linked”.²⁸⁷ Practitioners need to be “aware of the safety and security aspects of their work and the risks which may arise for themselves as well as victims and witnesses and their families and communities”.²⁸⁸

Although the space for civil society has opened up to some extent in parts of Myanmar since the end of military rule, the human rights environment in conflict-affected parts of the country remains extremely difficult.

Documentation of conflict-related violence and CARSV in particular, remains particularly sensitive. This activity is likely to pose significant security challenges for victims, witnesses and documenters.

As explained above, the security challenges for both documenters and victims depend on the specifics of each case. They may also vary significantly geographically – for example the challenges faced in areas on ongoing conflict are likely to be quite different to those in any area where there are no active hostilities. These may impact whether a documenter can access a particular area and particular victims at all.

Practitioners need to be aware that both they and victims may be under surveillance. As one local NGO explains: “Due to security concerns human rights monitoring cannot take place openly.... Fieldworkers and the people who communicate with them face security risks even in ceasefire areas, as the military and police often intimidate victims into keeping quiet. If a member of the military or police discovers that a fieldworker is gathering information human rights violations, that person could be at risk of arrest under repressive laws, harassment or even violent retribution”.²⁸⁹

Practitioners should take careful note of the best practices outlined in Chapter 8 of IP2, including the adoption of a holistic security strategy and ways to manage risks to practitioners, information and victims and witnesses. As stated there: “Safety and security considerations are linked to the Do No Harm principle... and should under-

pin any decision or action taken by practitioners throughout the documentation process: from planning activities, choosing how to approach victims and witnesses and where to meet them, recording, transporting and storing information, to referrals”.²⁹⁰

B. Managing risks to practitioners

Of the example risks to practitioners outlined in IP2, the following are likely to be most relevant in the Myanmar context:

- Road traffic accidents
- Stress, fatigue, vicarious trauma and PTSD
- Sporadic outbreaks of violence
- Specific targeting from individuals or groups under investigation and their supporters
- Improvised explosive devices (“IEDs”), unexploded ordnance and war debris
- Shelling or attack
- Environmental risks (e.g. floods, landslides or extreme weather conditions)
- Theft
- Office raids and search without a warrant
- Judicial harassment, arbitrary arrest/detention (especially for national practitioners)
- Deregistration (for national NGOs)
- Denied entry visas and other administrative obstacles (for foreigners)

In addition, the following specific risks should also be considered:

- Midnight census checks of homes by the government
- Search at checkpoints

Box 3 on pages 108-9 of IP2 outlines mitigation measures for many of these risks that should be carefully considered and implemented where appropriate.

Box 9. Addressing vicarious trauma

One issue that requires serious attention is the risk practitioners themselves face from vicarious trauma when documenting such serious crimes on an ongoing basis.²⁹¹

Organisations must address the well-being of their staff, and individual self-care strategies are essential to prevent and address chronic stress, vicarious trauma and burn-out. For further information see OHCHR, 'Manual on Human Rights Monitoring: Trauma and Self-Care', (2011), <<http://www.ohchr.org/Documents/Publications/Chapter12-MHRM.pdf>>.

C. Managing risks to information

All of the risks to information outlined in Chapter 8 of IP2 are potential risks for practitioners in Myanmar. Practitioners should ensure they use secure communication methods at all times when dealing with sensitive material, and be very careful with the information they post online and their use of social media.

Many small organisations may not have dedicated secure digital storage software. However, a carefully designed evidence handling and storage protocol can utilise a number of free services that allow for encrypted storage of files. For both digital and physical storage careful note should be taken of the information contained in Chapter 13 of IP2 (Storing and Handling Information).

D. Managing risks to victims and witnesses

As explained in more detail in Chapter 7, of the risks to victims and witnesses identified in Chapter 8 of IP2, the following are most likely to be present in Myanmar:

- Intimidation or retaliation by perpetrators
- Arrest and detention
- Social stigma
- Divorce, family rejection, reduced chance of marriage
- Re-traumatisation due to a lack of gender-sensitivity by service providers, practitioners and/or the justice system, which may lead to self-harm or even suicide
- (For men) imprisonment for 'same sex acts' due to homophobic laws, even when these acts were non-consensual

As stressed in IP2: "Victims and witnesses must be consulted about individual, local or community-specific risks during the documentation planning stage and prior to any decision to physically meet being made. However, prac-

tioners should keep in mind that victims and witnesses may sometimes not recognise threats, minimise their risks as a coping mechanism or have unfounded fears as a result of misinformation or past traumatic experience".²⁹²

Pages 116-117 of the IP2 set out a number of steps that practitioners should take to protect victims and witnesses in light of these risks, which should be carefully followed.

CHAPTER 10 / **TYPES OF EVIDENCE OF** **SEXUAL VIOLENCE IN MYANMAR**

A. Introduction

Chapter 10 of IP2 outlines the different types of evidence that can be gathered during the documentation process to prove CARSV, including how to collect such evidence and associated risks. The following chapter provides brief details on specific Burmese evidentiary and procedural requirements for the use of such evidence in Burmese legal proceedings. For other considerations please refer to IP2.

B. Testimonial evidence

Admissibility of testimonial evidence is generally covered under the Evidence Act 1872.

Oral evidence in civil and criminal proceedings must be direct; such that hearsay (recounting what someone else told you as evidence of the fact of that happening) is excluded.²⁹³

However a number of exceptions apply in criminal matters, in particular hearsay may be admitted as evidence of “notorious or bad reputation”,²⁹⁴ and evidence may be given of “dying declarations” of people who are now deceased.²⁹⁵

C. Documentary evidence

Myanmar does not have any freedom of information legislation, and government departments have no general legislative obligation to provide access to information.²⁹⁶

Government records are not public, and members of the public are unlikely to obtain access to these records and documents, especially if they are considered sensitive.²⁹⁷ Access to such documents would be determined by individual government officials in the relevant department in accordance with their own procedures.

However, according to lawyers, the usual practice in the court is that all the case documents accepted at the court during the trial are allowed to be copied for the lawyers, accused and family members of the accused. After the verdict, the case documents may be provided by these lawyers to other interested parties, ethical obligations permitting.²⁹⁹

D. Physical evidence

Rules about the collection of physical evidence are contained in the Evidence Act and Police Manual (2001). They cover issues such as proper handling of evidence and chain of custody requirements.³⁰⁰ However, police often fail to follow these procedures, running the risk of contaminating evidence.³⁰¹

Despite the fact that there is no formal requirement of corroboration to prove rape (see above Chapter 4), medical evidence is often considered crucial in such cases. A medical report will only be admitted in Court if it was completed by the forensic doctor at the nearest hospital to the crime scene and the Chemical Department of the Ministry of Home Affairs for the chemical analysis.

Box 10. Collection of physical evidence in teachers’ rape and murder

Serious concerns have been expressed about police failure to follow procedures for collection of evidence in the high-profile rape and murder of two teachers in Kachin in 2015, alleged to have been committed by soldiers staying in the village. Police collected evidence but it is alleged they failed to store and label it in proper sealed evidence bags, using instead ordinary plastic bags normally used for food storage. They are also alleged to have not collected finger prints properly. In addition, semen samples collected from the victims have either disappeared or are still being processed, three years later.²⁹⁸



ENDNOTES

¹ Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office (March 2017), 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law', Second Edition, p. 11, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf.

² For a definition of CARSV and use in this Supplement, see further IP2, p. 11, and Chapter Two of this Supplement.

³ IP2, p. 11.

⁴ IP2 details how CARSV crimes have been successfully prosecuted decades after being committed (at p. 148). Examples include the prosecution of sexual violence crimes in Bosnia & Herzegovina more than 20 years after the events (see IP2, p. 148), and the conviction of individuals for crimes against humanity, including rape, in Argentina, more than 30 years after their commission (see e.g. TeleSur, 'Argentina Sentences 6 to Life in Prison for Crimes Against Humanity During US-Backed Dirty War', (16 September 2017), <https://www.telesurtv.net/english/news/Argentina-Sentences-6-to-Life-in-Prison-for-Crimes-Against-Humanity-During-US-Backed-Dirty-War-20170916-0016.html>).

⁵ See e.g. Gender Equality Network, 'Behind the Silence: Violence Against Women and their Resilience, Myanmar: Briefing paper', (October 2015), p. 3, <http://www.themimu.info/node/61566>.

⁶ UNFPA (2017), 'Powerful Myths Hidden Secrets', (2017), p. 13, http://myanmar.unfpa.org/sites/default/files/pub-pdf/Powerful-MythsHiddenSecrets_EDITED.pdf.

⁷ See further Melissa Crouch (2014), 'The Layers of Legal Development in Myanmar', *Law, Society and Transition in Myanmar*, Melissa Crouch and Tim Lindsey (eds.), Hart: Oxford, pp. 41-47.

⁸ The Defence Ministry, the Home Affairs Ministry, and the Border Affairs Ministry. See Constitution of the Republic of the Union of Myanmar, (29 May 2008), s. 232(b) (hereinafter the "2008 Constitution").

⁹ See further in this Chapter pp. 5-6.

¹⁰ 2008 Constitution, Art. 418.

¹¹ Monique Skidmore (2003), 'Behind bamboo fences: forms of violence against women in Myanmar', in *Violence Against Women in Asian Societies*, Lenore Manderson & Linda Rae Bennett (eds.), London: RoutledgeCurzon, p. 78.

¹² United Nations High Commissioner for Human Rights ("UNHCHR"), 'Situation of human rights of Rohingya Muslims and other minorities in Myanmar', (June 2016), A/HRC/32/18, para. 2.

¹³ Laura Baron-Mendoza, 'The War Report 2017: Myanmar: A battle for recognition', (December 2017), *Geneva Academy of International Law*, p. 2, <https://www.geneva-academy.ch/joomlatools-files/docman-files/Myanmar%20A%20Battle%20for%20Recognition.pdf>.

¹⁴ Also sometimes known as "Burmese", although this term can technically apply to any citizen of Myanmar.

¹⁵ UNHCHR (2016), A/HRC/32/18, para. 2. Note that the government does not include Rohingya Muslims as an ethnic group in this figure (see further Box 1 (Ethnic cleansing of Rohingya Muslims)).

¹⁶ Skidmore (2003), p. 77.

¹⁷ David C Williams (2014), 'What's So Bad About Burma's 2008 Constitution? A Guide for the Perplexed', *Law, Society and Transition in Myanmar*, Melissa Crouch and Tim Lindsey (eds.), Hart: Oxford, p. 118.

¹⁸ Baron-Mendoza (2017), 'The War Report 2017', p. 3.

¹⁹ Skidmore (2003), p. 77.

²⁰ Betsy Apple, 'School for Rape: The Burmese Military and Sexual Violence', Earth Rights International, (1998), p. 9.

²¹ Baron-Mendoza (2017), 'The War Report 2017', p. 2.

²² Skidmore (2003), p. 78.

²³ Ibid.

²⁴ Ibid., p. 80. For more recent examples of use of the Four Cuts strategy in Kachin State see: Stella Naw, 'Four cuts strategy deepens Myanmar's war wounds', (15 July 2017), *Asia Times*, <http://www.atimes.com/article/four-cuts-strategy-deepens-myanmars-war-wounds/>.

²⁵ See e.g. Human Rights Watch ("HRW"), 'Untold Miseries: Wartime Abuses and Forced Displacement in Burma's Kachin State', (March 2012), <https://www.hrw.org/sites/default/files/reports/burma0312ForUpload10.pdf>.

²⁶ Catherine Brown (1999), 'Burma: The political economy of violence', *Disasters* 22(3), Blackwell Publishing, p. 236.

²⁷ Skidmore (2003), p. 78.

²⁸ Ibid., pp. 78, 83-84.

²⁹ Baron-Mendoza (2017), 'The War Report 2017', pp. 2-3. The EAOs who signed the agreement are the Democratic Karen Buddhist Army ("DKBA"), Restoration Council of Shan States ("RCSS"), Shan State Army South ("SSA-South"), Chin National Front ("CNF"), Karen National Union ("KNU"), Karen National Liberation Army Peace Council ("KPC"), Arakan Liberation Party ("ALP"), Pa-O National Liberation Organization ("PNLO"), All Burma Students' Democratic Front ("ABSDF").

³⁰ Baron-Mendoza (2017), 'The War Report 2017', p. 3. More than 600 people were killed and 700 injured (40% of them civilians) in Kachin and Northern Shan States between 2014 and mid-2017. See: The Asia Foundation, 'Myanmar: The State of Conflict and Violence in Asia', (2017), p. 9, <https://asiafoundation.org/wp-content/uploads/2017/10/Myanmar-TStateofConflictandViolence.pdf>.

³¹ Baron-Mendoza (2017), 'The War Report 2017', pp. 2-3.

³² In addition, since February 2017 there have been clashes between the Ta'ang National Liberation Army ("TNLA") and the Shan State Army South.

³³ Baron-Mendoza (2017), 'The War Report 2017', p. 4 (Figure 2).

³⁴ Matt Schissler, Matthew J Walton and Phyu Phyu Thi, 'The Roots of Religious Conflict in Myanmar', 6 August 2015, *The Diplomat*, <https://thediplomat.com/2015/08/the-roots-of-religious-conflict-in-myanmar/>.

³⁵ Ibid., p. 10.

³⁶ Ibid.

³⁷ The Population Control Law (May 2015), Buddhist Women's Special Marriage Law (August 2015), Religious Conversion Law (August 2015), and Monogamy Law (August 2015). See further Ibid., pp. 11-12.

³⁸ International Crisis Group (2017), 'Buddhism and State Power', p. 12.

³⁹ Ibid., p. ii.

⁴⁰ Ibid.

⁴¹ For a summary of the history of violence and abuses against Rohingya Muslims, see: HRW, 'All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State', (April 2013), Appendix I, <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>.

⁴² United Nations Flash Report, 'Interviews with Rohingyas fleeing from Myanmar since 9 October 2016', (February 2017), p. 5, <http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>.

⁴³ HRW, 'All of My Body Was Pain: Sexual Violence against Rohingya Women and Girls in Burma', (November 2017), p. 14. See further: UN Flash Report (2017), p. 5.

⁴⁴ HRW (2013), 'All You Can Do Is Pray', p. 139.

⁴⁵ Ibid., p. 141.

⁴⁶ Ibid., p. 140.

⁴⁷ Advisory Commission on Rakhine State, 'Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State' (August 2017), p. 19, http://www.kofiannanfoundation.org/app/uploads/2017/08/FinalReport_Eng.pdf. See also Republic of Myanmar (2013), 'Final Report of Inquiry Commission on Sectarian Violence in Rakhine State', 8 July 2013, http://www.burmalibrary.org/docs15/Rakhine_Commission_Report-en-red.pdf ("2013 Rakhine Commission Report"); HRW (2017), 'All of My Body Was Pain', p. 13.

⁴⁸ As of September 2017, it was estimated that 606,000 people were displaced to Bangladesh, see: Internal Displacement Monitoring Centre, 'How many internally displaced Rohingyas are trapped inside Myanmar?' (2017), <http://www.internal-displacement.org/library/expert-opinion/2017/how-many-internally-displaced-rohingya-are-trapped-inside-myanmar>.

⁴⁹ UN Flash Report (2017), pp. 13-36.

⁵⁰ UNHCHR, 'Statement to the UN Human Rights Council', (11 September 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041>.

⁵¹ UN Flash Report (2017), p. 42.

⁵² Justin Rowlett, 'Could Aung San Suu Kyi face Rohingya genocide charges?' 18 December 2017, BBC News, <http://www.bbc.com/news/world-asia-42335018>.

⁵³ Associated Press, 'UN official says Rohingya crisis has "hallmarks of genocide"', 1 February 2018, https://www.washingtonpost.com/world/asia_pacific/un-official-says-rohingya-crisis-has-hallmarks-of-genocide/2018/02/01/53180580-0723-11e8-aa61-f3391373867e_story.html?utm_term=.9e27d67618d4.

⁵⁴ Marzuki Darusman, Chair of the Independent International Fact-Finding Mission on Myanmar, 'Statement to the Special Session of the Human Rights Council on the Situation of human rights of the minority Rohingya Muslim population and other minorities in Rakhine State of Myanmar', (5 December 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22495&LangID=E>.

⁵⁵ See e.g. HRW (2017), 'World Report 2017: Burma: Events of 2016', <https://www.hrw.org/world-report/2017/country-chapters/burma>.

⁵⁶ See CEDAW Committee, 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Myanmar', 7 November 2008, CEDAW/C/MMR/CO/3, para. 24 ("The Committee expresses its deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated by members of the armed forces against rural ethnic women, including Shan, Mon, Karen, Palaung and Chin women"); Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, 7 March 2012, A/HRC/19/67, paras. 60-61. See further footnote 50.

⁵⁷ Watchlist on Children and Armed Conflict, 'No more denial: Children affected by armed conflict in Myanmar', (May 2009), pp. 5, 30-31, <http://watchlist.org/publications/no-more-denial-children-affected-by-armed-conflict-in-myanmar-burma-may-2009>.

⁵⁸ HRW (2017), 'World Report 2017: Burma'.

⁵⁹ Government of Australia Report (2017), 'Australia's Humanitarian Assistance in Response to Displacement from Rakhine State, Myanmar', <https://reliefweb.int/sites/reliefweb.int/files/resources/rakhine-what-will-our-assistance-do.pdf>.

⁶⁰ See e.g. CEDAW Action Myanmar, 'Myanmar CSO Shadow Report on Thematic Issues: Violence against Women', (17 June 2016), pp. 5, 15, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24232_E.pdf; HRW (2017), Burma 2016 Country Profile, <https://www.hrw.org/world-report/2017/country-chapters/burma>.

⁶¹ Chan Thar, 'Ta'ang Women's group demands action against rape suspects', *Myanmar Times*, 31 October 2017, <https://www.mmtimes.com/news/taang-womens-group-demands-action-against-rape-suspects.html>.

⁶² CEDAW Action Myanmar (2016), p. 15. Although it is not clear from this report what type of coercion has been used, it should be noted in this context that "[s]ex based on a false promise of marriage is considered as sexual violence within the local context, and is punishable by the Myanmar penal code": UNFPA, 'Powerful Myths Hidden Secrets', (2017), p. 16.

⁶³ One of the members of the UN Independent International Fact Finding Mission ("UNIFFM") on Myanmar said after a mission to Bangladesh to interview survivors of violence in Rakhine in 2017: "The accounts of sexual violence that I heard from victims are some of the most horrendous I have heard in my long experience in dealing with this issue in many crisis situations": OHCHR, 'Experts of the Independent International Fact Finding Mission on Myanmar conclude visit to Bangladesh', (27 October 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22320&LangID=E>.

⁶⁴ On this see OHCHR, 'End of mission Statement by Special Rapporteur on the situation of human rights in Myanmar', (1 February 2018), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22619&LangID=E>.

⁶⁵ See e.g. Women's League of Burma ("WLB"), 'If they had hope, they would speak: The ongoing use of state-sponsored sexual violence in Burma's ethnic communities', (November 2014), <http://womenofburma.org/if-they-had-hope-they-would-speak/>; WLB, 'Same Impunity, Same Patterns', (January 2014), http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern_English-final.pdf; WLB, 'System of Impunity', (2004), http://www.womenofburma.org/Report/SYSTEM_OF_IMPUNITY.pdf; Apple (1998), 'School for Rape': Numerous publications contain first-hand accounts of rape and other sexual abuse of ethnic Burmese women by Burmese soldiers. For some examples, see: Burmese Women Union, 'The Plight of Burmese Women', (1995), <http://www.burmalibrary.org/re.g.burma/archives/199508/msg00129.html>; Human Rights Foundation of Monland, 'Sex Discrimination Against Refugee Women by SLORC Troops', (1996), <http://www.ibiblio.org/obl/docs/MF1996-06.html>; Amnesty International, 'Myanmar: Human Rights Violations Against Ethnic Minorities', (1996), <https://www.amnesty.org/en/documents/ASA16/038/1996/en/>; HRW, 'The Human Rights Watch Global Report on Women's Human Rights', (1995), pp. 105-118, <https://www.hrw.org/sites/default/files/reports/general958.pdf>.

⁶⁶ Commission on Human Rights, 'Interim report on the situation of human rights in Myanmar prepared by Mr. Yozo Yokota', 28 October 1994, A/49/594, para. 14 ("Special Rapporteur on Myanmar 1994 Interim Report"), para. 14.

⁶⁷ Commission on Human Rights, 'Interim report on the situation of human rights in Myanmar prepared by the Special Rapporteur of the Commission on Human Rights in accordance with Economic and Social Council decision 1998/261 of 30 July 1998', (September 1998), A/54/364, para. 59. See further, Apple (1998), 'School for Rape', p. 4: "Rape by the Burmese military, particularly against ethnic minority women, is an intrinsic component of the conflict in Burma."

⁶⁸ Shan Women's Action Network ("SWAN"), 'License to Rape', (2002), <http://www.shanwomen.org/reports/36-license-to-rape>; Karen Women's Organisation ("KWO"), 'Shattering Silences', (2004), http://www.ibiblio.org/obl/docs/Shattering_Silences.pdf; WLB (2014), 'If they had hope'; WLB (2014), 'Same Impunity, Same Patterns'; WLB (2004), 'System of Impunity'; SWAN, 'Annual Report', (2015), http://www.shanwomen.org/images/2016/08/SWAN_Annual_Report_2015.pdf.

⁶⁹ WLB (2004), 'System of Impunity', p. 10.

⁷⁰ Ibid., pp. 10-11.

⁷¹ UN Flash Report (2017), p. 21.

⁷² UNHCHR, 'Mission report of OHCHR rapid response mission to Cox's Bazaar, Bangladesh', (September 2017), p. 7, <http://burmacampaign.org.uk/media/OHCHR-Mission-Findings-October-2017.pdf>.

⁷³ See e.g. Special Rapporteur on Myanmar 1994 Interim Report, A/49/594, para. 14.

⁷⁴ WLB (2014), 'Same Impunity, Same Patterns', p. 13.

⁷⁵ See e.g. WLB (2004), 'System of Impunity', p. 13; SWAN (2002), 'License to Rape', p. 1.

⁷⁶ WLB (2014), 'Same Impunity, Same Patterns', p. 8.

⁷⁷ HRW (2017), 'All of My Body Was Pain', p. 15; UN Flash Report (2017), p. 21.

⁷⁸ HRW (2017), 'All of My Body Was Pain', p. 2.

⁷⁹ Darusman (2017), 'Statement to the Special Session of the Human Rights Council on the Situation of human rights of the minority Rohingya Muslim population and other minorities in Rakhine State of Myanmar'.

⁸⁰ HRW (2017), 'All of My Body Was Pain', pp. 19-20.

⁸¹ See e.g. SWAN (2002), 'License to Rape', pp. 1, 10.

⁸² HRW (2017), 'All of My Body Was Pain', p. 2.

⁸³ UN Flash Report (2017), p. 22.

⁸⁴ UN Flash Report (2017), p. 22.

⁸⁵ HRW (2017), 'All of My Body Was Pain', p. 3.

⁸⁶ Ibid., p. 3.

⁸⁷ Ibid., p. 17.

⁸⁸ Darusman (2017), 'Statement to the Special Session of the Human Rights Council on the Situation of human rights of the minority Rohingya Muslim population and other minorities in Rakhine State of Myanmar'.

⁸⁹ UN Flash Report (2017), p. 22.

⁹⁰ Ibid., p. 29.

⁹¹ Ibid., p. 24.

⁹² Ibid., p. 28.

⁹³ SWAN (2002), 'License to Rape', p. 10; HRW (2017), 'All of My Body Was Pain', pp. 3, 18, 19; UN Flash Report (2017), p.24; Lydia Smith, 'Rohingya crisis: Muslim women reveal rape and torture inflicted by Burma military forces', (11 December 2017), *The Independent*, <http://www.independent.co.uk/news/world/asia/rohingya-crisis-women-rape-muslims-burma-military-soldiers-ethnic-cleansing-genocide-a8103441.html>.

⁹⁴ WGAD, Opinion No. 6/2014, (23 April 2014), A/HRC/WGAD/2014/6, para. 9.

⁹⁵ Woman and Child Rights Project (“WCRP”), ‘Catwalk to the Barracks: Conscripted Women for Sexual Slavery and Other Practices of Sexual Violence by Troops of the Burmese Military Regime in Mon Areas’, (2005), http://www.ibiblio.org/obl/docs3/Catwalk_to_the_Barracks.htm; WLB (2004), ‘System of Impunity’, pp. 16-17; SWAN (2002), ‘License to Rape’, p. 12. See further Apple (1998), ‘School for Rape’, p. 27; KWO, ‘State of Terror’, (2007), p. 12, <http://burmacampaign.org.uk/reports/state-of-terror>.

⁹⁶ UNHCHR, ‘Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh’, (September 2017), p. 7.

⁹⁷ HRW (2017), ‘All of My Body Was Pain’, p. 20.

⁹⁸ See e.g. Special Rapporteur on Myanmar 1994 Interim Report, A/49/594, para. 14; WLB (2004), ‘System of Impunity’, pp. 17-18; Apple (1998), ‘School for Rape’, pp. 55-56.

⁹⁹ Special Rapporteur on Myanmar 1994 Interim Report, A/49/594, para. 14.

¹⁰⁰ See further Apple (1998), ‘School for Rape’, p. 55: “Soldiers told me if they could get married to a Karen girl, they would get a reward. No one knows how much or why the reward was offered for sure. But people know the soldiers hate the Karen people and want to make more Burman babies. More than one soldier told me about this reward, and Major Tin Nyo Aung also told me he would be offered a reward if he married a Karen girl...”

¹⁰¹ See e.g. Kachin Women’s Association of Thailand (“KWAT”), and Legal Aid Network (“LAN”), ‘Justice Delayed, Justice Denied’, (2016), p. 45, <http://burmacampaign.org.uk/media/Justice-Delayed-Report-English.pdf>.

¹⁰² UN Flash Report (2017), p. 16. See also HRW (2017), ‘All of My Body Was Pain’, p. 20.

¹⁰³ KWAT, ‘Pushed to the Brink: Conflict and human trafficking on the Kachin-China border’, (2013), p. 5, http://womenofburma.org/Report/2013/KWAT,%20Pushed_to_the_Brink.pdf.

¹⁰⁴ Skidmore (2003), pp. 84-89.

¹⁰⁵ On blocking of humanitarian aid and attacks on IDP camps, see further KWAT (2013), ‘Pushed to the Brink’, p. 5.

¹⁰⁶ UNFPA (2017), ‘Powerful Myths, Hidden Secrets’, p. 55; WLB (2014), ‘Same Impunity, Same Patterns’, pp. 1, 16; Apple (1998) ‘School for Rape’, p. 44.

¹⁰⁷ WLB (2014), ‘Same Impunity, Same Patterns’, pp. 11, 16; UN Flash Report (2017), p. 29.

¹⁰⁸ WLB (2014), ‘Same Impunity, Same Patterns’, p. 16.

¹⁰⁹ UN Flash Report (2017), p. 20.

¹¹⁰ Ibid.

¹¹¹ Kachin Women Peace Network & Gender Equality Network, ‘Women’s Needs Assessment IDP Camps, Kachin State’ (February 2013), p. 11, https://themimu.info/sites/themimu.info/files/documents/Report_Women_Needs_Assessment_IDP_Camps_Kachin_Feb2013_0.pdf.

¹¹² Apple (1998), ‘School for Rape’, p. 44.

¹¹³ HRW, ‘Burma: Security Forces Raped Rohingya Women, Girls – New Eyewitness Accounts Show Systematic Attacks Based on Ethnicity, Religion’, (6 February 2017), http://www.ecoi.net/local_link/335674/465121_en.html.

¹¹⁴ UN Secretary General, ‘Report of the UN Secretary General on Conflict-Related Sexual Violence’, (15 April 2017), s/2017/249, para. 51. See further WLB (2014), ‘Same Impunity, Same Patterns’, p. 11; WLB (2014), ‘If they had hope’, p. 9.

¹¹⁵ WLB (2014), ‘Same Impunity, Same Patterns’, p. 11.

¹¹⁶ WCRP (2005), ‘Catwalk to the Barracks’.

¹¹⁷ SWAN (2002), ‘License to Rape’, p. 35. See further e.g. UN Flash Report (2017), p. 21 (rape of 11 year old girl); Fiona MacGregor, ‘Rohingya girls under 10 raped while fleeing Myanmar, charity says’, (25 October 2017), *The Guardian*, <https://www.theguardian.com/world/2017/oct/25/rohingya-children-fled-myanmar-violence-charity>; Reports from Médecins Sans Frontières that approximately 50% of those fleeing from Rakhine State who were treated for rape in Cox’s Bazaar, Bangladesh, were under 18.

¹¹⁸ See e.g. HRW (2017), ‘All of My Body Was Pain’, p. 19. For a sample of 173 cases showing victims between 5 and 62 years old see: SWAN (2002), ‘License to Rape’, pp. 110.

¹¹⁹ Special Rapporteur on Myanmar 1994 Interim Report, A/49/594, para. 14 (rape of a 13 year old boy), <http://hrlibrary.umn.edu/commission/country51/65.html>; Human Rights Education Institute of Burma (“HREIB”), ‘Forgotten Future: Children Affected By Armed Conflict in Burma’, (November 2008) (rape in 2005 of a 7 year old boy in Shan State), https://www1.essex.ac.uk/armedcon/story_id/childrenandarmedconburma.pdf. HRW documented testimony of one man who witnessed soldiers raping another man with a bamboo stick during interviews with Rohingya survivors in 2017: HRW (2017), ‘All my body was pain’, p. 17.

¹²⁰ REDRESS discussion with researchers.

¹²¹ Assistance Association for Political Prisoners, ‘The Darkness We See: Torture in Burma’s Interrogation Centers and Prisons’ (2005), pp. 52-55, <http://aappb.org/wp-content/uploads/2014/03/The-darkness-we-see.pdf>.

¹²² WGAD, Opinion No. 6/2014, (1 May 2014), A/HRC/WGAD/2014/6, para. 9.

¹²³ See further IP2, p. 248.

¹²⁴ HRW, ‘My Gun was as Tall as Me: Child Soldiers in Burma’, (2002), p. 3, <https://www.hrw.org/reports/2002/burma/>.

¹²⁵ Child Soldiers International, ‘Ongoing underage recruitment and use by the Myanmar military’, (2015), <https://childsoldiers.ritdns.co.uk/Handlers/Download.ashx?IDMF=71c3b264-a491-4305-8028-175b48b90e2e>.

¹²⁶ See e.g. United Nations International Children’s Emergency Fund (“UNICEF”), ‘Adult Wars, Child Soldiers: Voices of Children involved in armed conflict in Asia and the Pacific Region’, (2002), <https://www.unicef.org/eapro/AdultWarsChildSoldiers.pdf>.

¹²⁷ Donald M Seekins, ‘Historical Dictionary of Burma’, (2017), *Rowman & Littlefield*, p. 143; Child Soldiers International, ‘*Child Soldiers Global Report 2001 – Myanmar*’, (2001), <http://www.refworld.org/docid/498805dfc.html>.

¹²⁸ Child Soldiers International, ‘Ongoing underage recruitment and use by the Myanmar military’, (2015), pp. 6-7. As of June 2017, in addition to the Myanmar military, there are seven non-state armed groups listed by the UN Secretary-General as “persistent perpetrators” in the recruitment and use of children in Myanmar. They are the: 1. Democratic Karen Buddhist/Benevolent Army, 2. Kachin Independence Organisation/Army, 3. Karen National Liberation Army (“KNLA”), 4. Karen National Liberation Army Peace Council, 5. Karenni Army (“KA”), 6. Shan State Army South, 7. United Wa State Army (“UWSA”).

¹²⁹ WLB, ‘Women in and from Conflict Areas of Burma’, (2000), p. 30, http://womenofburma.org/Report/B5_report.pdf.

¹³⁰ SWAN (2002), ‘License to Rape’, pp. 9-10.

¹³¹ *Ibid.*, p. 10.

¹³² UN Flash Report (2017), p. 20; HRW (2017), ‘All of My Body Was Pain’, p. 2.

¹³³ UN Flash Report (2017), p. 41.

¹³⁴ See further John Buchanan, ‘Militias in Myanmar’, (July 2016), *The Asia Foundation*, <https://asiafoundation.org/wp-content/uploads/2016/07/Militias-in-Myanmar.pdf>.

¹³⁵ See e.g. CEDAW Action Myanmar, ‘Myanmar CSO Shadow Report on Thematic Issues: Violence against Women’, (17 June 2016), pp. 5, 15, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24232_E.pdf; HRW (2017), Burma 2016 Country Profile, <https://www.hrw.org/world-report/2017/country-chapters/burma>.

¹³⁶ Even where abortion is legal (a narrowly interpreted exception to save the life of the woman) it is very difficult to access because of difficult regulatory hurdles to meet, including obtaining approvals which often take months to obtain.

¹³⁷ UN Women and Justice Base, ‘Women’s Access to Justice in the Plural Legal System of Myanmar’, (2016), p. 27, http://www.burmalibrary.org/docs22/Justice_Base-2016-04-22-Women_in%20Myanmar-Plural_legal_systems.pdf.

¹³⁸ Due both to distrust of the formal legal system or barriers to accessing it, and to community pressure and/or pressure from police to refer cases of sexual violence to settlement through traditional dispute resolution procedures. See further WLB (2016), ‘Long Way to Go’, p. 22; WLB, (2017), ‘Girls Bear the Shame’, p. 9; Women and Child Rights Project & Human Rights Foundation of Monland, ‘Cracks in the Silence: Sexual violence against children and challenges to accessing justice in Mon State and Mon areas of Southeast Burma’, (March 2017), p. 42, <http://www.rehmonnya.org/reports/Cracks-in-the-Silence-Eng.pdf>; Ninu (Women in Action Group), ‘Social Justice for Chin Women’, (2017), p. 196.

¹³⁹ *Ibid.*, p. 7.

¹⁴⁰ See further UN Women and Justice Base (2016) ‘Women’s Access to Justice’, pp. 41, 62 – 63, 79; WLB, ‘In the Shadow of the Junta: CEDAW Shadow Report’, (2008), p. 7, <http://womenofburma.org/Report/IntheShadow-Junta-CEDAW2008.pdf>; WLB (2017), ‘Girls Bear the Shame’, p. 8; Ninu (2017) ‘Social Justice for Chin Women’, p. 189.

¹⁴¹ WLB, ‘System of Impunity’, (2004), p. 19.

¹⁴² See further 2008 Constitution, Arts. 51, 54, 56(c), 277-279, 283.

¹⁴³ Kim Jolliffe, ‘Ethnic Armed Conflict and Territorial Administration in Myanmar’ (June 2015), p. 40, <https://asiafoundation.org/resources/pdfs/ConflictTerritorialAdministrationfullreportENG.pdf>. Jolliffe provides examples of the following groups that deal with justice issues within the community: DKBA (p. 50), New Mon State Party (“NMSP”) (p. 56), PNLO (p. 67).

¹⁴⁴ Jolliffe (2015), ‘Ethnic Armed Conflict and Territorial Administration in Myanmar’, p. 41.

¹⁴⁵ See further Crouch (2014), p. 33.

¹⁴⁶ See further *Ibid.*, pp. 49-50; International Commission of Jurists (“ICJ”), ‘Redress and Accountability in Myanmar’, (2018), pp. 33-34, <https://www.icj.org/wp-content/uploads/2018/01/Myanmar-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2018-ENG.pdf>.

¹⁴⁷ See ICJ (2018), ‘Redress and Accountability in Myanmar’, pp. 30, 35. See further references in footnote 148 and Box 3.

¹⁴⁸ *Ibid.*, p. 30.

¹⁴⁹ CEDAW, ‘Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Myanmar’, CEDAW/C/MMR/CO/4-5, (4-22 July 2016), p. 5 (thereafter “CEDAW Concluding Observations”); ICJ (2018), ‘Redress and Accountability in Myanmar’, p. 33. For an analysis of the power the executive holds over the judiciary under the 2008 Constitution, see Williams (2014), pp. 123-125.

¹⁵⁰ ICJ (2018), ‘Redress and Accountability in Myanmar’, p. 33.

¹⁵¹ WLB (2014), ‘If they had hope’, p. 9; WLB (2016), ‘Long Way to Go’, pp. 21-22.

¹⁵² ICJ (2018), ‘Redress and Accountability in Myanmar’, p. 26.

¹⁵³ Code of Criminal Procedure, s. 154.

¹⁵⁴ 2008 Constitution, Arts. 20(b), 319, 343. See also Defence Services Act 1959, s. 72.

¹⁵⁵ Code of Criminal Procedure, s. 545(b).

¹⁵⁶ Williams (2014), pp. 132-133.

¹⁵⁷ Communication with REDRESS, January 2018.

¹⁵⁸ 2008 Constitution, Arts. 353, 358, 359.

¹⁵⁹ 2008 Constitution, Arts. 296, 378. These constitutional writs can generally be defined as: “**Habeas corpus** – an order for release from detention; to seek an order to release a person who has been detained illegally; **Mandamus** – an order that compels a government agency to do something (for example, an order that a government officer reconsider an application for a permit that was rejected. Note that it cannot require an officer to make a particular decision, but it can require them to reconsider a decision); **Prohibition** – an order to prevent a government agency from making a decision or taking certain action; such an order therefore prohibits an officer from exercising jurisdiction that it does not have (either by exceeding its jurisdiction, or having no jurisdiction at all); **Certiorari** – an order to quash, that is, an order that cancels the decision of the government agency in question; **Quo warrant** – an order to prevent an officer who has abused their office from continuing in that office”: Melissa Crouch, ‘Access to Justice and Administrative Law in Myanmar’, (October 2014), *Promoting the Rule of Law Project*, pp. 2-3, <http://www.myjusticemyanmar.org/wp-content/uploads/2016/12/PRLP-Report-on-Access-to-Justice-and-Admin-Law-Final-with-summary-2014.pdf>. Constitutional writs to challenge executive and administrative action were an important part of the Burmese legal landscape from 1948-1962, but their role was greatly diminished and then removed during the period of military rule. See further Melissa Crouch (2014), ‘The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar’, Law, Society and Transition in Myanmar, Melissa Crouch and Tim Lindsey (eds.), Hart: Oxford, pp. 141-144.

¹⁶⁰ Section 296(b).

¹⁶¹ See further ICJ, ‘Handbook on Habeas Corpus in Myanmar’, (May 2016), pp. 17-18, <https://www.icj.org/wp-content/uploads/2016/06/Myanmar-Handbook-on-Habeas-Corpus-Publications-Reports-thematic-reports-2016-ENG.pdf> (hereafter “ICJ Habeas Corpus Handbook”); Crouch, ‘Access to Justice and Administrative Law in Myanmar’, pp. 12-13.

¹⁶² 2008 Constitution, s 348.

¹⁶³ 2008 Constitution, s 353. See e.g. the unreported case of U Daung Lwam, a Kachin man, on behalf of his wife, challenging her alleged illegal detention in 2012, described in Crouch (2014), ‘The Common Law and Constitutional Writs’, pp. 151-152.

¹⁶⁴ Crouch (2014), ‘The Common Law and Constitutional Writs’, pp. 24-28.

¹⁶⁵ ICJ Habeas Corpus Handbook, p. 22.

¹⁶⁶ Crouch (2014), ‘The Common Law and Constitutional Writs’, p. 147. More recent cases have been reported by the UN Special Rapporteur on Myanmar, ‘Situation of Human Rights in Myanmar’, (September 2017), A/72/382, para. 10.

¹⁶⁷ ICJ Habeas Corpus Handbook, p. 20.

¹⁶⁸ Myanmar National Human Rights Commission Act 2014 (hereinafter the “NHRC Act”). This followed on from the Myanmar Human Rights Committee established under the Ministry of Home Affairs in 2000, renamed the Myanmar Human Rights Body in November 2007.

¹⁶⁹ ‘B’ status as of 26 May 2017, see http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf. See further ICJ (2018), ‘Redress and Accountability in Myanmar’, pp. 26-27. See further CEDAW Concluding Observations 2016, para. 16.

¹⁷⁰ ICJ (2018), ‘Redress and Accountability in Myanmar’, p. 27.

¹⁷¹ See further LAN and KWAT, 'Justice Delayed, Justice Denied', pp. 32-33.

¹⁷² NHRC Act, s. 22(c), (e), 30.

¹⁷³ NHRC Act, s. 36.

¹⁷⁴ NHRC Act, s. 40.

¹⁷⁵ LAN and KWAT (2016), 'Justice Delayed, Justice Denied', pp. 32-33.

¹⁷⁶ ICJ (2018), 'Redress and Accountability in Myanmar', pp. 31-32.

¹⁷⁷ See The Arakan Project, 'Investigation Commissions to whitewash atrocities? The need for an independent international investigation mechanism' (March 2017), http://www.burmalibrary.org/docs23/The_need_for_an_independent_international_investigation_mechanism.pdf.

¹⁷⁸ For example, in relation to the Commission of Inquiry appointed to investigate alleged atrocities committed in Rakhine state after October 2016, Human Rights Watch stated that "[a]ccording to reports by local groups, witness accounts, and publicly released footage, the commission's investigators badgered villagers, argued with them, told them not to say things, accused them of lying, and interviewed victims – including rape survivors – in large groups where confidentiality was not provided": HRW, 'Burma: National Commission Denies Atrocities' (August 2017), <https://www.hrw.org/news/2017/08/07/burma-national-commission-denies-atrocities>; ICJ (2018), 'Redress and Accountability', pp. 19-22.

¹⁷⁹ See e.g. 2013 Rakhine Commission Report.

¹⁸⁰ Nick Cheesman (2015), 'Opposing the rule of law: how Myanmar's courts make law and order', Cambridge University Press, p. 256.

¹⁸¹ See further *ibid.*, pp. 227-257.

¹⁸² See UN News Centre, 'UN experts raise concerns over 'landmark' Southeast Asian human rights declaration', (16 November 2012), <https://www.un.org/apps/news/story.asp?NewsID=43520#WmSbppP1XeQ>; Aliansi Masyarakat Adat Nusantara & others, 'Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration', (19 November 2012), <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>.

¹⁸³ See <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>. For an example of a case concerning Myanmar where sexual violence has been alleged see WGAD, Opinion No. 6/2014, (23 April 2014), A/HRC/WGAD/2014/6, para. 9.

¹⁸⁴ See further OHCHR, 'Human Rights Council Complaint Procedure', <http://www.ohchr.org/EN/HRBodies/HRC/Complaint-Procedure/Pages/HRCCComplaintProcedureIndex.aspx>.

¹⁸⁵ Human Rights Council, 'Resolution 34/22: Situation of Human Rights in Myanmar' (March 2017), A/HRC/RES/34/22.

¹⁸⁶ Darusman (2017), 'Statement to the Special Session of the Human Rights Council on the Situation of human rights of the minority Rohingya Muslim population and other minorities in Rakhine State of Myanmar'.

¹⁸⁷ See e.g. OHCHR, 'Independent International Fact Finding Mission on Myanmar concludes visit to Malaysia', (11 December 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22522&LangID=E>; OHCHR, 'Experts of the Independent International Fact Finding Mission on Myanmar conclude visit to Bangladesh' (27 October 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22320&LangID=E>.

¹⁸⁸ See IP2, p. 33, Box 2: Universal Jurisdiction as a Tool to Fight Impunity.

¹⁸⁹ See further TRIAL International, 'Herve Madeo', (last updated 9 June 2016), <https://trialinternational.org/latest-post/herve-madeo/>; TRIAL International, 'Thierry Desmarest', (last updated 9 June 2016), <https://trialinternational.org/latest-post/thierry-desmarest/>.

¹⁸⁹ TRIAL International (2016), ‘Herve Madeo’.

¹⁹¹ Global Justice Center and Justice Trust, ‘Factual and Legal Basis for Prosecution of Minister of Home Affairs and Minister for Immigration and Population, Lt.-Gen. Ko Ko, pursuant to the Swiss Criminal Code and the Convention Against Torture’, (November 2015), <http://www.globaljusticecenter.net/documents/GJC&JC.Final.KoKoIndictment.11.5.15.pdf>.

¹⁹² See further Business and Human Rights Resource Centre, ‘Unocal Lawsuit (re Myanmar)’, (accessed 30 January 2018), <https://business-humanrights.org/en/unocal-lawsuit-re-myanmar>.

¹⁹³ Although UN Working Group on Arbitrary Detention is a UN Special Procedure it is considered a quasi-judicial mechanism.

¹⁹⁴ The 2008 Constitution entered into force on 31 January 2011. The relevant text of the provision reads: “...No proceeding shall be instituted against the [SLORC and the SPDC] or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties”. This provision has not been tested in Court but lawyers hold a number of different interpretations of the provision. Some lawyers interpret it as limited to specific members of the SLORC and SPDC and the Cabinet (based on the Burmese wording) and not applying to military personnel generally or to illegal acts committed by any person (such as extrajudicial killings). Others regard it as providing blanket amnesty for all acts committed by the military prior to 2011, and others interpret it as providing immunity only for the period 1998-2011 (the period of SLORC and SPDC rule).

¹⁹⁵ 2008 Constitution, Arts. 20(b), 319, 343. See also Defence Services Act 1959, s. 72.

¹⁹⁶ 2008 Constitution, Art. 343. Although a few select cases have been dealt with by civilian courts, there is no indication that this has set a precedent: ICJ (2018), ‘Redress and Accountability in Myanmar’, pp. 8-11.

¹⁹⁷ 2008 Constitution, Art. 20(b).

¹⁹⁸ Defence Services Act 1959, Section 72.

¹⁹⁹ Defence Services Act 1959, Section 3(a)(1).

²⁰⁰ See Government of Myanmar, ‘List of issues and questions in relation to the combined fourth and fifth periodic reports of Myanmar: Replies of Myanmar’, 3 May 2016, CEDAW/C/MMR/Q/4-5/Add.1, para. 34 (“Myanmar Replies to CEDAW”). See further *Gwan Shein v. The Union of Burma*, 1959, B.L.R. (H.C) 129). Note that now under the 2008 Constitution the final decision as to whether a crime was committed on active duty would lie with the military (Art. 20(b) and Art. 343).

²⁰¹ Myanmar Replies to CEDAW (2016), CEDAW/C/MMR/Q/4-5/Add.1, para. 35. Note that ICJ reports that in June 2017 “police reportedly filed murder charges against members of a Myanmar military battalion in Kachin state. Locals accuse the soldiers of killing three Kachin IDPs in May 2017”: ICJ (2018), ‘Redress and Accountability in Myanmar’, p. 14. On 20 January 2018 it was reported that the military had sentenced six soldiers to ten years imprisonment for the murder of the men: Associated Press, ‘Myanmar soldiers jailed for killing civilians in rare trial’, (20 January 2018), *ABC News*, <http://abcnews.go.com/International/wireStory/myanmar-soldiers-sentenced-killing-kachin-civilians-52481766>. It is unclear whether civilian proceedings will continue.

²⁰² Aileen Thomson, ‘Civilian Justice Trumps Military Impunity in Myanmar’, *The Irrawaddy*, 13 December 2014, <https://www.irrawaddy.com/news/military/civilian-justice-trumps-military-impunity-myanmar.html>.

²⁰³ WLB (2017), ‘Girls Bear the Shame’, p. 2. See further ICJ, ‘Achieving justice for gross human rights in Myanmar – baseline study’, (January 2018), pp. 9-11, <https://www.icj.org/wp-content/uploads/2018/01/Myanmar-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2018-ENG.pdf>.

²⁰⁴ 2008 Constitution, ss. 20(b), 343.

²⁰⁵ WLB (2017), ‘Girls Bear the Shame’, p. 2. See also UNFPA, (2017), ‘Powerful Myths, Hidden Secrets’, p. 25; WLB, ‘Long Way To Go: Continuing violations of human rights and discrimination against ethnic women in Burma, CEDAW Shadow Report’, (July 2016), p. 25, http://womenofburma.org/wp-content/uploads/2016/07/CEDAW_Long-Way-To-Go-English_for-Web-1.pdf.

²⁰⁶ ICJ (2018), 'Achieving justice for gross human rights in Myanmar', p. 11.

²⁰⁷ *Ibid.*, p. 12.

²⁰⁸ See further HRW, 'Uniform Impunity: Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations', (April 2009), pp. 71-79, https://www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf.

²⁰⁹ UN Human Rights Committee, 'Concluding observations of the Human Rights Committee: Chile', CCPR/C/79/Add.104, (1999), para. 9.

²¹⁰ Commission on Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher', (8 February 2005), E/CN.4/2005/102/Add.1, Principle 29, <http://www.refworld.org/docid/42d66e780.html>.

²¹¹ See further San Yamin Aung, 'New Law to Protect Women, Girls Against Violence', (17 October 2017), The Irrawaddy, <https://www.irrawaddy.com/news/burma/new-law-protect-women-girls-violence.html>.

²¹² International Crisis Group (2017), 'Buddhism and State Power in Myanmar', p. 13.

²¹³ Chan Wing Cheong et al (2016), 'Criminal Law in Myanmar', LexisNexis: Singapore, [24.9]; WLB (2017), 'Girls Bear the Shame', p. 5.

²¹⁴ Chan (2016), [24.29], cf. Malaysia and Singapore.

²¹⁵ *Ibid.*, [24.28].

²¹⁶ *Ko Dewa v. The Socialist Republic of the Union of Myanmar* (Ma Ngwe Ma) (1976) BLR 57.

²¹⁷ *Ibid.*

²¹⁸ *Ko Thet Naing & Thet Kyi v The Union of Myanmar and Daw Yu Ya Lin* (2004) Criminal General Application (Special) 214 (Yangon) 14 March 2006 (unreported).

²¹⁹ Penal Code, Section 90.

²²⁰ Chan (2016), [24.40].

²²¹ Note the age of consent used to be 14 years but this was amended by the Law Amending the Penal Code 2016.

²²² ICC, 'Elements of Crimes', (2011), Article 7(1)(g)(1).

²²³ See generally, Isabelle Lassée and Eleanor Vermunt (2016), 'Fitting the Bill: Incorporating International Crimes Into Sri Lankan Law', *South Asian Centre for Legal Studies*, <http://sacls.org/resources/publications/reports/fitting-the-bill-incorporating-international-crimes-into-sri-lankan-law>.

²²⁴ *Prosecutor v. Erdemovic* (IT-96-22), Trial Chamber, 29 November 1996, paras. 64-65.

²²⁵ Although this is a substantive matter of modes of liability, in a practical sense it is also a matter of how crimes are conceived and evidence is collected.

²²⁶ See Priya Gopalan (2016), 'Time to Act: Accountability for conflict-related sexual violence in Sri Lanka', *Prosecuting Conflict Related Sexual Violence*, [http://www.iap-association.org/PSV/News/Accountability-for-Conflict-Related-Sexual-Vio-\(2\)](http://www.iap-association.org/PSV/News/Accountability-for-Conflict-Related-Sexual-Vio-(2)).

²²⁷ Chan (2016), p. 320. The Penal Code also imposes specific forms of secondary liability for certain specific offences (e.g. murder committed during dacoity).

²²⁸ *Ibid.*, p. 320.

²²⁹ *Ibid.*, p. 321, citing *Maung Ba Yone v Ma Hla Kin* – owner of a car used for an abduction is not guilty of abetment unless he knew that it was going to be used for or had ordered the abduction (AIR 1933 Rang 297).

²³⁰ Chan (2016), [20.8], citing *Aung Thein v The Union of Burma* (1956) BLR 1.

²³¹ Chan (2016), [20.12]. For further information on proof of intent see Chan (2016), [20.15]-[20.22].

²³² Penal Code, s 120A.

²³³ Penal Code, s 120A.

²³⁴ Evidence Act, s. 105.

²³⁵ Penal Code, s. 86.

²³⁶ Chan (2016), p. 282.

²³⁷ *Niamat Khan v Empress* (1883) PR No 17 of 1883, p. 29 per Rattigan J, cited in Chan (2016), p. 288.

²³⁸ ICRC, 'Children and Detention', (November 2014), p. 7, <https://www.icrc.org/eng/assets/files/publications/icrc-002-4201.pdf>.

²³⁹ *Ibid.*

²⁴⁰ Penal Code, ss. 82-83. Note following significant criticism of the low age of criminal responsibility the Government of Myanmar has committed to raising it to 10 years.

²⁴¹ 2008 Constitution, Section 445. Although as noted in that section there is debate as to the breadth of the immunity granted.

²⁴² See e.g. OHCHR, 'Rule of Law Tools for Post-Conflict States: Amnesties', (2009), p. 11, http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf.

²⁴³ Chan (2016), [24.12].

²⁴⁴ *Ibid.*, [24.13], citing *San Kar @ Soe Ngwe v The Union of Myanmar* (1996) BLR 66; *U Pan Aye v The Union of Burma* (1966) BLR 527; *Maung Nyunt Lwin v The Socialist Republic of Burma* (1976) BLR 35.

²⁴⁵ Chan (2016), [24.13], citing *The Union of Myanmar v Win Myint* (1991) BLR 74.

²⁴⁶ *Ibid.*

²⁴⁷ Chan (2016), [24.15].

²⁴⁸ Information provided to REDRESS, February 2018.

²⁴⁹ WLB (2017), 'Girls Bear the Shame', p. 5. See also Chan (2016), [24.10], citing *Maung Tin Maung v The Socialist Republic of Burma* (1976) BLR 40; *The Union of Myanmar v Aye Nawt* (2009) MLR 48.

²⁵⁰ Information provided to REDRESS, February 2018.

²⁵¹ REDRESS interview with lawyer, December 2017. See further above, Chapter 3.

²⁵² ICJ (2018), 'Redress and Accountability in Myanmar', p. 24.

²⁵³ Criminal Procedure Code ("CrPC"), s. 154 (in relation to cognisable offences, which include most of the crimes referred to in this Chapter). Crimes that are considered non-cognisable include sections 323 (Voluntarily Causing Harm) and 509 (Word, gesture or act intended to insult the modesty of a woman). In non-cognisable cases investigations require permission of the court to proceed, and the accused cannot be arrested without a warrant (CrPC, s. 155).

²⁵⁴ CrPC, s. 157.

²⁵⁵ Ibid.

²⁵⁶ See further <http://www.unionsupremecourt.gov.mm/?q=content/township-courts>.

²⁵⁷ See further <http://www.unionsupremecourt.gov.mm/?q=content/district-courts>.

²⁵⁸ See further <http://www.unionsupremecourt.gov.mm/?q=content/high-courts-region-and-state>.

²⁵⁹ WLB (2017), 'Girls Bear the Shame', p. 5.

²⁶⁰ Ibid., p. 11.

²⁶¹ CrPC, ss. 208, 247.

²⁶² WLB, (2016), 'Girls Bear the Shame', p. 11.

²⁶³ Ibid., p. 11.

²⁶⁴ Ibid., p. 11.

²⁶⁵ WLB, p. 11.

²⁶⁶ UN Women and Justice Base (2016), 'Women's Access to Justice', p. 65.

²⁶⁷ UNFPA (2017), 'Powerful Myths Hidden Secrets', p. 21.

²⁶⁸ IP2, p. 85.

²⁶⁹ IP2, p. 85.

²⁷⁰ WLB (2004), 'System of Impunity', pp. 1, 7, 10-11, 13, 19; WLB (2014), 'Same Impunity, Same Patterns', p. 11; WLB (2000), 'Women in and from Conflict Areas of Burma', p. 34.; Watchlist on Children and Armed Conflict (2009), 'No More Denial', pp. 5, 17, 31; LAN and KWAT (2016), 'Justice Delayed, Justice Denied', p. 36.

²⁷¹ KWAT (2013), 'Pushed to the Brink', p. 8.

²⁷² SWAN (2002), 'License to Rape', p. 4; UN Women and Justice Base (2016), 'Women's Access to Justice', p. 80.

²⁷³ WLB (2016), 'Long Way to Go', p. 22.

²⁷⁴ HRW (2017), 'All of My Body Was Pain', p. 33.

²⁷⁵ Ibid., p. 17.

²⁷⁶ Emergency Treatment of Patients Law (2014). See further UN Secretary General, 'Report of the Secretary General on Conflict-Related Sexual Violence', (15 April 2017), S/2017/249, para. 52, <http://www.stoprapenow.org/uploads/advocacyresources/1494280398.pdf>.

²⁷⁷ Kishali Pinto-Jayawardena & Jeannine Guthrie (2016), 'Introduction', in *The Search for Justice: The Sri Lanka Papers*, (2016), Kumali Jayawardena & Kishali Pinto-Jayawardena (eds.), New Delhi: Zubaan, Sexual violence in the context of armed conflict and calls for justice, para. 17.

²⁷⁸ See e.g. KWAT (2013), 'Pushed to the Brink', p. 19; Wakhu Shee, 'New approaches needed to help survivors of rape in Burma', (14 June 2014), <http://www.dvb.no/news/new-approaches-needed-to-help-survivors-of-rape-in-burma-myanmar/41502>.

²⁷⁹ Watchlist on Children and Armed Conflict (2009), ‘No More Denial’, p. 30.

²⁸⁰ HRW (2017), ‘All of My Body Was Pain’, p. 33.

²⁸¹ See e.g. on services in Kayah (Karenni) State: UNFPA, (2017), ‘Powerful Myths Hidden Secrets’, pp. 22-24.

²⁸² On these issues in Kayah (Karenni) State see generally *ibid.* In relation to Kayin (Karen) State see *ibid.*, pp. 41-42.

²⁸³ *Ibid.*, p. 24.

²⁸⁴ *Ibid.*, p. 23.

²⁸⁵ UN Special Rapporteur on Myanmar (September 2017), A/72/382, para. 53.

²⁸⁶ *Ibid.*

²⁸⁷ IP2, p. 105.

²⁸⁸ IP2, p. 105.

²⁸⁹ Network for Human Rights Documentation – Burma, ‘Report on the Human Rights Situation in Burma: January – December 2016’, (2017), p. 4, <https://www.burmalink.org/wp-content/uploads/2017/02/hrsituation2017.pdf>.

²⁹⁰ IP2, p. 105.

²⁹¹ See e.g. UNFPA, (2017), ‘Powerful Myths, Hidden Secrets’, p. 25.

²⁹² IP2, p. 115.

²⁹³ Evidence Act 1872, s. 60.

²⁹⁴ Evidence Act 1872, s. 60(c).

²⁹⁵ Evidence Act 1872, s. 32.

²⁹⁶ Crouch (2014), ‘Access to Justice and Administrative Law in Myanmar’, p. 17. Note that Section 4(d) of the Media Law (Law No. 1262/2014), has some provisions concerning access to information by journalists (including that journalists shall have the right “to collect information, to be provided with accommodation and to enter into certain offices, departments and organizations in accordance with regulations of relevant departments or organizations”).

²⁹⁷ Information provided to REDRESS, 5 December 2017.

²⁹⁸ LAN & KWAT (2016), ‘Justice Delayed, Justice Denied’, pp. 18-20.

²⁹⁹ Information provided to REDRESS, 5 December 2017.

³⁰⁰ Police Manual (2001), ss. 1747-1753.

³⁰¹ See further LAN & KWAT (2016), ‘Justice Delayed, Justice Denied’, pp. 16-17.

³⁰² UN Women and Justice Base (2016), ‘Women’s Access to Justice’, p. 61.



REDRESS

Ending Torture, Seeking Justice for Survivors

✉ 87 Vauxhall Walk
London SE11 5HJ
United Kingdom

☎ +44 20 7793 1777

@ info@redress.org



Institute for International
Criminal Investigations

✉ Anna Paulownastraat 101
2518 BC Den Haag
The Netherlands

☎ +31 70 364 4660

@ info@iici.global