

# SEEKING JUSTICE

An analysis of obstacles and opportunities for civil  
society groups pursuing accountability for human  
rights violations in domestic courts in Kachin and  
Northern Shan States

JULY 2020

KACHIN WOMEN'S ASSOCIATION THAILAND  
ASIA JUSTICE AND RIGHTS



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### **Kachin Women's Association – Thailand (KWAT)**

KWAT was formed in Chiang Mai, Thailand on the 9<sup>th</sup> September 1999 based on the urgent need for women to solve their own problems following the increased number of Kachin people fleeing the deteriorating political, economic and social situation and increased problems in Thailand. KWAT envisions that all forms of discrimination are eliminated in Kachin State; all women are empowered to participate in decision making at the local, national and international levels; and all Kachin children have the opportunity to fulfil their potential. KWAT advocates at the national and international levels to raise awareness about the human rights situation including women and the political situation in Burma.

[\*www.kachinwomen.com\*](http://www.kachinwomen.com)



**ASIA JUSTICE AND RIGHTS**

### **Asia Justice and Rights (AJAR)**

AJAR is a regional human rights organization based in Jakarta. AJAR works to increase the capacity of local and national organization in the fight against entrenched impunity and to contribute to building cultures based on accountability, justice and a willingness to learn from the root causes of mass human rights violations in Asia Pacific region.

AJAR's goals are to empower local actors to fight for the fulfilment and protection of their rights, increase access to the truth about mass human rights violations, including their root causes, contributing factors and effects, support the healing and empowerment of victims, facilitate positive change through providing safe space where people can interact, learn and build bridges.

[\*www.asia-ajar.org\*](http://www.asia-ajar.org)



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# EXECUTIVE SUMMARY

At the International Court of Justice on December 11, 2019, Daw Aung San Suu Kyi claimed that the Burma military justice system is willing and able to prosecute possible war crimes committed by its soldiers. Decades of human rights violations and impunity show the hypocrisy of this statement. The failure of domestic mechanisms to provide justice to victims has opened the way for the International Criminal Court (ICC) and the International Court of Justice (ICJ) to address some of the human rights violations committed by the Burma military.

In addition to those efforts at the international level, it is crucial to maintain pressure on the Burma government and military to fulfill their duty, as components of the State, to protect the rights of all people in Burma. This duty includes the obligation to investigate, prosecute, and punish human rights violations. Our research focused on the role that local civil society groups and community-based organizations can play in improving chances for justice. The analysis focused on cases of human rights violations against 51 civilians committed by Burma security forces, in particular the military, between 2011 and 2019 in Kachin and Northern Shan States.

This report is for local civil society groups and community-based organizations in Burma who are looking for strategies to assist victims of human rights violations to access justice. Our research gave us a detailed understanding of the formidable challenges and obstacles met by civil society groups trying to bring perpetrators to justice. It also provided a small window into possible opportunities for justice based on a handful of relatively “successful” cases.

We found how interference by the military remains the main obstacle to justice and uncovered why victims are often unwilling to take the risk of seeking justice. The cases show the ways in which police are not performing their functions according to the law and how judges are corrupt and under the influence of the military. Other obstacles include lawyers' and civil society organizations' lack of resources and support for these cases, as well as challenges in getting witnesses and strong evidence. Our research shows that victims of arbitrary detention and political prosecution lack basic fair trial rights, and that appeals to other authorities were always unsuccessful.

There have been, however, a few "successful" cases where soldiers have been prosecuted and sometimes convicted in military and/or civilian courts. Five of the cases included in our research resulted in conviction. Four of the cases were in civilian courts, which shows it is possible to try soldiers before a civilian court. An analysis of the factors that led to these "successes" taught us that successful cases require the involvement of all stakeholders, that public opinion can lead to a more positive outcome, and that raising awareness and training local groups helps.

These findings allowed us to identify strategies for local civil society groups, community-based organizations, and local leaders to better support victims seeking justice. We tried to identify clear, practical steps that civil society groups can take today in the current (extremely challenging) context to reinforce their capacity to support victims through the justice process. This includes building the knowledge and skills of staff and members, raising legal awareness among the population, creating partnerships with lawyers, and building alliances with other civil society groups, as well as developing advocacy and fundraising strategies for this type of work. A major recommendation is that civil society groups wanting to increase their capacity and effectiveness in assisting victims to access justice should consider setting up community-based paralegal programs.

In addition to building capacity, we also learnt what concrete actions civil society groups can take when there is a new case, in particular how to provide holistic support to the victim with the principle of "do no harm" as a top priority. This includes providing counselling, psychosocial support, access to medical care, and shelter, and helping the victim make an informed decision about seeking justice. If the victim wants to bring a case forward, civil society groups can help in documentation and evidence collection, and reporting to the police. In cases of sexual violence, it is important to help the victim get a medical examination order. Civil society groups can help make contact with a lawyer and, if possible, fund their fees and expenses. Finally, a crucial role that civil society can play to increase the chance of a case being heard in court is advocacy and mobilization of public support.

Civil society groups who are in direct contact with victims will also want to be in close communication with the victim's lawyer(s) and offer thoughts on potential legal strategies so the lawyer(s) can provide the best possible legal assistance to their client. For example, there are strategies that can be used to try to force the opening of a case in court, as cases are often blocked at the police investigation stage. Similarly, when helping people who are wrongfully accused and prosecuted, there are strategies that need to be used to try to defend their rights including strategies related to access to a lawyer, the presumption of innocence, the right to a fair trial, and protection against torture.

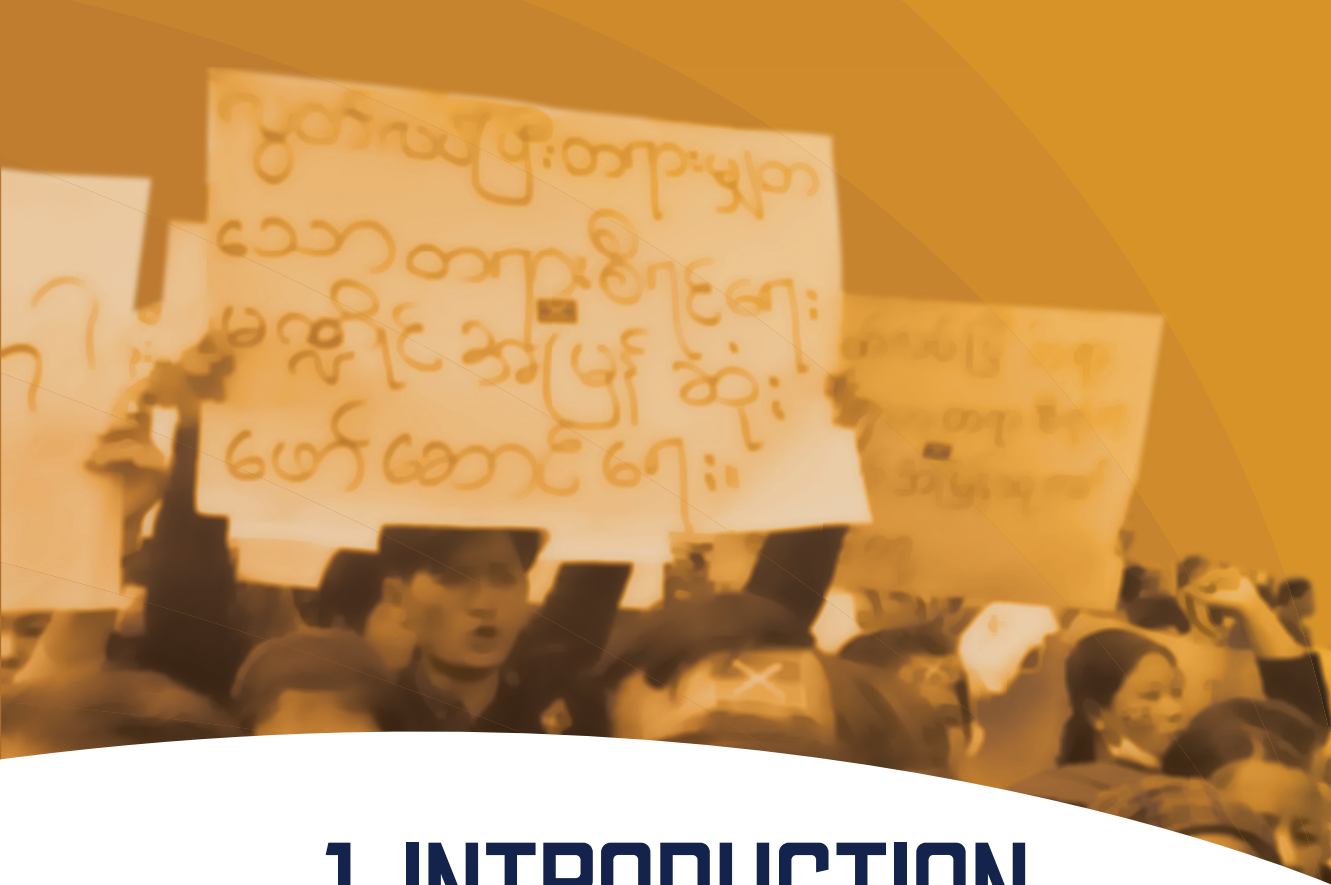
Based on our findings, we also make a series of recommendations to other stakeholders. Given the power and influence of the Burma military over civilian institutions, we call on both the government and the military to end human rights violations committed by State actors and undertake necessary political reforms to ensure accountability and the rule of law (including putting the military and police under civilian control, and ensuring the independence of the judiciary). We also make detailed recommendations on necessary legal reforms and changes in judicial practices, such as repealing or amending all laws which arbitrarily restrict the rights to freedom of expression, association, and peaceful assembly, and ensuring respect of the rights to a defence and a fair trial. Finally, we call on the government to support legal empowerment of ethnic communities and facilitate access to justice for victims.

We also call on the international community to stop support to the Burma government and military until they undertake necessary political reforms to ensure accountability and rule of law, including putting the military under full civilian control through a new federal constitution, and until there is genuine peace.

Finally, we call on donors, international agencies, and international organizations to ensure that the financial support provided for access to justice in Burma specifically reaches community-based organizations and local civil society groups who are doing politically sensitive work by providing assistance to victims of the most serious human rights violations. Donors should encourage their current grantees implementing well-funded large programs promoting rule of law and access to justice in Burma to reach out to and offer their services to those groups. Support from donors and international organizations should also include capacity building, and direct funding that is general, flexible, and long-term. In addition, donors and international organizations should support the implementation of community-based paralegal programs in ethnic areas.







# 1. INTRODUCTION

This report is for local civil society groups and community-based organizations in Burma who are looking for strategies to assist victims of human rights violations to access justice.

At the International Court of Justice on December 11, 2019, Daw Aung San Suu Kyi claimed that the Burma military justice system is willing and able to prosecute possible war crimes committed by its soldiers. Decades of human rights violations perpetrated by the military with almost complete impunity, as well as the current failure to prosecute ongoing abuses against civilians in ethnic conflict areas and elsewhere, show the hypocrisy of this statement.

The enduring lack of accountability for human rights violations in Burma has been widely documented over time by local and international civil society groups, as well as by various United Nations bodies such as the Special Rapporteurs on the situation of human rights in Myanmar, the International Fact-Finding Mission on Myanmar, and the Special Representative of the Secretary-General on sexual violence in conflict. The failure of domestic mechanisms to provide justice to victims has opened the way for the International Criminal Court (ICC) and the International Court of Justice (ICJ) to address some of the human rights violations committed by the Burma military, with limitations regarding their respective mandates and jurisdictions. More pressure from the

international community is needed to ensure that crimes committed in all areas of Burma can be addressed by international justice mechanisms.

In addition to those efforts to achieve a form of accountability at the international level, it is crucial to maintain pressure on the Burma government and military to fulfill their duty, as components of the State, to protect the rights of all people in Burma. This duty includes the obligation to investigate, prosecute, and punish human rights violations, which will require reforming Burma's domestic laws and institutions.

Many actors, local and international, have been working in Burma on improving the justice system and promoting the rule of law. A significant amount of research and literature has been produced on those topics, leading to numerous recommendations for the government and those in the justice sector. Our research focused on the role that local civil society groups and community-based organizations can play in improving the chances for justice, based on cases documented in Kachin and Northern Shan States.

The research objectives and methodology, as well as an overview of the cases included in this report, are outlined in chapters 2 through 4. In chapter 5, we identify, from the practical perspective of local civil society actors, what the obstacles are in seeking justice for crimes committed by the military and police, and also what factors may lead to more opportunities for justice. Critically, chapter 6 identifies strategies for civil society organizations to increase the chance of victims obtaining justice, while the last chapter outlines recommendations to other stakeholders.

# 2. RESEARCH OBJECTIVES

This report is for local civil society groups and community-based organizations in Burma who are looking for strategies to assist victims of human rights violations to access justice.

Our research focused on cases of human rights violations against civilians committed by Burma's security forces, in particular the military, between 2011 and 2019 in Kachin and Northern Shan States. Specifically, our work focused both on cases in which victims attempted to seek justice through the formal justice system or other formal mechanisms, and on cases in which victims were prosecuted arbitrarily. The goal of the research was to identify and analyze the obstacles faced by victims, civil society groups, and lawyers in their attempts to seek justice, as well as possible factors that enable more positive outcomes, from the perspective of civil society actors.

Our overall objective was to be able to suggest strategies for local civil society groups, community-based organizations, and local leaders on how to better support victims in seeking justice. We tried to identify practical and concrete actions that civil society groups can take today in the current (extremely challenging) context. While our research focused on cases which took place in Kachin and Northern Shan States, we believe that most of the findings and recommendations may be applicable across the country.

It is worth noting that our goal was not to undertake a comprehensive technical legal analysis of the justice system and the legal framework, but rather to focus on information that could be concretely useful for local civil society groups. Such a technical legal analysis may be found in the many other reports produced on access to justice and rule of law in Burma. (See, among others, the reports referred to in chapter 3 below).

While we focused on identifying strategies for local civil society groups, we are also using this opportunity to continue raising awareness about the extreme difficulties faced by victims and their families in seeking justice and to make general recommendations for other stakeholders, namely Burma's government and military, the international community, as well as donors and international organizations.

# 3. METHODOLOGY

Our research focused on cases of human rights violations against civilians committed by Burma's security forces, in particular the military, between 2011 and 2019 in Kachin and Northern Shan States. Specifically, our work focused both on cases in which victims attempted to seek justice through the formal justice system or other formal mechanisms, and on cases in which victims were prosecuted arbitrarily.

It is worth noting that our research was not about documenting new cases, but rather about analyzing cases that KWAT had already documented over the years, focusing on the ones where victims had attempted to seek justice or were prosecuted arbitrarily through the formal justice system. This is therefore neither an exhaustive analysis of all cases of human rights violations documented by KWAT, nor of all cases of crimes committed by the military in Kachin and Northern Shan States. Our statistical findings are consequently not representative of the reality of how many cases are reported to the police or make it through the justice system. This research was not designed as a quantitative study of access to justice in those areas, but rather as a qualitative, in-depth analysis of specific cases to help us understand the situation from a practical perspective.

## **The research methodology included:**

1. Data collection about individual cases (Using a standard questionnaire, KWAT interviewed victims, their relatives, and/or people who assisted them. The cases themselves had already been documented by KWAT over the years; the additional data collected focused on information related to access to justice.);
2. Interviews with lawyers and local leaders involved in the cases (such as religious leaders, camp leaders, village leaders, and leaders of local community-based organizations);
3. Review of some of the existing literature on the rule of law and access to justice in Burma and other relevant reports<sup>1</sup>;

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<sup>1</sup> UN Women and Justice Base, *Voices from the Intersection: Women's Access to Justice in the Plural Legal System of Myanmar* (2016); The Rule of Law Centers, Issue Brief Series, *Brief N. 3: Legal aid service providers and the communities they serve* (2017); My Justice, *Searching for Justice in the Law, Understanding access to justice in Myanmar* (Policy Brief, March 2018) ; UNDP, *Access to Justice and Informal Justice Systems in Kachin State, Salt Between Split Beans* (2017); Stephen McNamara, The Tharathi Myay Foundation, *Fixing Justice with the Tools at Hand* (2019); International Commission of Jurists, *Handbook on Habeas Corpus in Myanmar* (2016); International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar, Baseline Study* (2018); Article 19, Myanmar Briefing Paper, *Criminalization of Free Expression* (2019); Amnesty International, *Caught In The Middle, Abuses Against Civilians Amidst Conflict in Myanmar's Northern Shan State* (2019); My Justice, *A handbook for legal awareness strategy and design* (2019); My Justice and Justice Base, Legal Practice Brief series, *1: Challenging Undue Delay, 2: Accessing case documents, 3: Presumption of innocence and burden of proof, 4: Liberty and Bail, 5: Remand* (2019); Namati, *Guide to Organizing and Working With Community-Based Paralegals* (2019).



4. Review of findings from our previous reports on the issue<sup>2</sup>;
5. Focus group discussions with relevant staff from KWAT who have been monitoring the cases, an independent lawyer, and AJAR.

Limitations in the methodology included the fact that we were working with a relatively small sample of cases (51 victims over 8 years) as well as difficulties in getting precise information on some cases. In some of the cases documented, the respondents who provided the information were not familiar with legal language or the legal process in general, which sometimes made it challenging to clarify what exactly happened. However, only the cases for which the data was deemed reliable and complete were included in the research.

## 4. OVERVIEW OF CASES

Our research included the cases of 51 victims, including 29 victims of rape, killing, and/or disappearance, and 22 victims of arbitrary detention. Below is a breakdown of these cases based on the factors and criteria that we analyzed during our research.

**51**

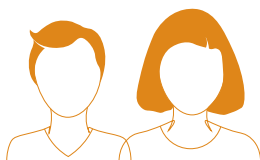
*Total number  
of victims*

**29**

*Rape, killing,  
disappearance*

**22**

*Arbitrary  
detention*



**36**

**male**

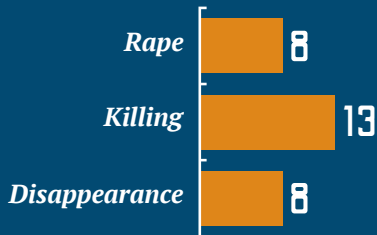
**15**

**female**

<sup>2</sup> Women's League of Burma (WLB) and Asia Justice and Rights (AJAR), Briefing Paper, Access to Justice for Women Survivors of Gender-based violence committed by state actors in Burma (2016); Kachin Women Association Thailand (KWAT), No justice for ongoing Burma Army crimes in northern Shan State (2020); KWAT, A Far Cry From Peace (2016); Legal Aid Network and KWAT, Justice Delayed Justice Denied, Seeking Truth About Sexual Violence and War Crimes in Northern Burma (2016).

# RAPE, KILLING, DISAPPEARANCE [29]

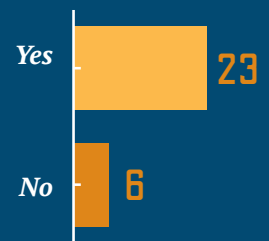
## Type of violation



## Perpetrator:



## Police Complaint



## Cases in Court

No: 21

Yes: 8 = 6 court cases

## By type of court:

Civilian Court: 4 victims = 4 court cases  
including 1 in both civilian and military

Military Court: 5 victims = 3 court cases  
including 1 in both civilian and military

## Convictions

No: 1 victim

Yes: 7 victims = 5 court cases

## Convictions

### by type of crime:

#### KILLING

3 victims = 1 court case  
in military court

#### RAPE

4 victims = 4 court cases  
in military and civilian court

## Convictions

### by type of court:

Military Court: 5 victims = 3 court cases

| Killing: 3 victims = 1 court cases

| Rape: 2 victims = 2 court cases  
\* actually only one conviction  
for rape charges (see below)

Civilian Court: 3 victims = 3 court cases

| Rape: 3 victims = 3 court cases

## ARBITRARY DETENTION [22]



**11** Tortured  
during detention

**8** Use of other  
recourses

Tried to appeal  
to higher courts:

No: **6** victims

Yes: **16** victims

Reasons for release:

**12** End of prison  
sentence

**9** President's amnesty  
(collective)

**1** Supreme Court decision  
combining charges,  
resulting in release for  
time served

## ALL CASES: [51]

Use of other recourses  
(letters, President, Minister,  
MNHRC, etc):

No: **30**

Yes: **21**

Successful: 0

Not successful: 21

Reparations

Some form of compensation

No: **49**

Yes: **2**

Appropriate reparations: 0

**An overview of the cases calls for the following remarks:**

**General remarks:** Our work focused both on cases in which victims attempted to seek justice through the formal justice system or other formal mechanisms, and on cases in which victims were prosecuted arbitrarily. Most cases were therefore selected purposefully because they involved the formal justice system. Our statistical findings are consequently not representative of the reality of how many cases are reported to the police or make it through the justice system. They are simply a way to analyze what factors are relevant to seeking justice in Burma.

**Police complaint versus cases in court:** Among the 23 victims of rape, killing, and/or disappearance who submitted a formal complaint at a police station, only 8 had their cases heard in a court of law. Based on our experience monitoring human rights cases, we believe that in reality an even lower proportion of cases make it to court, with the vast majority of cases being blocked at the police stage, if they even make it that far. See chapter 5.1.3 for an analysis of the role of police.

**Cases in court:** The cases of 8 victims included in our research (= 6 court cases) have been heard before a court, either civilian or military or both. See chapter 5.2 for an overview of these cases.

**Convictions:** Five of the cases that went to court (involving 7 victims) resulted in conviction. See chapter 5.2 for an analysis of the “successful” cases. It is worth noting that convictions in civilian courts related only to sexual violence, not to the killing of civilians.

**Rape cases in military courts:** Convictions for rape cases in military courts were very disappointing. A soldier tried for the rape of a 7-years old girl was sentenced to only two years in prison. (He was later transferred to a civilian court, convicted, and sentenced to 20 years.) A soldier tried for, among other things, attempted rape of an older woman was only convicted of charges not related to sexual violence (trespassing, use of illegal drugs, and violation of the military code of conduct). See chapter 5.2 for more details on these cases.

**Arbitrary detention:** Our research shows that victims of arbitrary detention and political prosecution lack basic fair trial rights. See chapter 5.1.7 for an explanation of these cases.

**Torture:** 11 of the 22 victims of arbitrary detention explicitly reported torture. Out of the 14 people prosecuted under the Unlawful Association Act, 10 reported torture.

**Tried to appeal in court:** 6 of the 22 victims of arbitrary detention did not try to challenge their detention in court. Among the reasons given for this, a lawyer cited the fact that sometimes there is simply not the financial resources to do so. See discussions on funding and resources in chapter 5.1.5.

**Reasons for release:** Almost all of the 22 victims of arbitrary detention were released either at the end of their sentence or by a collective presidential amnesty (which is not specifically about their case). There are no examples of higher courts reversing the convictions of lower courts. In one case, the Supreme Court combined some charges which resulted in the release of the accused because of time already served.

**Use of other recourses:** Of the 51 victims included in this research, 21 tried to appeal to other authorities outside of the justice system, but none were successful or received any positive answer. See chapter 5.1.8 for more information.

**Reparations:** In two separate cases of killing by the military, in June 2015 and November 2017, some money and/or food was offered to the family by the military, without the cases being brought to court or soldiers being punished. This did not provide satisfaction to the families and cannot be counted as a form of reparations.





*Mungji infantry soldiers on the way of Yawmaw Road in northern Shan State*





## 5. KEY FINDINGS

Our research gave us a detailed understanding of the formidable challenges and obstacles met by civil society groups trying to bring perpetrators to justice. It also provided a small window into possible opportunities for justice based on a handful of relatively “successful” cases.

### 5.1 Obstacles

When asked what the main reasons for the difficulties faced by civil society groups in pursuing justice are, one community leader told us: “It’s simple: one, everything is under military control; two, there is no budget to work on this.” This is an accurate summary of our key findings.

#### ***5.1.1 Interference by the military remains the main obstacle to justice***

Interference by the military was overwhelmingly cited during our research as the main reason for the difficulties in accessing justice. This is consistent with the result of an individual analysis of the cases, and with the findings of other public reports on the issue.

A member of the military reportedly once told one of the lawyers working with us that, with regards to prosecution of rape cases, the army needs to block anything that could negatively impact the image of the military as a whole because they are simply trying to “protect their dignity”. This euphemism is meant to justify the fact that the military systematically (and mostly successfully) shields security forces from public criminal prosecutions.

Our research shows how the military is the main reason for the lack of accountability of individual soldiers and police officers committing serious crimes against civilians: they either use the opaque military or police justice systems to hide the non-existence of prosecutions, or they influence and hinder civilian criminal justice processes.

## A. Military and police courts

Burma's legal and institutional framework means that the military and police have full control over the investigation and prosecution of crimes committed by their personnel.

The 2008 Constitution gives the military the right to independently administer all affairs of the armed forces,<sup>3</sup> and establishes permanent military tribunals (known formally as courts-martial and informally as military courts).<sup>4</sup> The Commander-in-Chief has ultimate authority over the military tribunals, and there is no right of appeal to the Supreme Court or other civilian body.<sup>5</sup> The 1959 Defense Services Act stipulates that soldiers who commit crimes of murder, homicide, and rape should be tried in a civilian criminal court rather than a court-martial, unless they were "on active service".<sup>6</sup> Although there are instances where soldiers have been transferred to civilian courts (see paragraph 5.2.1 below), it remains very rare. As the Commander-in-Chief retains ultimate power according to the Constitution (which overrides other laws), the competence to transfer cases remains completely under military power, with no oversight by the civilian justice system.

With regard to the police, the 1995 Myanmar Police Force Maintenance of Discipline Law provides for special police courts to prosecute offenses committed by police officers, and it is generally understood that human rights violations by police officers are to be prosecuted under those rules rather than under civilian criminal law.<sup>7</sup>

Prosecutions and convictions in military and police courts are extremely rare, and punishment is often weak and not adequate in comparison to the seriousness of the crimes.

Among the cases included in this research, only 3 cases (involving 5 victims) are known to have been heard in a military court. The soldiers were convicted in all 3 cases. However, these convictions did not provide satisfaction to the victims and their families.

Finally, the 2 cases of rape by police personnel included in our research do not appear to have been heard in a police court or been the object of any disciplinary action.

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3 Article 20(b).

4 Articles 293 and 319.

5 Article 343(b).

6 Section 72.

7 For more information, see the analysis in: International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar*, Baseline Study (2018), p.12, and Asian Legal Resource Centre, Written statement to the UN Human Rights Council, UN Doc A/HRC/29/NGO/44 (2015), para 3.



## Examples of cases

In one case, in which a soldier attempted to rape an older woman in April 2015, no charges of sexual violence were brought against him, despite the fact that there were witnesses to the assault. He was sentenced to seven years in prison for trespassing, use of illegal drugs, and violation of the military code of conduct. Local community leaders pushed to have the case brought to a civilian court, but were not successful.

In another case in which a soldier raped a 7-year-old girl in 2013, the military court sentenced the soldier to only 2 years in prison. The local community later managed to have the case transferred to a civilian court where he was convicted and sentenced to 20 years in prison (see details in chapter 5.2 below).

In another case, in which 3 civilian men were arrested, tortured, and killed by the military in 2017, a military court sentenced 6 soldiers to 10 years in prison with hard labor. The family members of the 3 men were not allowed to speak in court or to question witnesses, as is usually the case in military courts. They are not sure whether the soldiers indeed went to prison and are doubtful that they are still detained.

## **B. Influence over civilian criminal justice**

Even when cases are being handled within the civilian justice system, military interference at all levels makes it extremely difficult for politically sensitive cases to move forward.

According to the Constitution, the Union Attorney General should play a role in ordering investigations into human rights violations, but in reality, the military limits and undermines the authority of the civilian law officers to investigate and prosecute those cases.

Our research shows that control and influence over police investigations are all too common: police investigators refuse to investigate cases, the military starts investigating on their own without respecting the role of the police, offenders remain at large or are conveniently transferred to remote units, files get stuck at the police station or in court, evidence conveniently disappears, etc.

The lack of independence of the judiciary is also a key obstacle to a fair process. Political interference with the judicial process is common, in particular in politically sensitive cases. Law officers rarely prosecute cases perceived to challenge military interests, and when they do, judges are under pressure from the military and/or they voluntarily censor themselves.

Our research found that fear of the military is widespread among the different actors involved in the justice process, when it comes to sensitive cases involving security forces. Victims, witnesses, lawyers, government officials, community leaders, civil society groups, police officers, law officers, judges: “everybody is afraid”, we were told. Insecurity is a major problem, and there is no protection available. Threats, intimidation, and reprisals are common.

Members of civil society spoke about soldiers in uniform intimidating them, taking their picture, and threatening them explicitly while they were trying to collect evidence after an incident took place.

In addition, judicial harassment is common in Burma. The military often brings criminal proceedings against victims, witnesses, or lawyers, using charges of defamation or unlawful assembly.





## Examples of cases

In October 2012, a Kachin man sent a letter to the Myanmar National Human Rights Commission (MNHRC) alleging that Burma Army soldiers killed his 14-year-old daughter. In February 2013, a Burma Army officer submitted a complaint against him, alleging that he made false charges against the Burma Army in his letter to the MNHRC (under Article 211 of the Myanmar Penal Code). He was required to appear in court more than 45 times to defend himself against those charges and was ultimately convicted. He was required to pay a fine or spend 6 months in jail. He paid the fine and was released on February 13, 2015.

In the rape-murder case of two Kachin teachers in northern Shan State on the night of January 19, 2015, evidence pointed clearly to the perpetrators being troops of Burma Army LIB 503, a regiment that had just arrived in the teachers' village, but justice remains elusive until today. Medical staff were threatened by the military not to release evidence from the post-mortem examination, and the Commander-in-Chief himself publicly threatened to sue anyone accusing the military of involvement.



*Two Kachin teachers were raped and killed in northern Shan State in 2015*

### **5.1.2 *Victims are often unwilling to take the risk of seeking justice***

Victims of crimes committed by security forces, and/or their relatives, are often unwilling to embark on the process of seeking justice. There are psychological as well as pragmatic, practical reasons for this.

Many respondents in our research, including those who are trying to support victims to access justice (community-based organizations, local leaders, lawyers), report that victims often lack “motivation” to seek justice. The main reason cited is fear of repercussions. The victims are afraid of the military and police. In some cases, intimidation and threats against victims, witnesses, or local leaders have taken place. But even without explicit pressure, villagers in general do not dare to “tell the truth”, especially in remote areas. They do not dare to be involved in what they consider “political issues”, as they have been taught it is not their place.

In some cases, in particular cases of sexual violence, victims are ashamed. They fear stigma and being made an outcast by their community.

There is also a widespread sense of resignation among the population, who are used to having their rights violated. One respondent said, “the victims are already dead, so there is no need to do a lawsuit”. In addition, religious faith and the Christian culture of forgiveness have been cited as reasons for this lack of “motivation”.

The lack of legal awareness among the population, in particular in ethnic remote areas, is often given as one of the main obstacles to accessing justice. It is reported that victims and community leaders are not aware enough of their rights and the existing legal remedies. A respondent said that they “don’t know how to defend themselves”. Because of this lack of awareness, victims might fail to seek legal assistance at an early stage and/or have less capacity to interact with the relevant institutions. In addition, the provision of support and legal advice is more complicated where victims lack legal awareness. Such challenges are further magnified in the ethnic areas where there are significant language barriers because Burmese is generally not understood.

Several respondents also indicated that this lack of general legal awareness leads to communities not being supportive enough of victims, who need a community that is encouraging and supportive to be able to embark on the process of seeking justice.

Widespread distrust in the justice system is also cited as an obstacle to victims’ willingness to come forward. The common perception is that the institutions work for the rich and powerful and not for the general population. In some cases, negative perceptions of lawyers, or at least apprehension of lawyers, is also an obstacle.

The long duration and relatively high cost of legal proceedings are also important factors preventing victims from accessing justice. Merely the first instance of criminal proceedings before the trial court (not taking into account any appeals of further proceedings) can last between one and two years and include frequent adjournments. The cost of hiring a lawyer and the time spent travelling and attending court hearings can be overly burdensome for many people, especially in ethnic areas where farming is the main source of livelihood.

## Examples of cases

In 2017 in Northern Shan State, a policeman raped a 16-year-old woman who was pregnant. The victim was very scared, and the perpetrator had threatened to kill her if she spoke to anyone about it. The community was gossiping about her, and her family-in-law shunned her. The victim finally committed suicide. The case eventually went to court because of the uproar caused by her suicide. (See details in chapter 5.2 below.)

### ***5.1.3 Police are not performing their functions according to the law***

When courageous victims or their relatives do decide to seek justice for human rights violations, they often get blocked at the first step of the process: the police. Our research shows that most of the cases for which a complaint is filed with the police do not make it to court. Among the 23 cases brought to the police included in this research, 15 did not end up in front of a law officer or a judge. We believe that the proportion of cases that do not go to court is even higher than these numbers suggest since many cases included in this research were specifically selected because they went to court. Nevertheless, an analysis of these 15 cases alone shows how the police are one of the main obstacles in the path to justice for crimes committed by security forces.

## Examples of cases

In the 2017 disappearance case of a 50-year-old man who lived near a conflict area in Kachin State, the family heard he was taken by Tatmadaw soldiers and shot, but they never found the body and have no information about his whereabouts. His family and a lawyer filed a complaint at the police station, but the police never followed up on it.

A lawyer working with us pointed out that the problem is not the laws that govern police work, but rather the practice. If police were conducting their duties in accordance with the Police Manual and other relevant laws, access to justice for victims would be greatly improved.

As described above (see chapter 5.1.1), military interference is the main obstacle when it comes to cases involving soldiers. In Burma, the police are not neutral and have limited institutional independence. The Myanmar Police Force is a department of the Ministry for Home Affairs, and the Commander-In-Chief of the Armed Forces appoints the Minister for Home Affairs. Former army officials hold many key positions in the police institution, which leads to the police force being deferential to the military in terms of investigations and prosecutions, particularly in conflict areas.

From a victim's perspective, challenges related to the role of the police in bringing a case forward come at different steps of the process: they might refuse to "accept" the complaint, file a First Information Report, and "open" the case; they might not conduct a proper investigation or might not investigate at all; they might not take all necessary steps to arrest the perpetrator; or they might fail to transfer the case to court. Several respondents reported that the police told them they could not "open a case" if the perpetrator was not identified, but at the same time, they failed to conduct any investigation to try to identify him. Many cases get blocked at this stage.



An analysis of our cases shows that the military interferes from the beginning and tries to control the police's investigation and/or take over and conduct their own investigation without respecting the role of the police, while police officers are deferential to the military. Generally, police officers do not dare to confront the military and are afraid to investigate cases perpetrated by soldiers. When it comes to crimes committed by police officers, the police institution protects its own personnel. Notably, both of the cases analyzed in this research of rape involving police officers faced serious difficulties.

Some respondents spoke of how the military intervenes in cases that have been opened at a police station, destroys evidence, and makes the cases opaque before the police act. Moreover, the police's bias in favor of the army leads them to be inefficient in conducting proper investigations, examining the crime scene, and collecting evidence. Some respondents reported that police officers said they do not believe that there will be evidence so they do not "accept" the complaint.

Even beyond the lack of willingness to act, the lack of capacity of police in terms of forensic examination and preservation of evidence is a major obstacle. This appeared clearly in the handling of the physiological fluid evidence and DNA in the Kachin school teachers' case. Even in the absence of direct eye witnesses, perpetrators can still be identified by systematic collection of physical evidence. The police, however, often fail to engage in such collection and/or do not comply with basic procedures for handling evidence from the Police Manual.

Some respondents in our research reported instances where police destroyed evidence or concealed it from the victim's family, as well as intimidated or even threatened witnesses.

In cases of arbitrary detention, where for example civilians are detained and wrongfully accused of involvement with an unlawful group, it is also clear that the police do not act according to the law. They fail to apply the rules relating to detention, access to a lawyer, forced confessions, etc. (see chapter 5.1.7 below).

Almost all cases included in this research involved one or more of these challenges with the police.





## Examples of cases

In 2013 in Northern Shan State, two policemen were involved in the rape of a woman in her own house. To date, the police have not brought the case forward because they say they cannot find the perpetrators, despite years of effort by the victim herself, local organizations, and community leaders to get the case filed in court.

In the 2017 case where a policeman raped a 16-year-old woman who was pregnant and later killed herself (see above), the police initially blocked any kind of process and protected its personnel. It was only after the uproar caused by her suicide that the case was moved to the Lashio District Court and a trial was held.

In the killing of a 51-year-old woman at night in July 2019 in Northern Shan State, all evidence points to soldiers who arrived that day in her village. The family submitted a complaint at the police station, but the military has blocked police involvement and sought to protect its own personnel. After pressure by civil society organizations, including a press conference, the military did conduct an investigation, but it does not seem that any prosecutions have started. Local organizations are trying to have the case transferred to a civilian court in the hope of getting a fairer judgment, but that is proving hard.

In the case of the two Kachin teachers who were raped and killed in January 2015 (see above), the police very obviously mishandled the evidence, and later accused two civilian boys in order to protect the military.

In the case where a soldier raped a 7-year-old girl in 2013 and was then convicted in a military court and later in a civilian court (see above), the villagers arrested the perpetrator themselves and brought him to the police station. It was not the police who actively investigated and arrested him.

### **5.1.4 Judges are corrupt and under the influence of the military**

Our research shows that when politically sensitive cases go in front of a judge, corruption and interference by the military impact the fairness of the outcome. This is particularly obvious in cases of arbitrary detention where civilians are wrongfully prosecuted for involvement with an unlawful organization. In those cases, lawyers see clearly the judges' bias and their refusal to look at evidence.

The lack of independence and impartiality of the Burma judiciary is widely recognized, with the acknowledgement that political and military influence over judges is a major obstacle to the rule of law. Many senior judges and senior staff in judicial and law offices are former military officers, and some feel allegiance to the military and/or police. When it comes to politically sensitive cases, judges are subject to directions from government officials and institutions, particularly the military and police, whether it is coercive or implied. Some of our respondents talked of “self-censorship” by judges, where they make themselves biased even if they do not have to. Respondents see this as a problem of “old mindsets”.

In addition, corruption in the judiciary is widespread. These practices have a disproportionate impact on vulnerable and disadvantaged groups, such as farmers from ethnic minority areas, as they cannot afford the sums demanded.

*Court in Myitkyina*







*The case of a Kachin woman who was abducted, sexually assaulted, and killed by the Burma Army in 2011 was dismissed by the Supreme Court*

The lack of capacity of judges also appears to be a factor. Some of our respondents reflected on the fact that the historical lack of independence of the judiciary means that such jobs do not necessarily attract capable and talented people. Many judges lack knowledge of the law and the skills to conduct free and fair trials.

These challenges impact every aspect of the court proceedings: decisions to prosecute, decisions on bail, access to lawyers, disclosure of prosecution evidence, trial examination, submission of evidence and witnesses, and of course, sentencing. Because of corruption and undue influence, judges do not address the negative role that police can play, such as in politically motivated prosecutions, courtroom delays and the fabrication of evidence. Judges generally fail to act on forced confessions obtained under torture that are used as evidence in cases of arbitrary detention. Lawyers involved in our cases also spoke of judges' refusal to look at exonerating evidence, which leads to unfair judgements.



## Examples of cases

In the trial of two men who were arrested in June 2012 in Kachin State for allegedly being involved with the Kachin Independence Army (KIA), it took two years for the court to reach a decision because the prosecution's key witness did not come to court appointments. The accused men were tortured during interrogation, which included sexual violence for one of them, and ultimately they gave forced confessions. Although the families and lawyer tried to submit evidence that the men were not KIA, the judge refused to take the evidence into consideration and told them that he had to convict because his job was threatened if he did not.

The case of a 28-year-old Kachin woman who was abducted, sexually assaulted, and killed by the Burma Army in October 2011 was dismissed by the Supreme Court for "lack of evidence" after listening only to the side of the military defendants.

### **5.1.5 *Lawyers and CSOs have few resources and support for these cases***

Our research shows that local organizations (also known as civil society organizations or CSOs) and lawyers who are trying to support victims seeking justice, do so in extremely challenging environments and with very few resources and external support.

It must be noted that there is an extremely limited number of lawyers in Burma who are willing and able to take on such politically sensitive cases, and only a handful in Kachin and Northern Shan State. Most lawyers are afraid of the military. Lawyers interviewed for this research reported surveillance, threats, and/or intimidation when handling sensitive cases.

Attempts to restrict the independence of lawyers through monitoring, harassment, and other means are common in politically sensitive cases, and there have been instances of authorities taking legal action against lawyers involved in those cases.

There are some brave local civil society organizations willing to take the risk to engage actively in these types of cases. Their number is limited, and they lack proper resources to do such work, but they provide invaluable support to victims. It must be noted that they are often ethnic women's groups. These courageous organizations appear to be isolated from the mainstream well-funded programs working on the rule of law and access to justice supported by international agencies. Respondents from civil society groups expressed a desire to increase their legal skills and knowledge, and their capacity to understand the legal process and accompany victims through it.

Obtaining the financial resources needed for these types of sensitive cases is also an issue. Victims' families do not have the means to cover the costs and lawyers' fees for the whole trial process in court. It therefore falls on lawyers and civil society groups to find the resources, which can be challenging. Although some smaller progressive donors are doing their best to try to channel funds for this type of work, it is hard to obtain funds from large mainstream donors for politically sensitive work. A lawyer reported that a donor who is providing funding for their general work and for legal assistance seems to be uncomfortable with these politically sensitive cases and appeared to imply, without stating explicitly, that such cases should not be funded by the grant.

Generally, there is a need for more flexibility and long-term funding to be able to run a project addressing these types of cases, given how difficult it is to anticipate needs and estimate budgets for these cases. While it is possible, for example, to assess the expenses related to court appointments, it is impossible in these types of cases to estimate in advance how many court appointments there will be, and what other actions lawyers will need to take. If cases are heard outside of main cities, a lot of money will have to be spent on travel and transportation. Donors need to be flexible and trust

the lawyers' groups more. Smaller donors who are flexible and give general support are unfortunately not able to provide enough funding.

Local civil society organizations who are willing to take the risk to engage actively in these types of sensitive cases, generally obtain only small amounts from donors, which are not adequate for this type of unpredictable work. Moreover, even for small amounts, a lot of effort has to go into cumbersome reporting procedures, which leads to delays in the substantive work. Registration, or the lack thereof, also appears to be an issue. Again, more flexibility in funding is required to reconcile the need for financial transparency and accountability with the challenges of this work that is crucial for the promotion of human rights in Burma.

There is a need for much more support from international donor agencies to support local civil society's struggle to assist victims concretely in their fight for justice for human rights violations. It is striking that among the 22 cases of arbitrary detention included in this research, where civilians are being wrongfully prosecuted for political reasons, 6 did not try to appeal to a higher court. Among the reasons given for this, a lawyer cited the fact that sometimes there is simply not the financial resources to do so. This is unacceptable.

Funding should not only be channeled to mainstream rule of law or legal aid programs that do not challenge the status quo with regard to politically sensitive cases and crimes committed by security forces. International donors need to find a way to concretely support access to justice for victims of the most serious crimes.



## Examples of cases

In the case of a 52-year-old Kachin farmer who was arrested by the military and killed in June 2015 in Hpakant Township, the lawyers assisting the family attempted to open the case at the police station and tried to put pressure on authorities to have the case heard, but they were unsuccessful. The lawyers reported that it was extremely challenging to work on this case because it required significant, lengthy travel in an unsafe place.

In the case of two Kachin farmers who were arrested by the military in January 2018, the families and local community had no news from them for weeks, except that they had been arrested because they were accused of being KIA members. When it was suspected they had been killed, one of the community leaders, a pastor from the internally displaced persons (IDP) camp, led a group of relatives and community members to search for the bodies and give them a proper burial. He got directly threatened by soldiers who were telling him he had no permission to dig for the bodies. After a sham investigation by the military, the case filed with the police was closed without further action.

### **5.1.6 *It is difficult to get witnesses and strong evidence***

Many respondents in our research cited the lack of evidence as a main challenge in seeking justice for crimes committed by security forces, in the sense that evidence exists but that it is extremely difficult to obtain in these types of cases.

In any judicial setting, even a fair, independent, and impartial one, it is necessary to have strong evidence in the form of witness testimony or documentary evidence (such as photos, audio or video recordings, documents, medical letters, etc.). In the case of sexual violence, for example, it is important to get a medical examination order.

Our research shows the difficulties in collecting data and evidence in cases perpetrated by soldiers and police, in particular in remote areas. One respondent said “the victims’ side does not know how to protect evidence”. The lack of knowledge of local communities in this regard presents a challenge because it takes a long time for lawyers and other qualified people to locate and access the evidence, if doing so is even possible. Since the police cannot be relied upon to conduct proper investigations in these cases, this lack of capacity becomes a significant obstacle in seeking justice.

A lawyer involved in some of these cases explained that sometimes even if there is a witness whose testimony allows for a reasonable inference as to who the perpetrator was, often the testimony is not strong enough evidence to prove it, especially in a context where the police and judges are reluctant to handle the case in the first place. A witness’s testimony might be considered weak if the person did not witness the crime directly. However, the reality is that these cases generally do not happen with direct witnesses around, especially in remote ethnic areas. Moreover, even potential strong witnesses might be afraid of coming forward for fear of repercussions.

In addition, as mentioned above, even when evidence does exist, such as documentary evidence, in some instances the police or military make the evidence disappear or conceal it from the victim’s family.

Most cases of sexual violence by government troops take place in remote areas, far from any medical facilities. It is rare for survivors to receive emergency medical care or access medical tests that can prove rape. Even if they can access a hospital, often the staff are too afraid to release evidence if they know that the Burma Army is involved.

Challenges regarding evidence also apply to cases of arbitrary detention where civilians are wrongfully prosecuted. The use of admissions of guilt and forced confessions obtained under torture is unfortunately too common in these types of cases, and it is extremely hard to obtain evidence of torture in this context in order to challenge those statements.



## Examples of cases

In a case of disappearance where a Kachin man was abducted and probably killed by a local militia in Hpa Kan Township in June 2017, the family and the lawyer filed a complaint at the police station. As there were no witnesses willing to come forward, the police never acted on the complaint and the lawyer could not advance the case any further.

In the case of the woman whose rape in her own home in 2013 Northern Shan State involved two policemen (see above), to date, the police have not brought the case forward because they say there is no evidence and they cannot find the perpetrators, despite years of effort by the victim herself, local organizations, and community leaders to bring the case to court.

In the well-known case of the rape, torture, and murder of two Kachin volunteer teachers in 2015, where all evidence pointed to the government troops based in the village, medical staff were threatened by the military not to release evidence from the post-mortem examination. The Commander-in-Chief himself publicly threatened to sue anyone who accused the military of involvement in this case.



### 5.1.7 Victims of arbitrary detention and political prosecutions lack basic fair trial rights

Our research included 22 individuals who were wrongfully detained and prosecuted. In most cases, those victims did not “seek justice” as such, but deeply experienced the unfairness of the justice system.

## 22 INDIVIDUALS fall into two categories:

**Civilians exercising their  
right to freedom of expression: = 7**

*Charges under Articles 19 and 20 (Section  
4) of the Peaceful Assembly and Peaceful  
Procession Law: = 3*

*Charges under Section 500 of Myanmar  
Penal Code (defamation): = 3*

*Charges under Section 211 of Myanmar  
Penal Code (making false charges): = 1*

**Ethnic minority civilians  
persecuted based on their ethnicity: = 15**

*Charges under Article 17/1 of the  
Unlawful Associations Act (involvement  
with an unlawful organization): = 14*

*Charges under Section 15 of the 1993  
drug law: = 1*

*Demonstration in support of three Kachin activists prosecuted  
for defamation for organizing peaceful demonstrations calling  
for support for IDPs caught in the conflict in 2018*



Criminal proceedings are often brought against those exercising their right to freedom of expression. Several laws that criminalize free speech - in violation of international law - are being used to silence journalists, activists, and individuals voicing opinions critical of the State. Sometimes these laws are used as retaliation against victims seeking justice.

Human rights defenders are among those who are continuously harassed, intimidated, arrested, prosecuted and imprisoned for peacefully exercising their fundamental rights. For example, our research included three Kachin activists prosecuted for defamation because they organized peaceful demonstrations calling for support for IDPs caught in the conflict in April 2018. It also included two youth activists prosecuted for violation of the Peaceful Assembly and Peaceful Procession Law for organizing a street performance in June 2019 to bring attention to the plight of civilians affected by the ongoing conflict in Kachin State.

In conflict areas, collective suspicion and punishment of ethnic minorities commonly leads to the arbitrary arrest of innocent civilians (mainly men and boys) on the basis of their ethnicity and/or because of an incident that took place in their area. Authorities use the vaguely-worded 1908 Unlawful Associations Act to arrest and detain civilians, wrongfully accusing them of having ties with local ethnic armed groups. The detainees are usually taken to military bases for prolonged periods of time, where they are interrogated, before they are sent to the police to be charged with violating the Unlawful Associations Act. Such long periods of detention are unlawful. They violate the Constitution (Article 376) and Code of Criminal Procedure (Section 61), which stipulate that a suspect may only be detained for up to 24 hours before being brought before a judge.

It is extremely difficult for family members and supporters to obtain information about relatives detained by the military and the Special Investigation Branch. During this time, “nobody knows where they are”, respondents told us. Before they are transferred to a police station, it is, as a practical matter, impossible for a lawyer to meet their client, although it is their right. Sometimes, this period lasts for a very long time, thus drastically impeding the detainee’s right to a defence (which is provided for in Articles 19 and 375 of the Constitution).

In addition, challenges sometimes remain during detention by the police. Although the right to consult a lawyer during an investigation and trial is enshrined in the Code of Criminal Procedure (Section 340), police officers do not always comply with the Code and/or they make exercise of that right difficult.

The right to a defence also includes lawyers’ access to the prosecution files and the evidence against their client, in order to be able to act on the client’s behalf and defend the client. This includes witness statements taken by the police and military, and other relevant evidence. However, in Burma, the practice of disclosure of prosecution evidence is problematic and violates international standards. This challenge is

exacerbated in politically sensitive cases, such as prosecutions under the Unlawful Associations Act, where it is even more difficult to obtain the relevant documents in due time.

Obtaining bail can also be a challenge in politically sensitive cases. The charges often used against people exercising their freedom of expression are bailable offences (e.g. Articles 19 and 20 of the Peaceful Assembly and Peaceful Procession Law, Sections 211 and 500 of Myanmar Penal Code concerning making false charges and defamation). However, charges under Article 17/1 of the Unlawful Associations Act are not bailable, with some exceptions (e.g. women, elderly people, minors, sick people). The lawyers working with us could not recall anyone ever being granted bail under this charge.

The rights to a defence and to a fair trial are rarely respected in such politically sensitive cases. There instead appears to be a “presumption of guilt”. According to the law, the burden of proof should rest on the prosecution. But in reality, in these types of cases, the burden of proof is often on the defendant to prove his innocence. For example, in practice, when prosecuting someone under the Unlawful Associations Act, the prosecution does not have any evidence, apart from an investigation report prepared by the military, of the defendant’s affiliation with an unlawful group. The judges base their decision solely on that report, without corroboration or independent evidence. Respondents described traumatic situations with what felt like automatic convictions, regardless of the evidence. In addition, judges often render decisions based on orders coming from government and military officials. Respondents in our research expressed the view that once someone is charged under the Unlawful Associations Act, the authorities do not want to release them even if everyone knows they are innocent. Under tort law, a suspect found not guilty because of lack of evidence could attempt to sue the authorities.

Torture is commonly used in politically sensitive cases. Among the 14 people in our research prosecuted under the Unlawful Associations Act, 10 explicitly reported being subjected to a form of torture. The military or police obtained forced confessions that were then used as evidence in trials. Admission of guilt to police under coercion is not admissible in court, according to the Evidence Act (Sections 24, 25, 26) and the Code of Criminal Procedure (Section 162-1), but in practice, it is accepted. Judges rarely question or challenge such practices, and rarely attempt to ensure that the suspect is protected from coercion, threats, and torture in accordance with existing laws (e.g. Penal Code, Code of Criminal Procedure, Police Act, Evidence Act).

Efforts to appeal unfair decisions to higher courts are mostly ineffective. Among the 22 victims of arbitrary detention included in our research, 12 were released only at the end of their prison term. Nine were released following a collective presidential amnesty, and in 1 case only, the Supreme Court made some changes in the charges that resulted in the release of the victim.



## Examples of cases

In September 2018, Myitkyina police arrested and charged a 41-year old Kachin man whose family lives in an IDP camp and who worked as a security guard for an international non-governmental organization (INGO). He was accused of being a KIA soldier. As evidence of his innocence, the family provided his staff card, as well as his work key and phone, and the IDP camp leader provided testimony. However, during his detention and interrogation, the police beat him and forced him to sign a confession. He was prosecuted under Article 17/1 of the Unlawful Associations Act. The trial and court hearings lasted 8 months. The judge refused to take into consideration the evidence of his innocence and sentenced him to 2 years in prison in May 2019. He sent an appeal letter to the state judge's office but with no success. He was in prison until April 2020 when he was released under a general presidential amnesty.

In January 2016 in Northern Shan State, four Kachin farmers went missing. Their relatives did not know their whereabouts. The families, local leaders, and civil society groups held a press conference, which led to the police announcing publicly that the men had been arrested by the army. They were prosecuted under the Unlawful Associations Act. The investigation and trial took a full year. They were sentenced to two years in prison, and eventually were released by presidential amnesty.

The following high-profile case involving two Kachin farmers is also illustrative of the persecution of ethnic men wrongfully accused of being part of an armed group. The two Kachin farmers were arrested while herding cattle near their IDP camp in June 2012. The military accused them of being high level operatives of the KIA and carrying out bombing operations. They were interrogated by the Military Affairs Security Unit (Sa Ya Hpa in Burmese). During their interrogation, the two were brutally tortured and subjected to sexual violence. The military obtained a forced confession from each of them, which was used in court. Their trial lasted more than a year because the military witness repeatedly did not appear at court hearings. The judge refused to accept evidence related to the men's innocence. The families reported that the judge said he would lose his job if he did not issue convictions in this case. The two men were sentenced to 14 and 21 years in jail. One was released in December 2015, after serving some of his sentence and after the Supreme Court modified some of his charges. The other was released in April 2018, after serving some of his sentence and receiving a presidential amnesty for the rest.

### **5.1.8 Appeals to other authorities are unsuccessful**

Among the 51 victims included in this research, 21 tried to appeal to other authorities outside of the justice system, but none were successful or received any positive answer.

#### **The authorities that were approached included:**

- The Myanmar National Human Rights Commission (MNHRC)
- The President
- The State Counsellor, or Daw Aung San Suu Kyi personally before she became State Counsellor
- Local governments (at the state and division levels) in Kachin and Northern Shan States
- Army representatives (Northern Military Headquarters, Army Chief of Staff, Commander-In-Chief)
- The Home Affairs Ministry

None of these recourses were successful. On the contrary, it appears that appealing to other authorities, in particular the MNHRC, was counter productive and brought more trouble for victims.





## Examples of cases

In October 2012, a Kachin man sought justice for his 14-year-old daughter's murder by sending a letter to the MNHRC alleging that Burma Army soldiers killed his ethnic Kachin daughter. In February 2013, a Burma Army officer submitted a complaint against him (under Article 211 of the Myanmar Penal Code), alleging that he made false charges against the Burma Army in his letter to the MNHRC. He was required to appear in court more than 45 times to defend himself against those charges. He was subsequently convicted on February 13, 2015.

In the case of two Kachin farmers who were accused of being KIA members and were arrested and killed by the military in January 2018, the families and lawyers both opened a case at the local police station and sent letters to Naypyitaw and to the MNHRC. Following this, a “general from Naypyitaw” came and led an investigation into the families and the IDP camp leaders. Soldiers came to the IDP camp and took pictures of houses and people, which was very intimidating. According to the family, the soldiers did not write down their statements but asked them instead to sign a blank paper. Later, the case filed with the police was closed without further action.



## 5.2 Opportunities for Justice

As described in the first part of this chapter, there are formidable challenges and obstacles in pursuing accountability for crimes committed by security forces. There have been, however, a few “successful” cases where soldiers have been prosecuted and sometimes convicted in military and/or civilian courts.

Among the 29 victims of rape, killing, and/or disappearance included in our research, 8 victims (in 6 court cases) saw their case heard in a court, either civilian or military or both. There was a conviction in 5 of the 6 cases, while 1 case was dismissed. Again, it is important to stress that these numbers do not in any way represent the reality of access to justice for human rights violations, as the cases selected in this research have been chosen purposefully because they involved a formal justice process.

### **Military courts heard 3 of the 6 cases:**

- A soldier who raped a 7-year-old girl in November 2013 in Northern Shan State was first tried by a military court, where he was convicted and sentenced to 2 years in prison. The case was later transferred to a civilian court (see below).
- A soldier who attempted to rape an older woman in April 2015 was sentenced by a military court to 7 years in prison for trespassing, use of illegal drugs, and violation of the military code of conduct. No charges of sexual violence were brought against him.
- In another case, in which 3 civilian men were arrested, tortured, and killed by the military in May 2017, a military court sentenced 6 soldiers to 10 years in prison with hard labor. The family is not sure whether the soldiers indeed went to prison and are doubtful that they are still detained.

*3 civilian men were arrested, tortured, and killed by the military in May 2017*

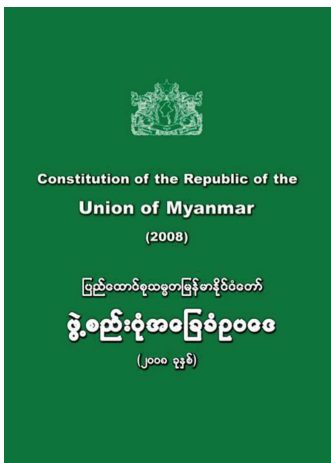


## Civilian courts heard 4 of these cases:

- Regarding the case mentioned above where a soldier raped a 7-year-old girl: After the case was heard by a military court, the case was transferred to a civilian court where he was convicted and sentenced to 20 years in prison.
- The case of 28-year-old Kachin woman, who was abducted, sexually assaulted, and killed by the Burma Army in October 2011 in Kachin State, was brought to the Supreme Court in Naypyitaw, and in March 2012, the Supreme Court rejected the case for “lack of evidence”.
- Two soldiers who raped a Kachin woman in Northern Shan State in May 2014 were tried in a civilian court, and the soldiers were convicted and sentenced to 7 years in prison.
- In a 2017 case where a police officer raped a 16-year-old woman who was pregnant and later killed herself, the case was opened at a District Court (rather than the local Township Court) and the perpetrator was convicted and sentenced to 12 years in prison.

During this research, we looked closely at these cases to try to understand what made it possible to bring them to court and sometimes obtain convictions, from the perspective of civil society groups.

### 5.2.1 *It is possible to try soldiers before a civilian court*



It is widely believed, for good reason, that it is impossible to prosecute soldiers before a civilian court. While there are very significant obstacles, it should be noted that, legally, it is possible, and that there are precedents.

As described above (see chapter 5.1.1) and according to the 2008 Constitution<sup>8</sup>, in principle, soldiers are to be tried through military courts (known as courts-martial). The Commander-in-Chief has ultimate authority over the military courts, and there is no right of appeal to the Supreme Court or other civilian body. However, the 1959 Defense Services Act does stipulate that soldiers who commit crimes of murder, homicide, and rape should be tried in a civilian criminal court rather than a court-martial, unless they were “on active service”.<sup>9</sup>

<sup>8</sup> Article 20(b), 293, 319 and 343(b)

<sup>9</sup> Section 72



**The Government of Burma described the procedure in the following terms:**

*When complaints are received, the Adjutant General Office and the military legal department form investigation tribunals with senior legal professionals, for alleged cases. Complaints are investigated in accordance with the 1959 Military Act, the 1959 Military by-laws and the 1972 Military Disciplines Manual. For crimes stipulated in Section 71 of the Military Act[, the complaints] are sent to military courts. The Tatmadaw transfers the cases of crimes under Section 72 of the Military Act to police so that such cases can be at civilian courts. In accordance with Section 72 of the 1959 Military act, cases involving military personnel committing murder or manslaughter, or rape cases during non-active duty time shall not be tried at military courts. From 2015 to January 2016, there were 6 cases of sexual violence committed by military personnel. These cases were transferred to civilian courts. Before perpetrators are transferred to civilian courts for sexual violence, they are sentenced for military offense. From 2011 to 2015, 31 sexual violence cases committed by the military personnel were transferred to civilian courts.<sup>10</sup>*

Legal limitations to such a transfer (especially the interpretation of the rule that the perpetrator must be out of service), coupled with common corruption and military interference in the judiciary, leads to a very low number of cases being transferred. As the Commander-in-Chief retains ultimate power according to the Constitution (which overrides other laws), the competence to transfer cases remains completely under military power, with no oversight by the civilian justice system.

There are however a few cases in Burma in the past few years in which trials in a civilian court took place, often after soldiers had been discharged from the military. What has been successful in some cases is for civil society groups to put pressure on authorities, leading to the soldiers being dismissed by the military (often after a sham court-martial trial). Cases against the dismissed soldiers then can be brought to civilian courts.

There also have been cases of police officers being tried by a civilian court, rather than only by obscure special police courts.

<sup>10</sup> Committee on the Elimination of Discrimination Against Women, CEDAW/C/MMR/Q/4-5/Add.1, “List of Issues and Questions in Relation to the Combined Fourth and Fifth Periodic Reports of Myanmar, Addendum, Replies of Myanmar”, 3 May 2016, para. 34, 35, p. 8.

As described above, 4 cases included in our research were heard by a civilian court (see chapter 5.2 for details). It is worth noting that all these cases relate to sexual violence against ethnic women. We have not documented any cases of killing brought to a civilian court (except the case of disappearance, which was dismissed by the Supreme Court).

We are aware of a handful of other cases in which soldiers or police were prosecuted in front of a civilian court, but they were not part of KWAT's documentation and are not included in our research as individual cases.

### **5.2.2 *Successful cases require the involvement of all stakeholders***

From analyzing the cases in our research, it seems obvious that “success” in prosecutions depends on the mobilization of all stakeholders. What made these cases possible was the active involvement of all stakeholders: villagers, local leaders, administrators, witnesses, and sometimes even police officers. Building awareness in communities and increasing the capacity of local actors provides a more favorable context for attempts to bring cases to court.

The local community is not only key in providing moral support to a victim seeking justice, it also plays a role in making the case possible. A respondent told us that there is a chance for justice if villagers “take responsibility for what is happening in their community”, in the sense of observing what is happening, reacting when there is a problem, getting involved, and trying to help find solutions, rather than being passive and resigned. In the case of the 7-year-old girl raped by a soldier, the villagers reacted immediately, caught the perpetrator, and brought him to the police station. Respondents reported to us that neighbors and community members also can play an important role in helping to preserve and collect evidence and alerting relevant authorities and actors who may be willing to assist.

Our research suggests that if the local population is more aware of their rights and has a better understanding of legal processes, they are more likely to take a more proactive role in calling for justice for the victims. This, in turn, might help in encouraging victims and witnesses to step forward, building public pressure, and preserving relevant evidence.

Training local community-based organizations and grassroots groups in basic legal concepts and the documentation of cases also increases victims' chances of accessing justice. Training can additionally take the form of facilitated discussion, where peers from different communities sharing their experiences and give advice to each other. Local civil society is then in a better position to support victims through the different stages of the process, such as collecting evidence, opening of a First Information Report (FIR) at the police station, obtaining a medical examination, making contact with a lawyer, etc.

Collaboration and efforts by community members were cited in all the cases researched.



## Examples of cases

The role of an empowered local community appeared clearly in the case where two soldiers raped a Kachin woman in 2014 in Northern Shan State. This incident happened only a few months after the rape case involving the 7-year-old girl in Northern Shan State (see above), which saw strong mobilization from the community. The local community and local civil society groups learnt from their peers who handled the previous case and willingly shared their experience. This is also probably why the Kutkai Cultural Group was successfully active in this case as well; it drew upon its experience in the previous case.

In the case of the 7-year-old girl who was raped in 2013, everyone in the community was very supportive because it was a child rape case. The village elders were particularly persistent, and local civil society groups and lawyers were very active and effective.

In the case of the 16-year-old woman who was raped by a policeman in 2017, the woman's suicide led to a public uproar that put pressure on police and the court to take action. The Kutkai Cultural Group and local women's groups were active.

In all 4 cases of rape included in our research that went to court and resulted in convictions, a medical examination was done immediately after the incident, and was then used in court. The role of local civil society supporting the victims was key in this regard.

### 5.2.3 Public opinion can lead to a more positive outcome

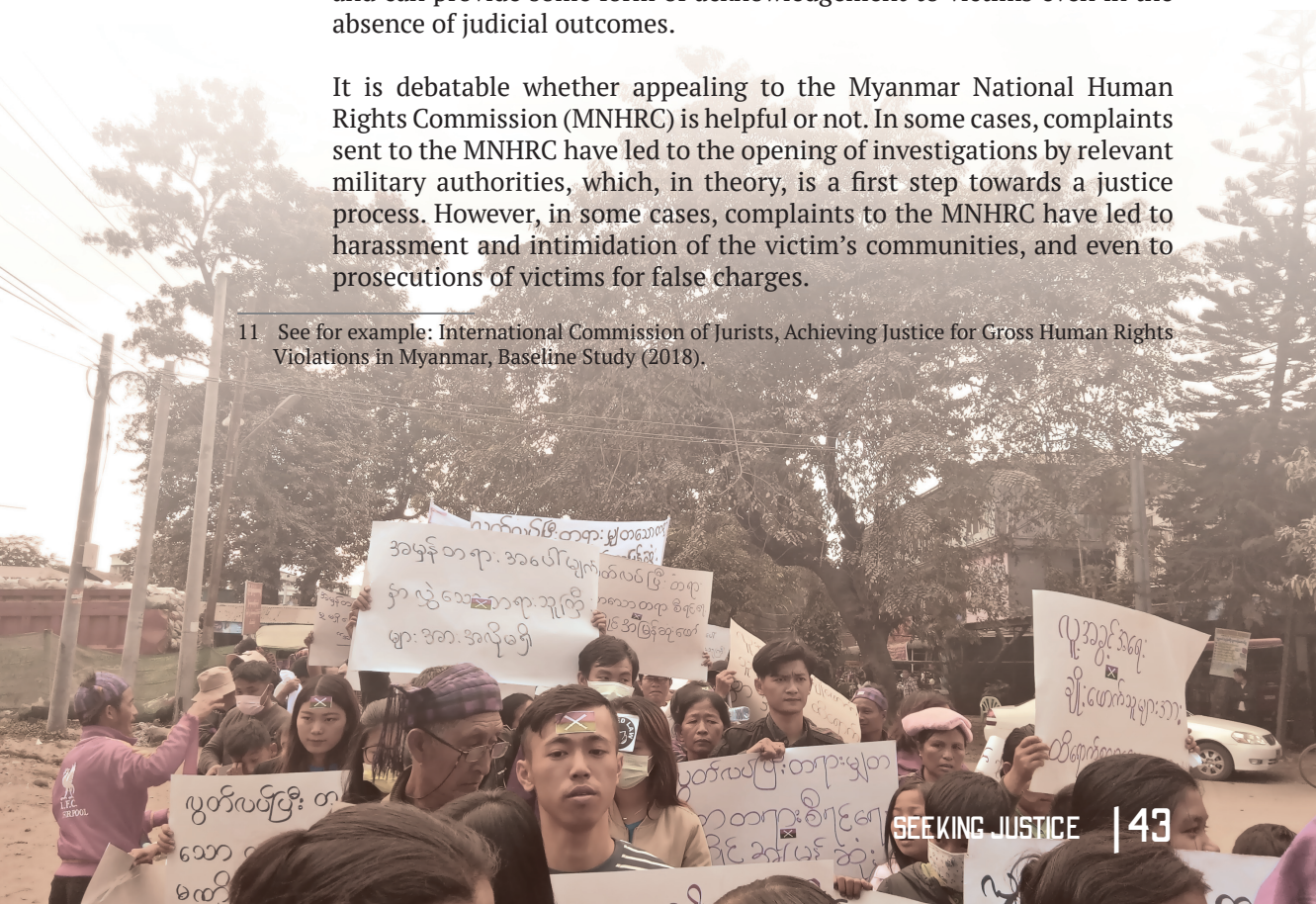
Our research shows that public pressure does have an effect in forcing authorities to act. This is supported by an analysis of our cases and testimonies from respondents. It has also been highlighted by other public reports on the issue, noting that attention and scrutiny from the media, civil society, and international organizations, such as the UN, can pressure authorities into opening investigations.<sup>11</sup>

Lobbying key individuals within local authorities (including the army), organizing public demonstrations, enhancing coverage in the media (local, national, international), mobilizing local leaders (community leaders, religious authorities, elected officials), monitoring by civil society groups (local and international), and prompting the involvement of the international community (Special Rapporteur, embassies, UN agencies, INGOs) were all cited as factors that put considerable pressure on authorities to act.

The role of the media, in particular, seems to be a determining factor. Holding press conferences has been helpful in some cases, while the presence of media during a trial has added an element of pressure on actors from the military, law officers, and judges. By contrast, the lack of media attention to incidents involving villagers in remote areas is cited as one of the reasons for the lack of justice in those cases. Publicity and media coverage are also seen as a form of protection for those involved, and can provide some form of acknowledgement to victims even in the absence of judicial outcomes.

It is debatable whether appealing to the Myanmar National Human Rights Commission (MNHRC) is helpful or not. In some cases, complaints sent to the MNHRC have led to the opening of investigations by relevant military authorities, which, in theory, is a first step towards a justice process. However, in some cases, complaints to the MNHRC have led to harassment and intimidation of the victim's communities, and even to prosecutions of victims for false charges.

11 See for example: International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar*, Baseline Study (2018).





## Examples of cases

In the case of the 7-year-old girl who was raped in 2013, public opinion was mobilized and very supportive because it was a child rape case. Media coverage and public attention played a key role in ensuring some degree of justice in this case.

In a similar way, in the case of the 16-year-old woman who was raped in 2017 and who subsequently committed suicide, it seems the public uproar caused by her suicide put pressure on police and the court to take action.

In the case of the Kachin woman who was raped by two soldiers in 2014, pressure by civil society groups and in particular the involvement of the influential Kutkai Cultural Group led to significant public pressure that forced authorities to act. Direct personal discussions with the military general in charge of the case by members of the Kutkai Cultural Group seem to have helped the case.

In the arbitrary detention case involving four Kachin farmers, the use of media helped to some extent. When the four Kachin farmers went missing in January 2016 in Northern Shan State, their relatives did not know their whereabouts. The families, local leaders, and civil society groups held a press conference, which led to the police announcing publicly that the men had been arrested by the army. They were prosecuted under the Unlawful Associations Act and sentenced to two years in prison. They eventually were released by presidential amnesty.

In the case in which six soldiers were convicted to 10 years in prison with hard labor for the killing of three civilian men in May 2017, public opinion was mobilized through the media. This was possible thanks to the courage of the families who bravely pursued the truth, of the witness who agreed to share the story on video, and of the community leaders who pushed for justice in this case.



# 6. STRATEGIES FOR CIVIL SOCIETY ORGANIZATIONS

The overall objective of our research was to be able to suggest strategies for local civil society groups, community-based organizations, and local leaders on how to better support victims in seeking justice. We tried to identify practical and concrete actions that civil society groups can take today in the current (extremely challenging) context. While our research focused on cases which took place in Kachin and Northern Shan States, we believe that most of the findings and recommendations may be applicable across the country.

We identified three types of strategies for civil society groups: legal actions that civil society can encourage lawyers to try; actions that civil society can take to generally increase its capacity to work on these issues; and actions that civil society can take on a specific case.

## 6.1 Legal strategies

Civil society groups who are in direct contact with the victims to support them in accessing justice will also want to be in close contact with the victim's lawyer(s). They are in a good position, on behalf of the victim, to monitor the work of the legal team. They can hold lawyers accountable to their responsibility to provide the best possible legal assistance to their clients, and check that lawyers are doing their best. They can ask questions to the lawyer and sometimes suggest a course of action. In this chapter, we try to highlight some legal strategies that we might want lawyers to take.

These strategies apply differently in instances where we are trying to bring human rights violation cases to court and in instances where we want to defend a victim of arbitrary detention and political prosecution.

To better understand these legal strategies, there are some written resources available for people who already have some legal knowledge. Among them are the "Paralegal Manual, Criminal Procedure and Criminal Cases"<sup>12</sup> and the "Legal Practice Brief series", which is directed at lawyers.<sup>13</sup>

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12 U Kyaw Myint Law Firm and others, "Paralegal Manual, Criminal Procedure and Criminal Cases" (2018) in Burmese

13 My Justice and Justice Base, Legal Practice Brief series (2019) available at <https://www.myjustice-myanmar.org/publications/resources>

### **6.1.1 *When trying to bring human rights violations cases to court***

Here strategies are needed to force the opening of the case in court, as cases are often blocked at the police stage. Firstly, lawyers can try to formally put pressure on the police based on the fact that legally they have 30 days to investigate before reporting to the court (and 15 days for lesser offences).<sup>14</sup>

In cases where the local police are fully obstructing a case (for example when one of their officers is involved), it is possible to move the case from the local township court to another township court or to the district court. There is no judicial map specifying which court has territorial jurisdiction over which offence. There might be some opportunity here to try to access a more progressive court in some instances.

It is also important to note a procedure referred to informally as “direct complaining”, whereby it is, in theory, possible for someone to directly file a complaint to the court without going via the police (Article 200 of the Code of Criminal Procedure). According to the law, the judge may accept the complaint if he/she deems that there is “sufficient ground for proceeding” (Article 204). This procedure, however, is very difficult in practice and judges tend to dismiss or ignore these complaints. The victims and lawyers need to be very motivated and assertive to try this route.

In addition, if the police refuse to file the First Information Report (FIR) before the court, it is possible to sue the police under the Police Act. It is also possible to file a writ to the Supreme Court and, if successful, the Supreme Court will instruct the police to open and file a FIR.

### **6.1.2 *When defending victims of arbitrary detention and political prosecutions***

When defending someone who is wrongfully accused and prosecuted, strategies are needed to try to defend them on as many fronts as possible since it is extremely challenging to have their rights respected, in particular in politically sensitive cases (see chapter 5.1.7).

**As we have seen in our research, it is necessary to try to defend their rights on different levels:**

- challenging detention and trying to get them released,
- ensuring access to their lawyer and a proper legal defence,
- getting access to the evidence against them,
- challenging the “presumption of guilt” in these cases and defending their right to a presumption of innocence,

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<sup>14</sup> Code of Criminal Procedure, section 167(2)

- trying to reduce the long time that legal procedures can take, which leads to “undue delays”, and
- addressing torture and forced confessions.

The “Legal Practice Brief series”<sup>15</sup> offers detailed advice and strategies for lawyers to protect the rights of their clients. The series is available in English and Burmese and covers topics such as Challenging Undue Delay, Accessing Case Documents, Presumption of Innocence and Burden of Proof, Liberty and Bail, Remand, Free Expression, and Defamation. The briefs even include templates for the various filings, submissions, applications, and complaint procedures. Lawyers need to be encouraged to refer to these documents when preparing to defend their clients.

For lawyers seeking to have their client released, the briefs recommend the lawyers challenge their client’s **detention** at all stages of the criminal proceedings, and the briefs offer advice on how to do that. Examples of strategies include arguing early and systematically for bail when applicable and filing a Writ of Habeas Corpus to the Supreme Court.

In terms of the right to **access a lawyer**, the briefs recommend that “lawyers can and should seek to provide legal advice and representation to their clients at the earliest opportunity”. To do so, lawyers can request access to detainees in custody as soon as possible and request bail when applicable. The briefs also recommend representing and defending detainees at remand hearings, and suggest strategies to do so.

In order to be able to defend their clients properly, lawyers need to have **access to the evidence file** against their clients, including any witness statements made to the police. A certified copy of the file can be obtained from the court. The briefs suggest strategies for obtaining these key case documents. They recommend that “at minimum, lawyers should ask for copies of witness statements pursuant to Section 162(2) of the Code of Criminal Procedure as part of the written request letter”. Strategies include applying for an adjournment until all case documents are provided or applying to the Supreme Court for a Writ of Mandamus. It is extremely important that lawyers do not wait until trial to have access to the case file.

Strategies to protect the clients’ **presumption of innocence** are also needed. Our research shows that in politically motivated prosecutions, there is a “presumption of guilt” and the standard rights of the defence are not respected, including the burden of proof on the prosecution (see chapter 5.1.7). The Legal Practice Briefs suggest strategies for protecting the presumption of innocence, including how to hold the prosecution to its burden of proof. For example, they recommend ways to challenge the admissibility of statements made by the accused, including confessions, under Section 162(1) of the Code of Criminal Procedure. The briefs also

15 My Justice and Justice Base, Legal Practice Brief series (2019) available at <https://www.myjustice-myanmar.org/publications/resources>

recommend challenging any behavior by judges or law officers that improperly suggests guilt, and to systematically appeal convictions.

In order to try to reduce the extremely long time that legal procedures take, the briefs also propose strategies for challenging “**undue delays**”. This includes, for example, challenging the grounds for arrest and detention during the police investigation. To address the lack of cooperation from prosecution witnesses, the briefs recommend that lawyers “argue for the judge to compel witness attendance by summons or warrant” or “argue for contempt of court proceedings against witnesses who fail to appear”. With regard to any inaction by law officers and judges, lawyers can try to appeal to the High Court or the Supreme Court or file a disciplinary complaint.

There are also strategies that can be attempted to address **torture** suffered by clients. The briefs suggest that “where a police officer physically abused, threatened, or tortured the accused to obtain a confession, defence lawyers take photographs of any injuries and seek medical treatment for the accused as soon as possible”. Lawyers can make an oral complaint to the police or the court, but the briefs recommend that lawyers strongly consider filing a criminal complaint against the officer who committed the abuse, on the basis of Section 330 or 331 of the Penal Code and/or under the Myanmar Police Force Maintenance of Discipline Act.

Under the law, **forced confessions** obtained under torture are not admissible before the court, but in practice, they are admitted. As mentioned above, the briefs recommend ways to challenge the admissibility of statements made by the accused, including confessions, under Section 162(1) of the Code of Criminal Procedure.

## 6.2 Reinforcing our capacity to support victims through the justice process

This chapter looks at how we can increase our capacity as civil society.

### 6.2.1 *Capacity of our organizations*

Our research shows the need to build the capacity of the individuals who are trying to support victims. This means not only staff and members of civil society, community-based, and grassroots organizations, but also, in some cases, local civilian or religious leaders who are very active but not involved in a specific organization. Generally, such people supporting and advising victims would be called community-based paralegals (see below).

There is a need for basic legal trainings for these individuals to increase their legal knowledge and their skills in relation to various issues, such as evidence collection, case management, understanding of legal proceedings, etc. These are called paralegal trainings.

Respondents in our research insisted on the need for these individuals to have a better understanding of what appropriate evidence is (in particular documentary evidence) and how to collect and preserve it as part of documentation efforts. In order to support victims, these individuals also need to understand the various steps of the legal process, from opening a case at the police station to the actual court proceedings.

There are some written resources available for people who have a basic legal understanding. Among them, the “Paralegal Manual, Criminal Procedure and Criminal Cases” is available in Burmese.<sup>16</sup>

Civil society groups also need to ensure they have the appropriate case management tools, if they are to support the legal process.

It is important to stress that support to victims should not be limited to legal advice and support with handling evidence. Civil society groups need to develop their capacity to provide holistic support to victims. This means that the individuals supporting them need to have skills in counselling and psychosocial support.

Respondents during our research, and in particular during our focus-group discussions, spoke of the need to organize a core group of people in villages, who could be trained and supported, and who could get the skills, confidence, and networking capacity necessary to help victims access justice. As mentioned above, those people would be called **community-based paralegals**, and civil society groups could organize to develop community-based paralegal programs to respond to the exact needs mentioned in this chapter (see below).

## **6.2.2 Legal awareness for affected communities**

Key findings from our research show that an increase in legal awareness in the community helps improve the chances for victims to access justice (see chapter 5.2). As mentioned above, the local community is not only key in providing moral support to a victim seeking justice, it also plays a role in making the case possible.

Respondents in our research spoke of the need to do awareness trainings to empower and encourage people to step forward, to have self-confidence, and to stand together. One leader said such trainings would be essential for the community to come together and organize to step

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16 U Kyaw Myint Law Firm and others, “Paralegal Manual, Criminal Procedure and Criminal Cases” (2018)



forward for justice. He compared it to “building a proper fence around our house”.

For victims and survivors, being aware of their rights is key to being able to confront entrenched discrimination and other traditional obstacles to seeking justice. That awareness enables them to have the “motivation” and courage to pursue their rights.

Efforts to increase legal awareness can include activities for legal empowerment of the general public, as well as basic trainings in communities, including sharing of experiences between groups (see chapter 5.2). The use of radio was also mentioned as an effective tool for awareness-raising. Again, respondents specifically stressed the need for people to be aware of the importance of evidence, as neighbors and community members would be the first (and sometimes only) actors to have an opportunity to preserve the evidence.

There are public reports and guides available to support civil society groups and community-based organizations in Burma in developing strategies for legal awareness and empowerment programs.<sup>17</sup>

### **6.2.3 Partnerships with lawyers**

It is important for civil society groups or individuals who want to support victims to build and maintain partnerships with lawyers or lawyers' groups. In this way, civil society groups can help the victim or their community make contact quickly with a lawyer, and ensure that there is proper legal advice from the beginning.

The first step is to identify lawyers or lawyers' groups who are able and willing to assist on these types of cases in the area.<sup>18</sup> It is then good to meet with them and establish some form of agreement or referral system, in order to be able to act quickly when a new case arises.

The question of financial resources for covering lawyers' fees is important here, and relates to finding funding for this type of work (see below).

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<sup>17</sup> See for example My Justice, *A handbook for legal awareness strategy and design* (2019) available at <https://www.myjusticemyanmar.org/publications/resources> and Namati, *Guide to Organizing and Working With Community-Based Paralegals* (2019) available at <https://namati.org/resources/guide-organizing-working-with-community-based-paralegals-myanmar-version/>.

<sup>18</sup> For security reasons, we are not listing here the lawyers and lawyers' groups that we have identified in Kachin and Northern Shan State. Please contact AJAR or KWAT for more information.

## **6.2.4 *Alliances with other civil society groups***

In addition, it is important to build partnerships and alliances with other civil society groups who have similar goals in terms of promoting access to justice.

Respondents in our research mentioned the importance of active collaboration between local civil society groups and community-based organizations, and how it helped in obtaining the opening of some cases in court and even convictions (see chapter 5.2). Some respondents suggested that there should be a collective fund between organizations that could be used for providing emergency assistance to victims in new cases.

It is also important to build a relationship with INGOs and international agencies working on the rule of law and access to justice. In addition to funding (see below), they might be able to help increase organizational capacity and provide access to paralegal trainings, give advice, and offer other forms of support. In some cases, INGOs might also be a support for advocacy efforts (see below).

There are some legal groups in Burma who are providing services that might be useful for local and grassroots actors. Our research found that many local civil society groups willing to take the risk to actively support victims in politically sensitive cases involving State actors lack resources to do so. They appear to be isolated from the mainstream well-funded programs promoting the rule of law and access to justice that are supported by international agencies, who are not engaging on politically sensitive cases. There is therefore a need to develop and foster these relationships.

Some of the groups supported by international agencies provide trainings on a range of issues, including basic trainings on the rule of law and generic paralegal trainings, in various cities across the country.<sup>19</sup> Such trainings might be useful for staff and members of civil society groups who are looking to increase their legal knowledge.

## **6.2.5 *Advocacy***

Our research shows that public pressure does have an effect on forcing authorities to act, as attention and scrutiny from the media, civil society, and international organizations, such as the UN, can pressure authorities into opening investigations (see chapter 5.2.3). It is therefore important that civil society groups working on these issues develop their capacity to do advocacy around specific cases when they emerge.

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19 Please contact KWAT or AJAR directly for informal information about such trainings.

Respondents in our research spoke of the need to make connections with key stakeholders and raise awareness with local authorities and leadership, in order to be able to put pressure on justice sector actors when there is a new case.

For more information on actions that can be included in an advocacy strategy around legal cases, see chapters 5.2.3 above and 6.3 below.

Developing effective advocacy strategies becomes even more important when civil society groups decide to use a case for strategic litigation, which means fighting a case in court to raise awareness about a specific issue and to bring about policy change.<sup>20</sup>

### **6.2.6 Fundraising**

Our research shows that the lack of financial resources is an obstacle to access to justice in cases of human rights violations, at various levels (see chapter 5.1.5). Funding for lawyers' fees is an obvious need, but resources are also needed for assisting victims more generally. Lawyers' groups do not have enough funding to cover all cases for which they are solicited or they might be limited by their donor requirements, and independent lawyers might not have any funding. It is therefore important for other civil society groups supporting victims to fundraise for this aspect of their work.

Beyond lawyers' fees and costs related to court proceedings, resources are needed for general legal and paralegal assistance. For example, expenses related to transportation are not only needed for the lawyers to travel to court hearings, they are also needed for the members of local and grassroots organizations who are supporting victims and doing paralegal work.

In addition, funding is needed for legal empowerment activities such as capacity building and legal awareness, as well as advocacy (see above). For example, a respondent mentioned the need to find resources for mobilizing public support (organizing demonstrations, engaging media, etc.) as public pressure can help get cases into court, but there is rarely any funding for concrete actions in this regard. Respondents also reflected on the need to have funds available for emergency assistance to support victims (medical care, shelter, transportation, food, etc.).

In general, our research found that there is a need to ask donors for more flexible and long-term funding for this type of work (see chapter 5.1.5).

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20 "Strategic litigation is the identification and pursuit of legal cases as part of a strategy to promote human rights. It focuses on an individual case in order to bring about broader social change. These cases set important legal precedents by publicly exposing injustices, raising awareness and bringing about changes in legislation, policy and practice." <https://trialinternational.org/topics-post/strategic-litigation/>

Developing a community-based paralegal program might help articulate a specific project to donors (see chapter 6.2 below).

Some donors that may be able to support work on these sensitive issues, or help identify possible sources of funds, are: Tharthi Myay Foundation, National Endowment for Democracy (NED), American Jewish World Service (AJWS), Fund for Global Human Rights (FGHR), and to a certain extent, the Olof Palme International Centre and Swedish Burma Committee (SBC). For large projects related to women's rights, there is the Foundation for a Just Society (FJS), and for urgent needs of funds, civil society groups can apply to the Urgent Action Fund. Local civil society organizations may also want to connect with My Justice<sup>21</sup> as they are supporting and implementing a wide range of initiatives relating to access to justice in Burma. Among other major international agencies who support rule of law and access to justice initiatives in Burma, there are: United States Agency for International Development (USAID, under its PRLM project), United Nations Development Program (UNDP), International Development Law Organization (IDLO), and United Nations High Commissioner for Human Rights (UNHCR).

## **6.2.7 *Community-based paralegal programs***

Civil society groups wanting to increase their capacity and effectiveness in assisting victims to access justice should consider setting up community-based paralegal programs. The concept of community-based paralegals could help civil society groups address most of the needs and strategies identified in the previous chapter.

Community-based paralegals have basic legal skills. They work directly with the community they serve, focusing on empowerment, and have connections with lawyers and other service providers.

Organizations that are interested in learning more about this concept can read the “Guide to Organizing and Working with Community-based Paralegals”, available in English and Burmese.<sup>22</sup> According to this guide, community-based paralegals do the following activities: raise legal awareness and grow the movement of justice in the community; consult and handle case; collect data and gather evidence for cases and systemic changes; network and coordinate with other stakeholders; and provide continuous learning and self-improvement opportunities. The guide also provides detailed recommendations for civil society groups wanting to develop a community-based paralegal program.

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<sup>21</sup> <https://www.myjusticemyanmar.org>

<sup>22</sup> Namati and My Justice, Guide to Organizing and Working With Community-Based Paralegals (2019), available at <https://namati.org/resources/guide-organizing-working-with-community-based-paralegals-myanmar-version/>

## 6.3 Taking specific steps when a new case arises

In this chapter, we try to identify concrete steps that members of civil society groups who are supporting victims can take when there is a new case, to try help the victim access justice.

Obviously, the first priority is the victim's **safety and wellbeing**. The victim and/or their relatives might need medical care, and in most cases will need emotional and psychological support. Ideally, it would be possible to provide some form of counselling or psychosocial support to the victim and/or their relatives. The aim of counselling should be the victim's emotional, psychological, and physical wellbeing, as a priority. Respondents in our research often spoke of the need to give "encouragement" to victims to seek justice. This can be important depending on the context, but it should only come as a second step if the victim seems strong and healthy enough to do it. Putting pressure on a person who just experienced trauma might lead to re-traumatization. The first guideline must always be "**do no harm**".

In some cases, the victim might need to be moved to a safe place. Some civil society groups are able to provide a **shelter**, or to find creative solutions to put the victim in safety.

If the context is appropriate, it is important to provide **information** to the victims about their rights and help them understand their options. It is also important to inform and consult family members. Although we want to support victims and encourage them to claim their rights, we have a duty to ensure they make an informed decision about this. This is an ethical responsibility.

Respondents in our research also spoke of the necessity, when there is a new case, to inform immediately the **local authorities**, such as the nearest village head or the camp leader. It can also be useful to ask promptly for advice from local religious leaders and civil society groups.

As seen in the research, **documentation and data collection** is a key step in the pursuit of justice (see chapter 5.1.6). Respondents in our research noted the importance of collecting data and evidence not only about the victim and the crime itself, but also about the perpetrator. Being able to identify the individual perpetrator can make a crucial difference in the capacity to bring a case to court. In order to have the chance of a case going to court, strong evidence is needed. The evidence can be in the form of witness testimony (by family members, neighbors, local leaders, etc.). It can also be documentary evidence, such as photos/pictures, audio or video recordings, documents, medical letters, etc. A lawyer noted that the standard for evidence to be accepted by a court is quite low so pictures on cell phones can get accepted easily.

In the case of significant physical harm, and in particular in cases of rape and other forms of sexual violence, it is important to get a medical examination. A "**medical examination order**" is a piece of paper, a form, that can be obtained from the court (or the police) and brought to the hospital for an examination.



The form will then be filled in by medical staff at the hospital, and the police will include it in the case file provided to the court. If possible, keep a copy of the medical examination form, in case the police do not handle it properly.

If possible, make contact with a **lawyer** quickly, in order to have proper legal advice and support from the beginning. The lawyer might be able to deal with the police in a more effective way, given their formal role, and they might give useful advice on the collection and preservation of evidence. This is why it is useful to have previously agreed partnerships with lawyers or lawyers' groups. Having access to financial resources for lawyers' fees and other legal assistance costs can help increase the chances of having a good lawyer intervene quickly.

Civil society actors can help the victim or the witness **report to the police**. The police officer must file what is called a First Information Report (FIR), which normally should lead to an investigation.

As seen in our research (see chapter 5.1.3), most cases get blocked at the reporting stage as the police do not perform their functions according to the law, in particular when it comes to politically sensitive cases involving the army or the police itself. Respondents in our research spoke of the need for the community to put pressure on the police at this point to push them to do their job properly.

A crucial role that civil society can play to increase the chance of a case being heard in court is **advocacy and mobilization of public support**. Our research showed that public opinion can lead to a more positive outcome, and that attention and scrutiny from the media, civil society, and international organizations, such as the UN, can pressure authorities into opening investigations (see chapter 5.2.3).

Advocacy activities can include the following: lobbying key individuals within local authorities (including the army<sup>23</sup>), organizing public demonstrations, engaging the media and holding press conferences, mobilizing local leaders (community leaders, religious authorities, elected officials), monitoring by civil society groups (local and international), and getting members of the international community involved (Special Rapporteur, embassies, UN agencies, INGOs).

As one lawyer activist said, civil society groups, and in particular women's groups, know "how to pursue the case and make waves".

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23 For example, in one of the "successful" cases, members of the influential Kutkai Cultural Group managed to have direct personal discussions with the military general in charge of the case (see chapter 5.2.3).

# 7. RECOMMENDATIONS TO OTHER STAKEHOLDERS

While our research focused primarily on identifying strategies for local civil society groups (see chapter 6), we are also using this opportunity to make recommendations for other stakeholders, namely the Burma government and military, the international community, as well as donors and international organizations.

## 7.1 To the Burma government and military:

1. Halt military operations throughout the country, and withdraw all troops from ethnic areas, so that inclusive peace negotiations toward a new federal constitution can begin.
2. Stop attacks on civilians and put an end to the practice of torture in military and police detention and during interrogation.
3. Undertake necessary political and legal reforms to ensure accountability and the rule of law, including putting the military and police forces under full civilian control.
4. End military impunity and ensure that military personnel are held accountable for war crimes and crimes against humanity.
5. Proactively encourage and organize the transfer to civilian courts of cases involving abuses by members of security forces.
6. End military interference in the work of the police and justice actors.
7. End corruption in the justice system and ensure the judiciary is independent and abides by the rule of law.
8. Repeal or amend all laws which arbitrarily restrict the rights to freedom of expression, association, and peaceful assembly, including the Unlawful Associations Act.
9. Release all people arbitrarily detained under the Unlawful Associations Act, and those detained for exercising their right to freedom of expression.

10. Ensure respect for the right to a fair trial in political cases, including early access to a lawyer, protection against arbitrary detention, the presumption of innocence, disclosure of evidence, and protection against torture and mistreatment.
11. End surveillance and harassment of lawyers and activists assisting victims of human rights violations committed by State actors.
12. Cooperate with the Independent Investigative Mechanism for Myanmar (IIMM) in its investigation of human rights violations.
13. Facilitate access to justice for victims, by providing protection for victims and witnesses, as well as effective gender-sensitive and accessible legal aid schemes.
14. Allow the set-up and implementation of community-based paralegal programs in ethnic areas.

## 7.2 To the international community

1. Support the current case against Burma at the International Court of Justice (ICJ) and the investigation at the International Criminal Court (ICC), and push for a referral of Burma to the ICC for crimes against humanity and war crimes in the whole country, including northern Burma.
2. Stop support to the Burma government and military until they undertake necessary political reforms to ensure accountability and the rule of law, including putting the military and police forces under full civilian control through a new federal constitution, and until there is genuine peace. In particular:
  - Suspend military-to-military relations with the Burma Army, and stop training police officers; instead, provide training for paralegal programs.
  - Stop investment projects which fuel conflict in ethnic areas and lead to human rights violations.
3. Ensure effective consultation of affected ethnic communities when developing programs and supporting policy-making on the rule of law and access to justice.

## 7.3 To donors and international organizations

1. Ensure that the support provided for access to justice in Burma specifically reaches community-based civil society groups who are doing risky, politically sensitive work and assisting victims of human rights violations committed by State actors.
2. Provide these organizations with funding and capacity-building specifically for cases of human rights violations committed by State actors.
3. Provide funding that is general, flexible, and long-term, given the challenging, circumstances presented by politically sensitive cases, and trust lawyers' groups to receive general institutional support for such cases.
4. Fund all aspects of access to justice projects, including lawyers' fees, costs related to court proceedings, and expenses related to general legal and paralegal assistance, legal empowerment activities (capacity building, legal awareness), advocacy, and public mobilization, as well as emergency assistance to victims (medical care, shelter, food).
5. Provide direct, cross-border funding to ethnic communities seeking justice for human rights violations committed by State actors.
6. Support the design, set up, and implementation of community-based paralegal programs in ethnic areas, in particular conflict-affected areas such as Kachin and Northern Shan States and remote rural areas, specifically with the aim of providing paralegal assistance to victims of human rights violations.
7. Encourage current grantees implementing large programs promoting the rule of law and access to justice in Burma to reach out to and offer their services to grassroots organizations who are doing risky, politically sensitive work and assisting victims of human rights violations committed by State actors.
8. Provide advanced trainings to lawyers on legal strategies to be used in cases of human rights violations perpetrated by State actors, including killing, rape, disappearance, arbitrary detention, and political prosecutions.





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