

# Right to Counsel: The Independence of Lawyers in Myanmar



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## **I. INTRODUCTION AND SUMMARY**

Since 2011, the legal profession in Myanmar has undergone significant changes, as the country seems to be moving from military rule to a quasi-civilian government. President Thein Sein, as well as opposition leader Aung San Suu Kyi, have both emphasized the importance of the rule of law for the development of Myanmar and, encouraged by the international community, reform of Myanmar's legal system. Since the end of direct military rule, Myanmar has reviewed, amended, abolished, and passed hundreds of laws, shifting the landscape for the legal system and the legal profession.

Lawyers in Myanmar who spoke with the ICJ broadly agree on three points:

First, many lawyers assert that their professional independence, and the independence of the profession as a whole, has increased substantially over the past two years. While structural challenges have largely gone unaddressed, authorities have significantly decreased their obstruction of and interference in legal processes, and their harassment and intimidation of lawyers in the course of their work.

Second, lawyers agree that on-going challenges remain to their independence, particularly in politically sensitive and criminal cases, in which state and security authorities continue to exert improper influence. In addition, multiple long-standing and systemic problems affect the independence of lawyers, including, prominently, the poor state of legal education, restrictions on the licensing of lawyers, and violations of lawyers' rights to freedom of association. Emblematic of these challenges is the fact that lawyers in Myanmar lack an independent Bar Council.

Third, lawyers in Myanmar pointed out the pervasive and corrosive effect of corruption on the independence of individual lawyers and to the legal profession overall in Myanmar. It underlies and affects every aspect of a lawyer's career, and is thus never absent from lawyers' calculations vis-à-vis legal fees, jurisdictions, and overall strategy. Crucially, the public also generally assumes that corruption will play a part in any interaction involving the legal system—severely undermining the notion of rule of law.

Within a justice system that respects the rule of law and the principle of separation of powers, judges, lawyers and prosecutors must be free to carry out their duties without improper interference. They must be protected in law and practice from reprisals resulting from the exercise of their profession, including attack, harassment or persecution. They must be active protectors of human rights, maintain the highest level of integrity, and be accountable for professional misconduct.

Lawyers' duties include advising clients on their rights and obligations and the working of the legal system insofar relevant to their rights and obligations; assisting clients in every appropriate way and taking legal action to protect their interests; and assisting clients before courts, tribunals and administrative authorities, where appropriate. Lawyers can and should play an essential role in the protection of human rights, including when representing persons who are deprived of their liberty, individuals who stand accused of a criminal offence, or people who are the victims of human rights violations and seek accountability and reparation. The right to be represented by a lawyer in the determination of any criminal charges constitutes an integral part of the right to a fair trial as recognized in international law. For lawyers to be able to fulfil their role effectively when representing clients in criminal and other matters, their independence must be respected. Moreover, in the course of their clients' representation, lawyers play a key role in challenging before the domestic court, national legislation that undermines human rights and the rule of law. In

order to ensure that lawyers are able to fulfil their roles effectively, their independence must be respected and protected. To this end, international law establishes safeguards aimed at ensuring the independence of the individual lawyer, as well as the profession as a whole.

This report presents a snapshot of the independence of lawyers in private practice in Myanmar, in light of international standards and in the context of the country's rapid and on-going transition.

Myanmar's legal system is derived from the English common law system as implemented in colonial India, although in practice the current system rarely utilizes such standard components of the common law system as written judgments and reliance on precedent.

The legal profession in Myanmar has low public and professional standing, due to a history of eroded respect for the rule of law, political oppression, and endemic corruption. It will take time, resources, and significant additional political will to overcome some of the historical, and on-going, difficulties faced by some lawyers.

Lawyers working on politically sensitive and criminal cases especially have seen the least benefits from the incipient reform process. They, and their clients, still face problems such as on-going illegal actions by the police, politically motivated disciplinary action by the non-independent Bar Council, and discrimination on the basis of religion and ethnicity.

Such lawyers continue to experience harassment, threats and monitoring by state security officials. Being identified with the causes of their clients, rather than being treated as independent professionals engaged in defending their clients' rights within the bounds of the law, they have been prosecuted on criminal charges, including contempt of court, presumably to discourage or punish them for opposing powerful state or private interests. Authorities also continue block lawyers' access to their detained clients, or otherwise undermine and contravene the very rights to legal representation or a defence. Authorities have not allowed or ensured that lawyer-client meetings take place in conditions that protect and respect the confidentiality of lawyer-client communications. Lawyers and their clients have been faced with purposeful delays in court processes when their clients, or the causes with which the clients are associated, are sensitive to powerful interests. Officials have abused disciplinary measures against members of the legal profession, by making unwarranted threats to have lawyers' licences suspended, by suspending or revoking a lawyer's licence to practice law for political reasons or as a means of controlling activism, or by imposing disproportionate periods of license suspensions for minor professional misconduct.

Lawyers in Myanmar suffered from decades of restrictions on their ability to organize themselves in an independent self-governing professional body that protects their professional interests and to speak freely about the problems they face in their work. Despite recent improvements in the realization of the rights to freedom of association and freedom of expression, problems remain. Most glaringly, the Myanmar Bar Council is a government-controlled body that fails to adequately protect the interests of lawyers in the country. Moreover, independent bar associations and other groups of lawyers have been unable to legally register and many lawyers continue to fear the consequences of speaking about problems within the legal system in public venues. Lawyers have sometimes been harassed for organizing themselves, and some have refrained from doing so for fear of acting illegally.

With a general increase in respect for the right to freedom of expression in Myanmar since 2011, lawyers have spoken up with greater confidence than in several decades. But they

still face improper restrictions on their freedom of expression, resulting in uncertainty and fear as to the limits of that freedom when it comes to politically sensitive issues.

As the authorities in Myanmar slowly but surely decrease their direct and overt interference with individual lawyers in the exercise of their professional duties towards their clients, systemic barriers to the independence of the legal profession have been placed in greater relief. With the exception of literally 25 years of purposeful weakening of legal education in Myanmar, these barriers are the result less of explicit official action than of inaction, policy failures, and lack of financial and technical capacity. They are matters of omission rather than commission, but overcoming them will require the reverse: deliberate efforts to build, bolster, and bring the operation of the legal profession in Myanmar into compliance with international standards.

The systemic barriers to the independence of the profession apply to all lawyers equally, and thus affect the legal system, and the profession as a whole, as well as the laws its members promulgate, practice, defend, and interpret. These systemic barriers retard the rule of law in Myanmar.

Problems with the independence of the legal profession in Myanmar begin in law school, which is not highly regarded, and produces lawyers who are poorly prepared and unlikely to act independently in the exercise of their profession. Lawyers' professional security—an integral part of their independence—is also harmed not only by their inability to rely upon an independent Bar Council, but also by having to negotiate a Bar Council that is prone and even inclined to constrain the rights of lawyers and clients more than to promote and protect them. A considerable amount of 'red tape' resulting from disorganization of the courts also adversely affects lawyers and their clients.

Finally, systemic corruption manifests itself in individual acts of bribery, delay, and obstruction, as well as in decisions made on the basis of financial transactions rather than the smooth procedural advancement of a case or legal reasoning. Lawyers are seen as 'brokers' between and among themselves and their clients and a range of officers and officials—police, witnesses, court clerks, opposing counsel and judges.

Based on its findings, the International Commission of Jurists provides 22 recommendations to relevant Myanmar authorities pertaining to corruption, the Bar Council and associations of lawyers, harassment and discipline, access to clients and information, legal education, and the administration of justice. These recommendations appear in full at the end of this report. The chief recommendations are:

- The Union Attorney-General and Union Parliament should significantly reform the Bar Council to ensure its independence and ability to: promote and uphold the cause of justice; defend the independence of the profession and the role of lawyers in society; maintain the honour, integrity, competence, ethics, standards of conduct, and accountability of the profession; ensure and maintain an independent and fair disciplinary system; ensure free access to the profession, without discrimination, for persons with the requisite professional competence; promote and support law reform; promote effective access of the public to the system of justice; promote the welfare of members of the profession; and affiliate with and participate in the activities of international organizations of lawyers.
- The Union Attorney-General and Union Parliament should create a specialized, independent mechanism mandated with the prompt and effective criminal investigation of allegations of corruption. The mechanism should also be mandated to investigate and make recommendations concerning combating systemic

corruption. Consistent with respect for the rule of law, each case of suspected corruption should be investigated individually, impartially and thoroughly, in a manner consistent with respect for human rights, the independence of the judiciary and internationally recognised guarantees of fairness and due process of law.

- The Ministry of Education should, in consultation with the legal profession, commit to improving legal education in Myanmar by bolstering standards of admission to law school, law school curricula, and instruction and assessment of students; ensuring that Myanmar nationals, including those from minority groups, are linguistically able to fully comprehend instruction and related materials; improving access to materials for students and faculty; and facilitating collaboration with the international community.



## II. INTERNATIONAL LAW AND STANDARDS

*"The International Commission of Jurists recognizes that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."*<sup>1</sup>

According to international law and standards, intrinsic to compliance with the rule of law are the obligation to respect and guarantee human rights and the obligation to organize the State in such a way that the structure and operation of State power is founded on the separation of the powers of the executive, legislative and judicial branches. Having a judiciary that is independent in structure and function of the other branches of government is a necessary condition for the fair administration of justice and inherent to respect for the rule of law.<sup>2</sup>

Accordingly, the constitution, laws and policies of a country must ensure that the judiciary is truly independent from the other branches of the State. Therefore, within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without improper interference from any quarter, and must be protected from reprisals, including attack, harassment or persecution. They must be active protectors of human rights, must maintain the highest level of integrity under national and international law and ethical standards, and must be accountable for professional misconduct.<sup>3</sup>

Lawyers, as set out in the UN Basic Principles on the Role of Lawyers, shall at all times maintain the honour and dignity of their profession. Their duties include advising clients on their rights and obligations and the working of the legal system insofar relevant to their rights and obligations; assisting clients in every appropriate way and taking legal action to protect their interests; and assisting clients before courts, tribunals and administrative authorities, where appropriate. In doing so, lawyers must seek to uphold human rights and fundamental freedoms, and at all times act freely and diligently in accordance with the law and recognized deontological standards. They must always loyally respect the interests of their clients.<sup>4</sup>

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<sup>1</sup> International Commission of Jurists, Declaration of Delhi (1959).

<sup>2</sup> See, among others, Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 16; Bacre W. N'diaye, Special Rapporteur on extrajudicial, summary or arbitrary executions, and Param Kumaraswamy, Special Rapporteur on the independence of judges and lawyers, Report to the Commission on Human Rights on the Situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/Add.1 (1997), para. 71: "... the separation of power[s] and executive respect for such separation is a *sine qua non* for an impartial judiciary to function effectively"; Param Kumaraswamy, Special Rapporteur on the independence of judges and lawyers, Report to the Commission on Human Rights, UN Doc. E/CN.4/1995/39 (1995), para. 55: "... the principle of the separation of powers, which is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy ...".

<sup>3</sup> See, among others, Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter: 'UN Basic Principles on the Independence of the Judiciary'), Principles 1 and 2; Basic Principles on the Role of Lawyers, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (hereinafter: 'UN Basic Principles on the Role of Lawyers'), Principles 12, 14 and 16; Guidelines on the Role of Prosecutors, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Guidelines 3-5 and 12.

<sup>4</sup> See UN Basic Principles on the Role of Lawyers, Principles 12-15.

Lawyers then are one of the pillars upon which respect for human rights and the rule of law rests.<sup>5</sup> They have an essential function in protecting human rights and in guaranteeing that the right to a fair trial is respected, including in the context of legal proceedings. The right to be represented by a lawyer in the determination of any criminal charge constitutes an integral part of the right to a fair trial as recognized in international law.<sup>6</sup> Further, lawyers play a critical role in protecting the right to liberty and the prohibition against arbitrary detention when representing people deprived of their liberty, including by challenging the legal basis of arrests and filing *habeas corpus* petitions. They also play a crucial part in combating impunity, advising and representing victims of human rights violations and their relatives in the context of criminal cases brought against the alleged perpetrators, and in proceedings aimed at obtaining other forms of reparation. Moreover, in the course of their representation of their clients' interests, lawyers also play a key role in challenging before the courts national legislation that undermines human rights and the rule of law.<sup>7</sup>

The UN Basic Principles on the Role of the Lawyer recognize that in order for such legal assistance to be effective, it must be carried out independently.<sup>8</sup> To this end, international law establishes safeguards aimed at ensuring the independence of the individual lawyer, as well as the profession as a whole.

A range of international human rights standards set out an authoritative framework aimed at ensuring the independence and impartiality of the judiciary and individual judges, and the legal profession and lawyers. These standards include, among others, the Basic Principles on the Independence of Judges, the Bangalore Principles of Judicial Accountability, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors, as well as provisions of the Universal Declaration of Human Rights (UDHR) and provisions of the International Covenant on Civil and Political Rights (ICCPR). While as of July 2013, Myanmar was not yet a state party to the ICCPR, the ICJ considers that its provisions and the elucidation of them by the Human Rights Committee should be among the standards that provide a helpful guide to the authorities in Myanmar on essential guarantees for respect for the rule of law, respect for human rights, and the independence of judges and lawyers. This is particularly the case given that the authorities expressed a commitment,

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<sup>5</sup> Lawyers' essential role in defending human rights and the rule of law has been underscored repeatedly by United Nations authorities, see *inter alia* General Assembly, Strengthening the rule of law: Report of the Secretary-General, UN Doc. A/57/275 (2002), para. 41; Human Rights Council, Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/23/6 (2013), Preamble.

<sup>6</sup> See Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR); UN Basic Principles on the Role of Lawyers, Principle 1; Article 11(1) of the Universal Declaration of Human Rights (UDHR).

<sup>7</sup> See *inter alia* General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principles 11, 12, 15, 17, 18, 23, 25, 32 and 33; General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, UN Doc. A/RES/45/113 (1990), Rules 18, 60 and 78; General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), UN Doc. A/RES/40/33 (1985), Rules 7.1 and 15.1; Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 93. See further also Human Rights Committee, General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), UN Doc. HRI/GEN/1/Rev.9 (Vol. I) at p. 200, para. 11; General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Freedoms, UN Doc. A/RES/60/161 (2006), Articles 1, 9, 11; General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34 (1985), Principle 5; General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133 (1992), Article 13; Economic and Social Council, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN Doc. E/1989/89 (1989) at p. 52, Principle 6; General Assembly, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, UN Doc. A/RES/55/89 (2000), Principles 3 and 4.

<sup>8</sup> UN Basic Principles on the Role of Lawyers, Preamble para. 9.

during the course of the 2011 Universal Periodic Review at the UN Human Rights Council, to “consider accession” to the ICCPR.<sup>9</sup>

The ICCPR and other international standards provide that every person charged with a criminal offense is entitled to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interest of justice so require, and free of charge if he cannot afford to pay.<sup>10</sup> When the right to a lawyer applies, including in criminal or civil proceedings, “[n]o court... shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law.<sup>11</sup>

Lawyers must be granted prompt and regular access to individuals who have been deprived of their liberty, regardless of whether they have been charged with a crime.<sup>12</sup> Initial lawyer-client meetings should occur from the very outset of detention, and in a matter involving suspected criminal conduct, before and during questioning of a suspect by the competent authorities, such as police, and investigating judges.<sup>13</sup> Any delay in access to counsel must be determined and justified on a case-by-case basis. In any case delay should not exceed “forty-eight hours from the time of arrest or detention”.<sup>14</sup> Ensuing meetings between lawyers and their clients should be long enough to allow the lawyer and client to prepare the case. International standards related to the rights of people charged with a criminal offence, including the ICCPR, provide that a client must be granted “adequate time and facilities for the preparation of his defence”.<sup>15</sup> The UN Basic Principles on the Role of Lawyers, among other standards, affirm that those detained “shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality”.<sup>16</sup> Because confidentiality is paramount to an effective lawyer-client relationship, international standards specify that lawyer-client consultations between a detained person and their

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<sup>9</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review: Myanmar, UN Doc. A/HRC/17/9 (2011), para. 104.6.

<sup>10</sup> See ICCPR, Article 14(3)(d); UN Basic Principles on the Role of Lawyers, Principles 1 and 6; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 76.

<sup>11</sup> UN Basic Principles on the Role of Lawyers, Principle 19.

<sup>12</sup> See UN Basic Principles on the Role of Lawyers, Principle 7; General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principle 17; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 34; Human Rights Committee, Concluding Observations on Georgia, UN Doc. CCPR/C/79/Add.74 (1997), para. 28; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8.

<sup>13</sup> See General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2012), Guideline 3, para 43(b); Human Rights Council, Resolution 13/19 on Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, UN Doc. A/HRC/RES/13/19 (2010), para. 6.

<sup>14</sup> UN Basic Principles on the Role of Lawyers, Principle 7.

<sup>15</sup> ICCPR, Article 14(3)(b). See also General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principle 18.

<sup>16</sup> UN Basic Principles on the Role of Lawyers, Principle 8. See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 34; General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principle 18; see also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 91; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8; International Bar Association (IBA) Standards for the Independence of the Legal Profession (1990), Article 12-13; International Law Association, Paris Minimum Standards of Human Rights Norms in a State of Emergency (1984), Article 5.2(b).

lawyer “may be within sight, but not within the hearing, of law enforcement officials”<sup>17</sup>, ensuring confidentiality but taking security needs into account.

The state is obliged to ensure that lawyers have “access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients”.<sup>18</sup>

It is essential that lawyers do not face any adverse consequences for representing any client. The UN Basic Principles require that lawyers “shall not be identified with their clients or their clients’ causes as a result of discharging their functions”.<sup>19</sup> Furthermore, lawyers “must never be subjected to criminal or civil sanctions or procedures which are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients”.<sup>20</sup> Thus, lawyers “shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority”.<sup>21</sup>

Myanmar is clearly in a period of transition as it emerges from 50 years of military rule in which neither lawyers nor the judiciary were independent. Nearly every element of “the rule of law” and “the role of judges and lawyers” is under review, including revision and restructuring of the court system (with the glaring exception of any discussion of accountability for past violations of international law). In these endeavours, a number of principles, specifically pertaining to the role and functioning of lawyers derived from international standards and set out in the ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, are highly pertinent. Among them are:

“7. Since the protection of human rights may be precarious in times of crisis, lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and the defence of human rights. All branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of their professional functions or legitimate exercise of human rights. In particular, lawyers must not be identified with their clients or clients’ causes as a result of discharging their functions. The authorities must desist from and protect against all such adverse actions. Lawyers must never be subjected to criminal or civil sanctions or procedures which are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients.

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<sup>17</sup> UN Basic Principles on the Role of Lawyers, Principle 8. Outside criminal justice matters, Principle 22 establishes that “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential”.

<sup>18</sup> UN Basic Principles on the Role of Lawyers, Principle 21. See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 33; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8.

<sup>19</sup> UN Basic Principles on the Role of Lawyers, Principle 18.

<sup>20</sup> International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 7. See also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 84.

<sup>21</sup> UN Basic Principles on the Role of Lawyers, Principle 20. See also Singhvi Declaration, Article 85.

"8. In times of crisis, lawyers must be guaranteed prompt, regular and confidential access to their clients, including to those deprived of their liberty, and to relevant documentation and evidence, at all stages of proceedings. All branches of government must take necessary measures to ensure the confidentiality of the lawyer-client relationship, and must ensure that the lawyer is able to engage in all essential elements of legal defence, including substantial and timely access to all relevant case files."<sup>22</sup>

Guided by international standards and these principles and considering the findings of its research, the ICJ considers that it is essential that measures are taken to ensure: lawyers' ability to perform their professional duties without intimidation, hindrance, harassment or improper interference; lawyers' ability to provide effective legal assistance to their clients; and respect and protection of lawyers' rights to freedom of expression and association. Furthermore, measures must be taken to enhance the quality of legal education and to ensure greater access to the legal profession.

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<sup>22</sup> International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008).

### III. BACKGROUND

#### 1. Brief recent history and transition in Myanmar

The territory of Myanmar, the precursor of what is today the Republic of the Union of Myanmar, was gradually captured through a series of wars by British colonial authorities from India in the 19<sup>th</sup> century (who named the country Burma), and was declared a formal colony in 1937. British Indian colonial law governed the country exclusively until World War II. After the war, the Aung San-Attlee Agreement of 1947 provided for the election of a constituent assembly to draft a Constitution, approved the same year. The Panglong Agreement of the same year established that contested border areas inhabited mainly by ethnic groups distinct from the majority Burman population, might at some point obtain greater autonomy in a federalist system.

When on 4 January 1948 the Union of Burma formally became a sovereign independent republic, existing laws, insofar as they were not inconsistent with the new Constitution, remained in force. A Laws Revision Committee classified and published the pre-independence laws still in force and the laws enacted up to 1954 in the Burma Code (Volumes I to XIII). These volumes included, amongst other things, the Penal Code, Code of Criminal Procedure, Code of Civil Procedure, Bar Council Act and the Legal Practitioners Act, all introduced by the British colonial authorities.

A *coup d'état* by General Ne Win in March 1962 established the Revolutionary Council and its 'Burmese Way to Socialism'. Existing laws remained in force until repealed. The 1947 Constitution was superseded in January 1974 by the Constitution of the Socialist Republic of the Union of Burma. New laws and rules enacted by the Revolutionary Council were applied and enforced, but again existing laws remained in force insofar they were not contrary to the Constitution and until and unless they were repealed.

In September 1988, a month after large-scale pro-democracy protests swept through the country, the military began a wave of repression, killing as many as 3,000 people, and staged another *coup d'état*. The new junta established the State Law and Order Restoration Council (SLORC) and suspended the 1974 Constitution, declaring martial law, decreeing a series of emergency measures, but also keeping in force existing laws until annulled or repealed. After the opposition National League for Democracy (NLD), led by Aung San Suu Kyi, won relatively free elections in 1990, the SLORC refused to cede power. In practice the SLORC retained martial law, and continued to exercise control over legislative, executive and judicial powers. The SLORC did, however, transform the country's assembly from a legislative body into a National Convention tasked with drafting a new Constitution, which met from 1993 through 1995, when NLD delegates walked out in protest and the Convention was adjourned. In November 1997, the SLORC changed its name to the State Peace and Development Council (SPDC), but military rule remained in full force.

In August 2003, Prime Minister General Khin Nyunt announced a "Seven Step Roadmap to Democracy" and the National Convention resumed the following year. In September 2007, in the midst of anti-government protests led by Buddhist monks, popularly known as the "Saffron Revolution", the Convention finished drafting a new Constitution. In the immediate wake of devastating Cyclone Nargis in May 2008, a referendum on the draft Constitution took place in which, according to the government, 92.48 per cent of voters approved the Constitution, with 26 million out of 27 million eligible voters visiting the polls.

November 2010 saw Myanmar hold its first general election in 20 years, widely criticized as neither free nor fair. A week later, however, Aung San Suu Kyi was released from house

arrest (having been detained for nearly 15 of the previous 21 years), and in March 2011 Thein Sein assumed the presidency, bringing Myanmar's new Constitution fully into force and ending a half-century of military rule. Aung San Suu Kyi won a Parliamentary seat during the April 2012 by-elections, and immediately joined the President in calling for respect for the rule of law in Myanmar.

Since then, Myanmar has reviewed, amended, abolished, and passed hundreds of laws, shifting the legal landscape in ways felt by every sector of society, including that of the legal system and profession itself.

## **2. Myanmar's legal system**

As a result of Myanmar's turbulent recent history, the country's legal system exhibits strong influence from the English common law tradition (as it was received and codified in British India in the 19<sup>th</sup> and early 20<sup>th</sup> centuries), overlaid by four decades of increasingly authoritarian, and sometimes arbitrary, rule until 2011. Nearly all lawyers in Myanmar characterize the country's legal system as a variant of the English common law system, although in practice only infrequent use is made of such standard components of the Common Law system as written judgments and reliance on precedent.

The 2008 Constitution provides for separation of powers, the setting up of judicial and quasi-judicial bodies for Constitutional review, and the creation of a devolved structure of government. It also enshrines guarantees for respect for human rights and the rule of law, although restrictive qualifiers undermine many such provisions.

The Constitution codifies immunity for human rights violations committed by officials before March 2011,<sup>23</sup> affords the military effective veto power over any Constitutional amendments,<sup>24</sup> and confers upon the Defence Services the right to independently administer and adjudicate the affairs of the armed forces.<sup>25</sup>

The Constitution provides that existing laws, regulations, by-laws, notifications, orders, and directives and procedures remain in operation in so far as they are not contrary to the Constitution and until and unless they are repealed or amended by Parliament or government.<sup>26</sup>

The government has conceded that much of the previously applicable law in Myanmar may not be in accordance with the new Constitution.<sup>27</sup> U Sit Aye, Senior Legal Advisor to the

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<sup>23</sup> See Constitution, S. 445.

<sup>24</sup> Constitution, S. 74 *jo.* S. 109 and S. 141, respectively, reserve 110 of 440 total seats in the lower house, and 56 of 224 total seats in the upper house for Defence Services personnel nominated by the Commander-in-Chief. S. 436 of the Constitution requires a 75 per cent majority to ratify any amendment to the Constitution, *de facto* giving the military a veto.

<sup>25</sup> Constitution, S. 20(b) establishes that "The Defence Services has [sic] the right to independently administer and adjudicate all affairs of the armed forces". S. 293(b) and S. 319 provide for the establishment of permanent military tribunals, for which the Commander-in-Chief exercises appellate power. The Special Rapporteur on the situation of human rights in Myanmar has repeatedly stated the need for civilian control of the military as fundamental to any democracy that upholds the rule of law, and has recommended the amendment of these constitutional provisions. See Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/22/58 (2013), para. 76.

<sup>26</sup> See Constitution S. 446-447.

<sup>27</sup> See Human Rights Council, Working Group on the Universal Periodic Review of Myanmar, Report of the Working Group, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/17/9/Add.1 (2011), para. 10; United Nations Development Programme, *Democratic Governance in Myanmar: Preliminary Situation Analysis*, July 2012, p. 7; International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 41.

President, told the ICJ that the “British common law system is outmoded and needs reviewing, updating and harmonizing”.<sup>28</sup>

Senior government lawyers freely told the ICJ that the current Constitution suffers from multiple shortcomings and gaps—an assessment shared widely by legal observers inside and outside the country. In a fairly representative comment, one lawyer told the ICJ that “the laws are rusted”, but also that the Ministries and the Union Attorney-General’s office are hampered by a shortage of lawyers who might identify inconsistent laws. Another lawyer told the ICJ that the biggest challenge to providing effective advice to her clients, was the fact that the laws are “not stable yet” and necessary interpretive regulations are missing.

A number of existing laws and legal provisions contravene international human rights law and standards, many dating from the period of the military dictatorship. A number of reforms to those laws are being considered, but Parliament has predictably struggled with carrying out these reforms in a short time. Lack of transparency and public consultation and participation in the legal reform process are also on-going issues of concern.<sup>29</sup>

Myanmar is party to a number of international treaties,<sup>30</sup> but notably is not yet a party to many of the key international human rights legal instruments, including the International Covenant on Civil and Political Rights (and its two Optional Protocols); the International Covenant on Economic, Social and Cultural Rights (and its Optional Protocol); the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (and its Optional Protocol); the International Convention for the Protection of All Persons from Enforced Disappearance; and many Optional and Additional Protocols to other human rights conventions. At the UN Human Rights Council’s Universal Period Review of Myanmar in 2011, however, national authorities said that the country “is also considering to become party to the Human Rights instruments that it has not yet acceded to, depending on its resources and capacity to fully implement the obligations as a developing country”.<sup>31</sup>

### **3. The legal profession in a time of transition**

The legal profession in Myanmar has low public and professional standing, due to a history of eroded respect for the rule of law, political oppression, and endemic corruption. It will take time and considerable political will to overcome some of the lack of independence and other challenges that lawyers have faced and some still face.

Nearly all the lawyers who spoke with the ICJ stated that they thought the legal profession has functioned more freely since 2011, with far less official harassment and interference with their work. However, challenges remain and lawyers working on politically sensitive cases especially have seen the least improvement since the reform process started.

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<sup>28</sup> Interview with ICJ researcher, Naypyidaw, 28 May 2013.

<sup>29</sup> See Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the General Assembly, UN Doc. A/67/383 (2012), para. 70-72 and 95.

<sup>30</sup> Among others the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the Convention on the Rights of Persons with Disabilities; the Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions; the Convention Against Corruption; ILO Forced Labour Convention (No. 29); and ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87).

<sup>31</sup> Human Rights Council, Working Group on the Universal Periodic Review of Myanmar, Report of the Working Group, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/17/9/Add.1 (2011), para. 3.



Notwithstanding the improvements made since 2011, most of the lawyers with whom the ICJ met agreed that the public (including clients) still does not hold the legal profession in high regard. Some criticism, such as that lawyers are self-interested, highly solicitous or greedy, and compensated “whether the client laughs or cries”, may be heard about lawyers in many societies. But the poor public standing of the legal profession poses a significant concern to society in Myanmar as the country aims to move toward ensuring greater respect for rule of law and human rights. Due to their association with a court system widely perceived as malfunctioning and corrupt, lawyers still continue to be generally viewed as brokers—dealmakers between client and judge. Several lawyers explained that the public still considers that the quality of lawyers’ legal knowledge, analytical and advocacy skills are irrelevant because cases are not determined on the basis of law but rather bribery or influence. One senior lawyer said that some people actually perceive a lawyer’s involvement as detrimental to their case, as an obstacle rather than a means to strike an advantageous deal. Indeed, one lawyer identified a loss of trust by clients as “the biggest blow to the legal profession”. Junior lawyers in particular are generally seen as poorly educated and inexperienced, and unethical in their pursuit of fees. This is in spite of the fact that they spend much of their fledgling career providing legal advice for free.

Some lawyers with whom the ICJ met noted a “new, merit-based reliance” on lawyers and a gradual change for the better in the legal profession’s image in Myanmar. Among the reasons for this are the high-profile legal cases that have pitched farmers against government, military and big corporate interests; the efforts of lawyers networks to provide free legal assistance to those who cannot afford it; and an increasing awareness that a good lawyer can advance one’s cause. A lawyer in Bago, for example, remarked that the police no longer perceived themselves invulnerable to complaints. Others said that the general public too is growing more appreciative of the profession, and a senior lawyer and member of the NLD noted a newfound interest in legal matters, caused amongst other things by increased foreign direct investment and the expectation and demand for the predictability of the rule of law.

Some of the more senior lawyers with whom the ICJ met, however, continued to be more sceptical about the current state of their profession. A senior lawyer in Bago spoke of “shadows of the past” that remain hanging over the courts, such as the continued arbitrary use of contempt of court proceedings against lawyers who raise critical arguments. A senior civil lawyer in Mandalay observed that the legal profession’s problems are an unresolved inheritance from the previous system, although he said that the political and legal transitions were sustainable if done properly. In the opinion of another senior lawyer in Bago, whose license remains revoked, however, the judiciary is far behind in adapting to either transition. One of his peers characterized the Constitution as both “very weak” and “very ugly”, and recalled that widespread corruption persists within the court system, obstructing change. U Sit Aye, Senior Legal Adviser to the President, was fair in pointing out that many, if not most, judges and lawyers lack capacity, experience and expertise.

#### **4. Corruption**

Nearly all of the 60 lawyers to whom the ICJ spoke identified corruption in the form of misuse of influence and monetary incentives for particular legal outcomes throughout the whole legal system as the most acute challenge to their independence as individual lawyers and to the legal profession overall. They explained that corruption underlies and affects every aspect of a lawyer’s career, from completing law school, to retaining clients, accessing information, meeting with clients who are detained, securing meetings, submitting motions, presenting witnesses, winning cases, ensuring the enforcement of judgments, and retaining their licenses to practice law. In words of one lawyer, “I will lose if my opponent has

money”; according to another, corruption is “in every court, in every case.” The consensus view of lawyers speaking to the ICJ was that while corruption varies in degree among individuals, police stations, and courts, it is never absent from the equation, or thus from lawyers’ (and clients’) calculations vis-à-vis fees, forum, and overall strategy. It is so deeply embedded into the legal system that it is essentially taken for granted; accepted if not embraced.

Corruption is by no means limited to the judicial system, either. Transparency International, an NGO that monitors corporate and political corruption in international development, placed Myanmar 172<sup>nd</sup> out of 176 countries it reviewed in its 2012 Corruption Perceptions Index, which ranks countries based on how corrupt a country’s public sector is perceived to be.<sup>32</sup> In its 2011 survey of Worldwide Governance Indicators, the World Bank put Myanmar in the 0<sup>th</sup>-5<sup>th</sup> percentile for four out of five indicators including “Control of Corruption”, which concerns perceptions of the extent to which public power is exercised for private gains, including petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.<sup>33</sup>

Corruption within the legal system is worst at the lower rungs of the administrative system, at the district and township level administrative authorities—“decentralized” in the words of one lawyer. While one lawyer from Bago told the ICJ “there is so much corruption, you cannot fight it”, a small group of lawyers in Pyay have organized themselves and refuse to accept or solicit bribes, demonstrating how the problem can and must be confronted. Individuals—lawyers, clients, authorities—on both the give and the take, must stop and protest, while the authorities empowered to change the legal system must take steps toward eradicating it. It must be prevented and punished robustly.

Toward this end, the ICJ welcomes the Myanmar’s government’s accession to the UN Convention against Corruption in January 2013, and its subsequent creation of an anti-corruption committee. In July 2013, Parliament passed a new anti-corruption law that superseded the country’s 66 year-old domestic legislation. The adverse effects of corruption on the administration of justice in Myanmar cannot be overstated, and the independence of the legal profession will be significantly compromised until and unless corruption at every level is addressed.

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<sup>32</sup> See Transparency International, Corruption by Country: Myanmar (<http://www.transparency.org/country#MMR>).

<sup>33</sup> See World Bank, Worldwide Governance Indicators: Myanmar (<http://info.worldbank.org/governance/wgi/index.aspx#home>).

#### IV. POLITICAL INFLUENCE AND SPECIAL INTERESTS

On-going challenges to the independence of lawyers in Myanmar take many forms. Broadly, they fall in one of two categories: actions by state and security authorities against individual lawyers in ways that undermine their independence, or failures to initiate, or fully implement, steps necessary to improve the profession's independence as a whole. The next two sections of this report address the former category, concerns about interference with the independence of individual lawyers.

These types of attacks on the legal profession's independence have a well-documented history in Myanmar, and so exist as 'old habits' of a military government only recently replaced by one largely made up of civilians. In 1992, the United Nations Commission on Human Rights decided to nominate a Special Rapporteur to establish direct contact with the Government and people of Myanmar, with a view to "examining the situation of human rights" in the country and "following any progress towards the transfer of power to a civilian government".<sup>34</sup>

Spanning two decades, the picture that emerges from the Special Rapporteurs' yearly reports<sup>35</sup> is one of systematic violations of the human rights of the population of Myanmar by its authorities, through the application of a harsh 'rule by law' system that left little room for dissent. In this context, the Special Rapporteur repeatedly criticized the regime's systematic attacks on the legal system's independence.<sup>36</sup> Though decreasing overall, in fits and starts, actions of the state and security officials that undermine human rights and the

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<sup>34</sup> Commission on Human Rights, Resolution 1992/58 on Situation of human rights in Myanmar, UN Doc. E/CN.4/RES/1992/58 (1992), para. 3.

<sup>35</sup> They can be accessed through the OHCHR's database:

[http://ap.ohchr.org/documents/dpage\\_e.aspx?c=125&su=129](http://ap.ohchr.org/documents/dpage_e.aspx?c=125&su=129).

<sup>36</sup> See, among others, Yoza Yokota, Special Rapporteur on the situation of human rights in Myanmar, Report of the Special Rapporteur to the Commission on Human Rights, UN Doc. E/CN.4/1994/57 (1994), para. 46 regarding the revocation of lawyers' licenses; Rajsoomer Lallah, Special Rapporteur on the situation of human rights in Myanmar, Report of the Special Rapporteur to the Commission on Human Rights, UN Doc. E/CN.4/1997/64 (1997), para. 28-30 regarding the lack of fair trial guarantees; Rajsoomer Lallah, Special Rapporteur on the situation of human rights in Myanmar, Report to the Commission on Human Rights, UN Doc. E/CN.4/2000/38 (2000), para. 18-29 regarding the lack of independence of the judiciary, the breakdown of the rule of law under the junta, the lack of due process and judicial control over detention, the suppression of the freedom of individual lawyers to exercise their profession and defend opponents of the regime, and the withdrawal of lawyers' licenses; Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar, Report to the Commission on Human Rights, UN Doc. E/CN.4/2002/45 (2002), para. 40 regarding the arrest of two lawyers for political activity; Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar, Report to the Commission on Human Rights, UN Doc. E/CN.4/2004/33 (2004), para. 41 regarding detainees' lack of access to a lawyer; Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar, Report to the General Assembly, UN Doc. A/61/369 (2006), para. 34-39 regarding the misuse of the legal system, which denies rule of law and represents a major obstacle to the exercise of human rights; Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/4/14 (2007), para. 49 regarding the lack of independence of the judiciary, which provides a "legal" basis for the abuses of power and exonerates those responsible for serious human rights violations, the abuse of due process in political trials and the denial of rights in detention; Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/7/18 (2008), para. 49 regarding the abusive application of anti-terror laws against lawyers; Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/10/19 (2009), para. 20 regarding the lack of representation by counsel in court, para. 25 regarding difficulties faced by defence lawyers in gaining access to their clients and pertinent information on the case, and para. 26 regarding the conviction of defence lawyers for contempt of court. In his latest report to the Human Rights Council (UN Doc. A/HRC/22/58, 17 April 2013), the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, noted seeing no evidence that the judiciary is developing any independence from the Executive (para. 63), and expressed continued concern over information he received of on-going intimidation of lawyers by State officials and arbitrary revocation of licenses (para. 67).

independence of the system of justice remain persistent problem areas for individual lawyers, their clients, and the administration of justice generally in Myanmar.

Government officials and institutions continue to restrict the independence of lawyers. This is particularly the situation when lawyers are involved in 'political cases': generally, those that challenge the government, officials or their vested interests. They also include cases (generally criminal) involving human rights defenders or alleged acts involving violations of human rights by authorities; land grabbing by authorities, companies or powerful individuals; grievances of ethnic minority groups; and political activities by high profile individuals. In these cases, the generally applicable challenges to the independent operation of the legal community, described in Part VIII below, are intensified and exacerbated, while added to them are monitoring and harassment by state intelligence agents, fabrication of evidence, and pre-trial determination of judgments.

It is fundamental to any legal system operating in accordance with the rule of law and respecting human rights that judges be independent and impartial.<sup>37</sup> In the words of the UN Special Rapporteur on the situation of human rights in Myanmar, "[a]n independent, impartial and effective judiciary is central to ensuring that the rule of law is upheld and that laws are applied to safeguard human rights."<sup>38</sup>

An individual's right to adjudication by an independent and impartial tribunal "is an absolute right that is not subject to any exception".<sup>39</sup> Independence means that "[n]o one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge".<sup>40</sup> The judiciary and each individual judge must be free to decide cases "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".<sup>41</sup>

The impartiality of the judiciary has both subjective and objective aspects. Subjective impartiality means that: "judges must not allow their judgment to be influenced by personal bias or prejudice".<sup>42</sup> To demonstrate objective impartiality "the tribunal must also appear to a reasonable observer to be impartial".<sup>43</sup>

The requirement of independence applies equally to lawyers, whose duty it is to advise their clients as to their legal rights and obligations, and the workings of the legal system in so far as it is relevant to them, and to assist their clients in every appropriate way, including before the courts, where appropriate.<sup>44</sup> In carrying out these activities, lawyers must be

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<sup>37</sup> See, among others, ICCPR, Article 14(1); UDHR, Article 10; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 1; UN Basic Principles on the Independence of the Judiciary, Principle 1 and 2. This right applies equally to juveniles facing deprivation of their liberty, Convention on the Rights of the Child, Article 37(d). Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, recently reiterated that "an independent judiciary lies at the very heart of a system of government that respects the rule of law" (UN Doc. A/HRC/22/58 (2013), para. 63).

<sup>38</sup> Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the General Assembly, UN Doc. A/67/383 (2012), para 74.

<sup>39</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

<sup>40</sup> Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 4.

<sup>41</sup> UN Basic Principles on the Independence of the Judiciary, Principle 2. See also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 2.

<sup>42</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 21.

<sup>43</sup> *Ibid.*

<sup>44</sup> See UN Basic Principles on the Role of Lawyers, Principle 13.

able to act freely and independently without intimidation, hindrance, harassment or improper interference, including from the authorities.<sup>45</sup>

It is also fundamental that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”.<sup>46</sup> This means that courts cannot discriminate against any individual or his or her lawyer based on “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>47</sup> Providing equal access to the courts also means that favoured groups and politically powerful government institutions cannot be granted immunity for any illegal actions they are responsible for—whether as a result of immunity under the law or practices that lead to a lack of investigation and prosecution.<sup>48</sup>

Equality before the law applies to lawyers as well as to their clients, and any discrimination that would otherwise exist against their clients should be forestalled by a lawyer’s presence.

## 1. Police

When the interests of the police force or police officers are directly relevant to litigation, additional pressures and threats may face lawyers, as several lawyers explained to the ICJ. The police often play a detrimental role in ‘political’ cases, partaking in or allowing corruption, fabrication of evidence, courtroom delays, politically motivated investigations and prosecutions, denial of access to clients, and the undermining of the presumption of innocence.

Robert San Aung, a prominent activist lawyer, described how a police lieutenant prompted the prosecution of his client, U Nay Myo Zin, on defamation charges after he spoke publicly about police corruption in January 2013.<sup>49</sup> On 2 May 2013, U Nay Myo Zin was convicted of defamation and ordered to pay a fine of 20,000 Kyat or serve three months in prison; he chose the latter. He was released from prison in unclear circumstances on 17 May 2013.

Another lawyer representing the family members of a young woman who died while in police custody, reportedly tried to initiate proceedings against the police officers believed to be involved, but the authorities have refused to move forward with the case. It is also alleged that the doctor who examined the body of the victim made false reports because of fears of retaliation by the police. The husband of the victim has been charged with criminal conduct; it is believed that these charges are baseless and instead are motivated by the husband having been involved in attempts to pursue a case against the police.

Myanmar’s military ruled the country for nearly 50 years until 2011. While many lawyers in Myanmar told the ICJ that litigation was and remains a difficult and dangerous endeavour when confronting military interests, investigation of this issue was beyond the scope of the

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<sup>45</sup> See UN Basic Principles on the Role of Lawyers, Principle 16.

<sup>46</sup> ICCPR, Article 26; UDHR, Article 7.

<sup>47</sup> ICCPR, Article 2(1) and 26. See also UDHR, Article 2; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 9. International law and standards require states to undertake to eliminate all forms of discrimination. As a State party, Myanmar is bound by the obligations to this effect contained in the Convention on the Elimination of All Forms of Discrimination against Women, Article 2; Convention on the Rights of Persons with Disabilities, Article 4.

<sup>48</sup> See Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc. CCPR/C721/Rev.1/Add.13 (2004), para. 18. The Convention Against Torture, for example, imposes an affirmative obligation on states to investigate and prosecute credible allegations of torture, Article 7.1

<sup>49</sup> See Myanmar Times, *Activist opts for prison over fine*, 2 May 2013 (<http://mmtimes.com/index.php/national-news/6611-activist-opts-for-prison-time-over-fine.html>).

ICJ's immediate research. Given, however, that the Myanmar Constitution of 2008 shields military personnel from accountability in the nation's courts; confers upon the defence services the right to independently administer and adjudicate the affairs of the armed forces;<sup>50</sup> establishes a system of military courts that are ultimately answerable to the Defence Services Commander-in-Chief, with no right of appeal to the Supreme Court or other civilian body;<sup>51</sup> and provides a blanket amnesty for members of past military regimes for "any act done in the execution of their respective duties",<sup>52</sup> military interests often impact the administration of justice in civilian courts and should be explored further.

## 2. Religion and race

Discrimination on the basis of religion and ethnicity also inhibits the ability of lawyers to represent clients.

Recent inter-communal and anti-Islamic violence in Myanmar has exposed social fault lines in Myanmar that have significantly impacted the administration of justice. The religious and ethnic identity of parties in legal disputes seriously affects those parties' access to justice and the extent to which they can expect just outcomes from litigation.

Conceptions and perceptions of "justice" vary among religious and ethnic groups, whose languages and experiences with armed conflict are also different.

Lawyers who spoke with the ICJ noted discrimination against the country's Muslim population, particularly against the Rohingya ethnic and religious minority, who reside primarily in Rakhine State in western Myanmar. A Human Rights Watch report issued in April 2013 raised concern that members of the Rohingya community had been subjected to arbitrary arrest, detention and torture, and while detained they had routinely been denied access to lawyers and family members.<sup>53</sup> In his 2013 report to the Human Rights Council, the Special Rapporteur on the situation of human rights in Myanmar expressed concern about "information he has received of the on-going intimidation of lawyers by state officials, including lawyers in Rakhine State seeking to provide legal counsel to Muslim defendants".<sup>54</sup>

Few lawyers, even among non-Rohingya Muslim populations, are willing to represent Rohingya clients. One of the lawyers who spoke with the ICJ said no one at his firm dared to take up the defence of a Muslim in Rakhine State accused of murder, as they feared that the authorities could not protect them from retaliatory violence by Buddhists.

Discrimination also erodes independence and impartiality of the legal system in the other direction, favouring Buddhism, which as the main religion of the majority of Myanmar's population as well as several major ethnic minority groups, holds a special place in Myanmar culture and society. Monks are revered and the *sangha* (monkhood) has significant spiritual, social and political significance. According to information received, the involvement of monks in a legal dispute can affect the impartiality of the adjudicating court and the ability of a lawyer to represent his or her client's interests effectively. In the experience of one law firm:

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<sup>50</sup> See Constitution, S. 20(b).

<sup>51</sup> See Constitution, S. 293, 319 and 343(b).

<sup>52</sup> Constitution, S. 445.

<sup>53</sup> See Human Rights Watch, *All You Can Do Is Pray*, April 2013, p. 37.

<sup>54</sup> Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/22/58 (2013), para. 67.

"[Our] cases are all fine except when we have cases involving a monk. In one case, the monk said that our client intruded onto land. It is not true but it is very sensitive because the plaintiff is a monk. We need to be careful because the monks in our community can make a complaint to the authorities and it will cause us problems."

A Christian lawyer from the same firm said that she refrains from representing individuals in matters in which monks are involved. Instead she leaves the representation in such cases to her Buddhist colleagues.

## V. DISCIPLINE AND HARRASSMENT OF LAWYERS

Lawyers in Myanmar suffer personal and professional adverse consequences as a result of their lawful efforts to represent clients. The past two years have seen dramatic improvements in this area, but serious problems persist that hamper lawyers' ability to provide effective legal representation. In particular, official disciplinary action, including the revocation of licenses, is used against lawyers involved in cases considered to be "politically sensitive". Lawyers acting in such cases also experience other forms of harassment, threats and monitoring by state security officials; some have faced criminal charges, including contempt of court, brought presumably in an effort to discourage or "punish" them for their role which is viewed as "opposing" or challenging powerful state or private interests.

Establishing a code of professional conduct for lawyers, consistent with international standards and safeguards on the independence and role of lawyers, is essential to the integrity of any judicial system. These codes can fulfil a dual function: in all cases, they serve to instil a common understanding of the high professional standards by which lawyers should abide; and they may also provide a basis for disciplinary action. The UN Basic Principles on the Role of Lawyers states that: "Codes of professional conduct shall be established by the legal profession through its appropriate organs, or by legislation".<sup>55</sup> Disciplinary proceedings cannot be arbitrary and opaque, but must be conducted "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession".<sup>56</sup> Complaints against lawyers in their professional capacity should be "processed expeditiously and fairly under appropriate procedures",<sup>57</sup> and examined and determined on the basis of the disciplinary code and consistently with international standards.

International standards recognize the validity of different mechanisms for managing the discipline of lawyers,<sup>58</sup> as long as these mechanisms comply with fundamental principles demanding that the responsible body should be impartial and ensure that proceedings are conducted with full observance of the requirements of fair and proper procedure.<sup>59</sup> Lawyers accused of wrongdoing must have "the right to be assisted by a lawyer of their choice".<sup>60</sup> A disciplinary hearing must be held by an independent and impartial authority or by a court,<sup>61</sup> which demands the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.<sup>62</sup> In a disciplinary hearing against lawyers, the right to a fair hearing under article 14 of the ICCPR, including the principle of equality of arms, must be protected. In accordance with this right, lawyers should be informed of the nature and cause of the charges against them; they and their legal representatives should have adequate time and facilities to prepare and present a defence; they should have the opportunity to challenge the allegations and evidence against them, including by questioning witnesses, and should have the opportunity to present evidence,

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<sup>55</sup> UN Basic Principles on the Role of Lawyers, Principle 26. See also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 102. The International Bar Association (IBA) Standards for the Independence of the Legal Profession (Standard 21) reserve this task for lawyers' associations.

<sup>56</sup> UN Basic Principles on the Role of Lawyers, Principle 29.

<sup>57</sup> UN Basic Principles on the Role of Lawyers, Principle 27.

<sup>58</sup> See UN Basic Principles on the Role of Lawyers, Principle 28; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 24.

<sup>59</sup> See UN Basic Principles on the Role of Lawyers, Principle 27 and 29. See also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 106; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 22.

<sup>60</sup> UN Basic Principles on the Role of Lawyers, Principle 27.

<sup>61</sup> See UN Basic Principles on the Role of Lawyers, Principle 28.

<sup>62</sup> See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 25.



including through calling witnesses.<sup>63</sup> The decision should be in writing and reasoned on the basis of the law and code of professional ethics, which conform to international standards, as applied to the admissible evidence presented.<sup>64</sup> The lawyer should have the right to appeal the finding and the sanction before an independent and impartial judicial body, and receive a reasoned decision within a reasonable time.<sup>65</sup> All sanctions must be proportionate to the gravity of the case and consistent with international human rights standards.

The system as a whole must be designed to ensure that the only purposes for which disciplinary action is used are maintaining the professional standards of lawyers and ensuring that lawyers act in the best interests of their clients in a manner that is consistent with professional standards and the independence, honour and dignity of the profession, as set out in international standards.<sup>66</sup>

The sanction of being held in contempt of court must not be imposed arbitrarily or used to punish a lawyer for advocating for his or her client. While lawyers must “at all times maintain the honour and dignity of the profession as essential agents of the administration of justice”<sup>67</sup>, they are entitled to civil and criminal immunity for “relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority”.<sup>68</sup> The arbitrary use of contempt proceedings against lawyers for carrying out their professional duties is not only inconsistent with the respect for the independence of the legal profession but also violates the right to freedom of expression.

The government must refrain from interfering in a lawyer’s representation of a client and should take affirmative steps to ensure that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference”.<sup>69</sup> Authorities have a duty to respect lawyers’ rights to freedom of expression<sup>70</sup>, and to provide adequate safeguards to protect lawyers whose security is threatened as a result of discharging their functions.<sup>71</sup>

## **1. Disciplinary action and disbarment**

In Myanmar, the Supreme Court has the authority to discipline lawyers for various forms of misconduct. Different rules and procedures apply to higher-grade pleaders and advocates (see Section VII.2), with the former being governed by the Legal Practitioners Act<sup>72</sup> and the latter by the Bar Council Act.<sup>73</sup>

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<sup>63</sup> See International Bar Association (IBA) Guide for Establishing and Maintaining Complaints and Discipline Procedures, para. 7 and 8.

<sup>64</sup> See International Bar Association (IBA) Guide for Establishing and Maintaining Complaints and Discipline Procedures, para. 17; UN Basic Principles on the Role of Lawyers, Principle 29.

<sup>65</sup> See UN Basic Principles on the Role of Lawyers, Principle 28; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 105; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 24.

<sup>66</sup> International Commission of Jurists, *Disciplinary action against lawyers in CIS countries: analysis of international law and standards*, 18 June 2013, p. 7.

<sup>67</sup> UN Basic Principles on the Role of Lawyers, Principle 12.

<sup>68</sup> UN Basic Principles on the Role of Lawyers, Principle 20. See also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 85.

<sup>69</sup> UN Basic Principles on the Role of Lawyers, Principle 16. See also Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 75.

<sup>70</sup> See UN Basic Principles on the Role of Lawyers, Principle 23.

<sup>71</sup> See UN Basic Principles on the Role of Lawyers, Principle 17. See also: International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 7.

<sup>72</sup> See Legal Practitioners Act 1999, S. 12-15.

<sup>73</sup> See Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 10-13.

The Legal Practitioners Act empowers the Supreme Court to dismiss or suspend higher-grade pleaders for certain enumerated disciplinary offences, including a criminal conviction “implying a defect of character which unfits him to be a pleader”; taking instruction from a party other than her or his client; or acting in a fraudulent or “grossly improper” manner.<sup>74</sup> The Supreme Court may also suspend or dismiss higher-grade pleaders “for any other reasonable cause”.<sup>75</sup> Judges in subordinate courts are able to initiate investigations into misconduct by higher-grade pleaders and make recommendations to the Supreme Court, which is empowered to make a final ruling on suspension or dismissal. Higher-grade pleaders must be given the opportunity to defend themselves in a hearing before the subordinate court, and any evidence they present is to be admitted to the record.<sup>76</sup>

The Bar Council Act is less specific about the form of conduct that justifies disciplinary action, granting the Supreme Court power to “reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct”.<sup>77</sup> Disciplinary action against advocates may be initiated by complaints to the Supreme Court by courts, the Bar Council or “any other person”. The Supreme Court may then either dismiss the case or refer it to either a special Bar Council “Tribunal” or (after consultation with the Bar Council) a District Court.<sup>78</sup> After receiving the findings of the Bar Council or District Court, the Supreme Court must convene a hearing at which the advocate, Bar Council and Attorney-General are given the opportunity to speak.<sup>79</sup>

In practice, save for the fact that lawyers are seldom given an opportunity to defend themselves, it is unclear how these procedures are implemented and who holds ultimate responsibility for disciplinary actions.

According to the International Bar Association, more than 1,000 of Myanmar’s estimated 48,000 lawyers<sup>80</sup> have been disciplined in Myanmar over the past 20 years,<sup>81</sup> with many having their licenses revoked (essentially disbarred) or suspended. While many lawyers have had their licenses reinstated during the past two years, recent reports indicate that as many as 200 lawyers, who were disbarred for political reasons, may remain without their licenses.<sup>82</sup> The ICJ spoke with many of these lawyers, but was unable to confirm the total number of nationwide cases of disciplinary action and license revocation and restoration.

According to the information available to the ICJ, authorities frequently used disciplinary procedures to harass and warn lawyers in sensitive cases, despite no apparent wrongdoing on the part of the lawyer. Procedural protections, including the right of lawyers to present evidence and defend themselves during disciplinary hearings, were reportedly often ignored.

There have been far fewer politically motivated disciplinary proceedings during the recent period of quasi-civilian government. Many lawyers with whom the ICJ spoke said that they are unaware of recent license revocations. But the ICJ has confirmed at least four instances of lawyers whose licenses had been revoked or suspended during the past two years for

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<sup>74</sup> See Legal Practitioners Act 1999, S. 12-13.

<sup>75</sup> See Legal Practitioners Act 1999, S. 13(f).

<sup>76</sup> See Legal Practitioners Act 1999, S. 14.

<sup>77</sup> Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 10(1).

<sup>78</sup> Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 10(2) and 11.

<sup>79</sup> See Bar Council Act, India Act XXXVIII 1926 (amended 1989), article 12.

<sup>80</sup> See DLA Piper New Perimeter, Perseus Strategies and Jacob Blaustein Institute for the Advancement of Human Rights, *Myanmar Rule of Law Assessment*, March 2013, p. 35.

<sup>81</sup> See International Bar Association’s Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 63.

<sup>82</sup> See Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/22/58 (2013), para. 67.

seemingly political reasons. Two lawyers reportedly had their licenses revoked for making public comments of a “political nature” and critical of the judiciary. Another believes that his license was suspended because he represented a client against a powerful and wealthy local community leader, even though the official reasons given by the court which disciplined him relate to his missing a court date; such absences are not uncommon and do not generally result in a suspension.

Many lawyers, some known for their human rights cases or political activities, who lost their licenses under previous military regimes, have had them restored since the change of power, including four who spoke with the ICJ.<sup>83</sup> Myanmar’s National Human Rights Commission has worked with the Union Attorney-General’s Office to secure the return of licenses in some cases.

Despite these positive developments, and assurances from the government that lawyers whose licences were revoked prior to 2011 can get their licenses back if “no cause exists to deny them on grounds of codes of conduct or discipline under the relevant laws and rules”,<sup>84</sup> the process for securing license restoration remains unclear. The ICJ spoke with 11 lawyers whose licenses remain revoked and who cannot therefore practice law, and also heard accounts of other colleagues in a similar situation. One lawyer said that those who have not been given permission to begin practicing law again are “the most activist [and] threatening; those working for workers [and] peasants”. Several disbarred lawyers have made applications to the government to have their licenses restored but have not received a response.

## **2. Monitoring, harassment, and threats**

Under military rule, monitoring and intimidation of lawyers by state security officials and intelligence agents was common and, in many instances, severe. One lawyer described his experience as follows: “Very often in the past, in the middle of the night Military Intelligence would come and knock on your door for a ‘brief discussion’ after having seen a client, so lawyers were afraid”. Public events and private meetings held by lawyers were also frequently interrupted or terminated by visits from police or military officers.

While this type of contact between lawyers and security officials has reportedly decreased significantly in the last two years, as recently as March 2013, the UN Special Rapporteur on the situation of human rights in Myanmar expressed concern about “on-going intimidation of lawyers by State officials”.<sup>85</sup> A prominent human rights lawyer from Myanmar told the ICJ that on a recent fact-finding mission to Ma Day Island in Rakhine State he was met at the airport by 20 police officers, who followed him throughout the mission. A lawyer was followed and questioned by a Special Branch officer after privately meeting an ICJ representative in May 2013, and another had a similar experience after speaking with the delegation from the International Bar Association in August 2012. Several training or rights-awareness workshops held in early 2013 were interrupted by visits from police officers.<sup>86</sup>

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<sup>83</sup> See, e.g., Irrawaddy, *Activist Lawyers Have Licenses Returned*, 21 November 2012 (<http://www.irrawaddy.org/archives/19466>).

<sup>84</sup> See Asian Human Rights Commission, *Lawyers can get revoked licenses back, govt says*, 25 May 2012 (<http://www.humanrights.asia/news/press-releases/AHRC-PRL-017-2012>).

<sup>85</sup> Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/22/58 (2013), para 67.

<sup>86</sup> Matthew Bugher, ICJ consultant and co-author of this report, was present when Special Branch officers interrupted a workshop on women’s rights led by local lawyers.

Additional information on this subject appears in Section VI below.

### **3. Criminal charges**

Historically, lawyers in Myanmar were routinely subjected to criminal prosecution and conviction related to their peaceful political activities or their representation of clients in politically sensitive cases. They have been prosecuted and convicted for political reasons not connected to a legitimate criminal justice purpose. At present, despite improvement, according to information provided to the ICJ “there remain fabricated cases against lawyers for retaliation, mostly in political cases. It works the other way too, in that authorities sometimes ignore the real wrongdoing of lawyers who are not working on political cases.”

Under the categories of “Contempt of the Lawful Authority of Public Servants” and “False Evidence and Offenses against Public Justice”,<sup>87</sup> the Myanmar Penal Code lists a number of crimes which, when applied in the context of conduct in a courtroom, are often referred to generally as “contempt of court.” Judges threatening lawyers with contempt has been a strategy for punishing lawyers working on politically sensitive cases. The use of this “chain dragging at the legs of the lawyers” for political reasons has reportedly decreased, but the threat thereof – implicit or explicit – reportedly continues to have a chilling effect on the legal profession. The ICJ spoke with one lawyer who faced contempt charges in 2011, but was acquitted after appeal to the Supreme Court. In 2012, after several mass releases of political prisoners and a public call from President Thein Sein for the return of exiled persons to Myanmar, a lawyer who had fled the country when he was charged with intentional insult to a public servant sitting in judicial proceedings in 2008 (after three of his clients who were arrested during a march calling for the release of Aung San Suu Kyi turned their backs to the court during their trial in protest of the legal process) moved back to Yangon, only to be arrested, tried and sentenced to six months imprisonment.<sup>88</sup>

Authorities have used a number of other laws in a retaliatory manner against lawyers. These include the Unlawful Associations Act; the Emergency Provisions Act; the State Protection Act; the Lawful Assembly and Demonstrations Act; and various sections of the Penal Code.<sup>89</sup>

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<sup>87</sup> See Myanmar Penal Code, S. 172-229.

<sup>88</sup> See DVB, *Exiled activist handed prison sentence after returning to Burma*, 30 August 2012 (<http://www.dvb.no/news/exiled-activist-handed-prison-sentence-after-returning-to-burma/23539>).

<sup>89</sup> See International Bar Association’s Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 61-63; ARTICLE 19, *Myanmar: The Decree on the Right to Peaceful Assembly and Peaceful Procession*, 2012.

## VI. LAWYERS' FREEDOM OF ASSOCIATION AND EXPRESSION

Lawyers in Myanmar suffered from decades of restrictions on their ability and right to form or join associations to protect their interests and their rights to speak freely about the problems they face in their work. Despite recent improvements in the realization of the rights to free association and expression, problems remain. Most glaringly, the Myanmar Bar Council is a government-controlled body that fails to adequately protect the interests and rights of lawyers in the country. Moreover, independent bar associations and other legal groups have been unable to legally register and many lawyers remain fearful about the consequences of speaking about the legal system in public venues.

Like other citizens, lawyers are entitled to freedom of expression, belief, association and assembly. These fundamental freedoms acquire specific importance in the case of persons involved in the administration of justice. The UN Basic Principles accordingly underscore and clarify the particular rights of lawyers to take part in public discussions of matters concerning the law, the administration of justice, and human rights; to join or form local, national or international organizations; and to attend the meetings of such groups or associations without suffering professional restrictions. In turn, they emphasize that in exercising their rights to freedom of expression and association, lawyers must conduct themselves in line with the law and recognized standards and ethics of the legal profession in exercising these rights.<sup>90</sup>

Regarding freedom of association, the UN Basic Principles further clarify that:

“Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.”<sup>91</sup>

The UN Special Rapporteur on the independence of judges and lawyers has also underscored the “importance of an organized legal profession, including an independent and self-regulated association, to safeguard the professional interests of lawyers”.<sup>92</sup>

These provisions establish a clear duty for the State to abstain from interfering in the establishment and work of professional associations of lawyers. The Human Rights Committee has raised concern about requirements for the compulsory affiliation of lawyers to a State-controlled association and the need for authorization by the Executive as prerequisites for the exercise by lawyers of the legal profession.<sup>93</sup>

International standards also underscore that associations of lawyers must, however, cooperate with governments to ensure effective and equal access to legal services, and to

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<sup>90</sup> See UN Basic Principles on the Role of Lawyers, Principle 23; International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 5, which stresses that “The rights of judges and lawyers to freedom of association, including the right to establish and join professional organizations, must at all times be respected.”; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 14.

<sup>91</sup> UN Basic Principles on the Role of Lawyers, Principle 24. See also International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 17.

<sup>92</sup> Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers, Report on missions to Mozambique, UN Doc. A/HRC/17/30/Add.2 (2011), para. 79.

<sup>93</sup> See Human Rights Committee, Concluding Observations of the Human Rights Committee on Belarus, UN Doc. CCPR/C/79/Add.86 (1997), para. 14.

ensure that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.<sup>94</sup>

Lawyers' associations are created to safeguard the professional interests of lawyers and to protect and strengthen the independence of the legal profession. As associations of essential agents in the administration of justice, they also have a key role in supporting law and justice sector reform. They should be able to engage in activities, and to initiate and participate in public discussion on the substance, interpretation and application of existing and proposed legislation. They should do so in a manner that is consistent with the protection and promotion of human rights, upholding the dignity of the legal profession and the legal system.<sup>95</sup>

## **1. Myanmar Bar Council**

The Myanmar Bar Council is a statutorily mandated institution whose primary purpose is oversight of the registration and discipline of advocates. Until 1989, the Myanmar Bar Council was a 15-member body comprised of the Attorney-General, four nominees of the High Court, and ten members elected by licensed advocates.<sup>96</sup> In 1989, the Bar Council Act was amended, shrinking the Bar Council to an 11-member body comprised of the Attorney-General as Chair, the Deputy Attorney-General as Vice Chair, and the Director General of the Office of the Attorney-General as Secretary, as well as a Supreme Court judge nominated by the Chief Justice, the Director General of the Supreme Court, and six advocates nominated by the Supreme Court. Many legal observers believe this restructuring of the Bar Council was intended to secure greater government control over lawyers, in response to their having played a prominent role in nationwide pro-democracy protests in 1988.<sup>97</sup>

According to the International Bar Association in late 2012, the opinions of lawyers in relation to the role that the Bar Council has played in promoting the interests of their profession were "uniformly negative".<sup>98</sup> The 60 lawyers with whom the ICJ spoke were also unanimous in their condemnation of the Bar Council. One lawyer stated that the government's interest in the Bar Council is "a matter of control over the profession"; another said that the Council actually acts "against the interest of lawyers". Most claims were linked to descriptions of the use of disciplinary procedures against lawyers involved in "politically sensitive" cases, described above.

In addition to tackling corruption within the legal system, reform of the Bar Council into a fully independent body that acts in the interest of the legal profession ranks as a leading concern and priority for lawyers in Myanmar. The ICJ spoke with lawyers who have written papers calling for the reform of the Bar Council, and have attended events where collective demands were made for changes to the body. U Sit Aye, Senior Legal Advisor to President Thein Sein, conceded that the current Bar Council is not independent and that reform is desirable—a sentiment repeated by other senior government lawyers. In early 2013, the

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<sup>94</sup> See UN Basic Principles on the Role of Lawyers, Principle 25. For a more elaborate list on the functions of lawyers' associations, see also International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 18. See also General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2012), Principle 11.

<sup>95</sup> See UN Basic Principles on the Role of Lawyers, Principles 12 and 23; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 18.

<sup>96</sup> See Bar Council Act, India Act XXXVIII 1926, S. 4 (prior to amendment in 1989).

<sup>97</sup> See International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 61.

<sup>98</sup> International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 63-64.

government published a draft amendment to the Bar Council Act that would incorporate membership of ten advocates elected from among themselves, but would still leave the Bar Council under the chairpersonship of the Union Attorney-General. As of September 2013, the ICJ was unable to clarify whether this reform was still being considered in this form or whether further amendments were being discussed.<sup>99</sup>

## **2. Independent bar associations and lawyers groups**

In addition to their compulsory membership of the Bar Council, many lawyers have also become members of non-official, independent bar associations. The ICJ spoke with lawyers who are members of the Yangon, Mandalay and Bago Bar Associations. These and other similar groups of lawyers do not have any official or government-mandated functions, but provide outlets for communication, coordination and social interaction with each other.

Following the 1988 pro-democracy uprising, the government cracked down on independent bar associations and other groups of lawyers, denying them registration under the law.<sup>100</sup> Lawyers described submitting applications for registration renewal in the late 1980s – as well as since the change of power – and never receiving a response. Denials have impacted bar associations and lawyers’ groups in different ways. The Yangon Bar Association, for example, had to abandon most of its activities for more than two decades, while the Bago Bar Association was able to carry on many of its activities—even cooperating with local authorities on matters concerning lawyers.<sup>101</sup> Since 2011 most bar associations have resumed operations and a full range of activities, but remain in a sort of legal limbo, as they are not registered, with all attendant legal risks but without official sanction. While officials have expressed a desire to enable the registration of bar associations and legal organizations,<sup>102</sup> as of July 2013 the government had taken no positive steps to facilitate this process. One result is that lawyers have also formed less formal ‘networks’ among themselves to avoid legal scrutiny, but some of the same ambiguity and risks accompany those groups as well.

## **3. Freedom of expression**

With a general increase in freedom of expression in Myanmar since 2011, lawyers have spoken up with greater confidence than in several decades, including in particular about the need for law and justice sector reform, enhancing protection and respect for human rights and the rule of law in the context of the transition. But many lawyers told the ICJ that they still face restrictions on their right to freedom of expression, not least of which results in uncertainty and fear as to the limits of that freedom when it comes to speaking out about “politically sensitive” issues.

In July 2012, Janelle Saffin, an Australian MP, highlighted the silence of lawyers in an open “Letter to Myanmar’s Lawyers”:

“Burma’s lawyers are conspicuous by their absence from the public debate taking place on Burma’s political transition. The politicians, journalists, economists and business people are all vocal, but we hear little from the lawyers ... At all other times of political transition in Burma’s history, lawyers have been front and centre, leading and calling for legal reforms, the promotion and protection of peoples’

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<sup>99</sup> See International Bar Association’s Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 65.

<sup>100</sup> *Ibid.*, p. 61.

<sup>101</sup> *Ibid.*, p. 63.

<sup>102</sup> *Ibid.*, p. 65.

rights and for the rule of law to be adhered to. They are needed now to actively play a leading role in the development and reform of the state's legal, judicial and justice architecture."<sup>103</sup>

Several lawyers told the ICJ that they agree with Janelle Saffin but are hesitant to criticize what they perceive as miscarriages of justice or weaknesses in the justice sector, such as those described in this report, and indeed many expressed reluctance to have their names associated with comments made to the ICJ. Specifically, they fear official retaliation in the form of disciplinary action, prejudicial treatment, and even criminal charges, notably contempt of court. On 3 June 2013, lawyer Robert San Aung was taken by Special Branch police officers to Aungthabyay police station, questioned about an interview he had given in which he called for President Thein Sein's resignation, and threatened with prosecution for sedition. Lawyers also cite monitoring by intelligence services, official censorship of written opinions, and requirements to gain permission (often not granted) for public events as constituting additional barriers to their ability to express their views freely.

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<sup>103</sup> Janelle Saffin, *Where are Burma's lawyers in the transition?*, New Mandala, 18 July 2012 (<http://asiapacific.anu.edu.au/newmandala/2012/07/18/where-are-burma%E2%80%99s-lawyers-in-the-transition/>).



## **VII. SYSTEMIC BARRIERS TO THE INDEPENDENCE OF THE LEGAL PROFESSION**

As the authorities in Myanmar decrease their direct and overt restrictions on and interference with the activity of lawyers, systemic barriers to the independence of the legal profession have been placed in greater relief. These barriers show the detrimental effect of a quarter century during which the government weakened legal education in Myanmar. They also demonstrate government inaction, policy failures, and lack of financial and technical capacity. Overcoming these obstacles to the functioning of the legal system demands deliberate action to build, bolster, and bring the legal profession in Myanmar into compliance with international standards related to its independence. Unlike the politically focused concerns detailed in the sections above, these challenges to independence apply to all members of the legal profession equally.

The quality of legal education and licensing requirements and procedures are among the systemic barriers to the independence of the legal profession in Myanmar.

### **1. Legal education**

Quality legal education is an essential requirement for producing competent legal professionals who can serve their clients' interests and contribute to the rule of law and fair administration of justice. The UN Basic Principles on the Role of Lawyers place a duty on governments, professional associations of lawyers, and educational institutions to ensure that lawyers have appropriate education and training. This includes knowledge of human rights and fundamental freedoms recognized by national and international law, and an awareness of the role of lawyers and their ethical duties.<sup>104</sup>

Legal education in Myanmar is undermined by, among other factors, low admissions standards, corruption, poor curriculum and methods of instruction, and English-language examination requirements. Graduates are generally considered to be ill prepared to practice law after completing their studies.

Problems related to ensuring the independence of the legal profession in Myanmar begin in law school. Myanmar's education system deteriorated greatly during decades of military rule. Legal education in particular suffered after 1974, and again after the 1988 pro-democracy uprising. Law is considered as one of the less desirable fields of study, and therefore attracts students with lower academic qualifications.

Lawyers, including legal academics, who spoke with the ICJ were unanimous in their characterization of legal education in the country as very poor. Specific factors include low entry requirements for students, unqualified law faculty professors, a narrow and much outdated curriculum and inadequate connections with educational institutions in other countries. There is little confidence in the preparedness of law graduates to practice their profession effectively. One lawyer summarized the feelings of many, saying that "Lawyers only know civil law and criminal law. They don't know other laws. The other laws are above them. They graduate from Yangon University and they don't know about anything."

For many years, Yangon University's law school was the only law school in the country. There are now 11 institutions that provide some form of legal education. Some lawyers believe previous governments acted explicitly to downgrade and discredit the legal profession. One fact frequently cited in support of this allegation is the extremely low entry

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<sup>104</sup> See UN Basic Principles on the Role of Lawyers, Principle 9; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standards 2-4.

requirements for law programmes, which vary yearly and among universities, and whose minimum scores are pegged to admissions targets set by the Ministry of Education. Students, lawyers, and legal instructors agreed, however, that the entrance scores are consistently the lowest among all professional schools.<sup>105</sup>

A major factor in the lowering of such requirements is the high level of enrolment in the distance-learning education programme initiated in the mid-1970s for students pursuing law degrees.<sup>106</sup> Today, this programme operates under two Universities of Distance Education (UDE) in Yangon and Mandalay, and is the most popular method of obtaining a law degree in Myanmar. Qualifications for enrolment in the programme are minimal, and lawyers and legal faculty hold it in very low regard. With minimal contact between students and faculty, students prepare for English language examinations through pre-test 'intensive courses' in which they are provided with the questions that will be asked on exams.<sup>107</sup>

The language of the law curriculum and examinations is a major point of criticism among lawyers. Since at least the mid-1990s, the official language of legal instruction and examination has been English; previously it was the Myanmar language.<sup>108</sup> However, few law students have adequate proficiency in the language, making comprehension of the lectures and materials extremely limited. Lecturers often resort to explaining English language curriculum in the Myanmar language, despite being responsible for preparing students for written tests that are administered in English. Recent law school graduates describe rote memorization of English language questions and answers from review materials provided in advance or during study sessions with professors, without comprehending the substance of questions and answers. Khin Mar Yee, Head of the Department of Law at Yangon University, cited English language requirements as the greatest challenge to legal education and believes that allowing instruction and examination to be conducted in the Myanmar language would benefit law students immediately and significantly.

The need for considerable self-education upon completion of formal legal education is assumed, with a lawyer from the Shan ethnic group stating that, "The education we acquired is not adequate to practice law in the real world. In my first practice I was the only lawyer in [a certain town in Shan State]. I had to learn the law by myself. My friends in Yangon had to send books to me."

Although President Thein Sein and Aung San Suu Kyi have spoken out about the need for educational initiatives and the government has increased funding for education, progress in revitalizing the country's schools and universities has been slow. One exception is the supplementary training programme provided to newly hired government lawyers, which impart basic legal knowledge and skills.

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<sup>105</sup> High school and university students consulted during a focus group session by an ICJ researcher indicated that a composite score of 260 out of 600 is required for admission to law school, whereas candidates for medical school must achieve a score of 500, and dental, computer science and merchant marine candidates need 450. See also DLA Piper New Perimeter, Perseus Strategies and Jacob Blaustein Institute for the Advancement of Human Rights, *Myanmar Rule of Law Assessment*, March 2013, p. 36.

<sup>106</sup> See Myint Zan, *Legal Education in Burma since the 1960s*, unedited electronic version of articles that appeared in *The Journal of Burma Studies*, p. 14 (consulted at [http://www.niu.edu/burma/publications/jbs/vol12/Legal\\_Education\\_in\\_Burma\\_Unpublished\\_Version.pdf](http://www.niu.edu/burma/publications/jbs/vol12/Legal_Education_in_Burma_Unpublished_Version.pdf))

<sup>107</sup> *Ibid.*, p. 19.

<sup>108</sup> *Ibid.*, p. 7.

## 2. Licensing

Government authorities must ensure that there is no discrimination with respect to entry into or continued practice within the legal profession. Further, they should take special measures to provide opportunities and ensure needs-appropriate training for candidates from groups whose needs for legal services are generally not met, particularly when those groups have distinct cultures, traditions or languages or have been the victims of discrimination.<sup>109</sup> The Special Rapporteur on the independence of judges and lawyers has recommended that “all aspects of the lawyers’ career be regulated by the bar association”.<sup>110</sup>

Independence both implies and includes security, and for lawyers, this regularly means being granted a license that establishes their credentials and gives them the privilege to practice law. Licensure is a means to ensuring the quality and integrity of lawyers. It thus serves to protect and assure those who call upon lawyers for legal services and enhances the quality of the administration of justice. At the same time, being part of a licensed profession provides lawyers with special protection, applying particular safeguards to the exercise of their professional activities, thus contributing to their independent functioning.

Importantly, no discrimination on prohibited grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status is allowed with regard to entry into the profession or continued practice: every person who has the necessary qualifications and integrity should be allowed to practice as a lawyer.<sup>111</sup> Law licenses can and should be suspendable or revocable for professional misconduct on the part of lawyers, as such practices protect the profession, clients, and society as a whole. As detailed in Section V above, however, abuse of license suspension and revocation powers, including unwarranted threats, or suspending or revoking licenses for political reasons or as a means of controlling activism, disproportionate periods of suspension, adversely affects the independence of lawyers.

Lawyers in private practice in Myanmar fall in one of two categories that date back to British colonial rule: higher-grade pleader and advocate.<sup>112</sup> The Legal Practitioners Act governs the admission of higher-grade pleaders; the Bar Council Act governs the admission of advocates; while the Court Manual provides further detail in relation to the qualifications and admissions processes for both classes of lawyers.<sup>113</sup> Admission to both categories of the profession is restricted to citizens.<sup>114</sup> In this regard, the on-going discrimination against Myanmar’s ethnic and religious minority Rohingya population poses a significant challenge, because most Rohingyas lack Myanmar nationality on account of historic and on-going

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<sup>109</sup> See UN Basic Principles on the Role of Lawyers, Principle 11.

<sup>110</sup> Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report on mission to Turkey, UN Doc. A/HRC/20/19/Add.3 (2012), para. 66. See also Human Rights Committee, Concluding Observations on Belarus, UN Doc. CCPR/C/79/Add.86 (1997), para. 14.

<sup>111</sup> See UN Basic Principles on the Role of Lawyers, Principle 10; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 77 and 80; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 1.

<sup>112</sup> The law relating to advocates is contained in the Bar Council Act, India Act XXXVIII 1926 (amended 1989); the law relating to pleaders in the Legal Practitioners Act 1999. See also Courts Manual 1999, S. 1.

<sup>113</sup> See Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 9; Legal Practitioners Act 1999, S. 6-8, 36 and 41-44.

<sup>114</sup> See Courts Manual 1999, S. 3(3) and S. 7(3). The Burma Citizenship Law 1982 awards full citizenship only to people who can prove that they belong to a recognized indigenous group, or that they descended from people who were permanently settled in Burma in 1823. Anyone else is “associate” or “naturalized” citizen or is not officially recognized at all. As a consequence, an unknown but large number of Myanmar’s inhabitants lack full citizenship. See also International Bar Association’s Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 27.

discrimination. Thus in their case, while imposing a nationality requirement for access to the profession is in principle not prohibited,<sup>115</sup> it serves as a discriminatory barrier to entering the legal profession.

To be admitted as a higher-grade pleader, applicants must provide proof of qualification in the Myanmar language,<sup>116</sup> and must hold a Bachelor of Laws (LLB) from a university “in Rangoon” or have passed either the Advocateship Examination or the Pledership Examination.<sup>117</sup> The applicants must then have read for at least a year in the chambers of a practicing advocate of no less than five years’ standing,<sup>118</sup> at which point they can apply to the Supreme Court for a license.<sup>119</sup> Higher-grade pleaders can take on any type of civil, criminal or administrative case. Since 2012 this has been restricted to pleadings in District Courts.<sup>120</sup>

To be admitted as an advocate, applicants are likewise required to produce proof that they meet the Myanmar language requirement.<sup>121</sup> The following categories may then be admitted: a) persons entitled to practice as a barrister in England, if they have read in chambers for at least one year in England (with a barrister of more than five years’ standing) or Myanmar (with an advocate of more than ten years’ standing), or if they have practiced as a higher-grade pleader in Myanmar for at least three years;<sup>122</sup> b) Bachelors of Law graduates who have completed a law course recognized by the Minister of Education and who have practiced as a higher-grade pleader for three years, or who have held judicial office for at least five years after admission as a higher-grade pleader;<sup>123</sup> and c) persons who have practiced as a higher-grade pleader for at least five years or held judicial office for five years, and who can prove they passed the Advocateship Examination.<sup>124</sup> They may then apply to the Supreme Court for licensing.<sup>125</sup> Advocates are entitled to practice in the High Court and any other courts subordinate to it, and before any other tribunals or persons legally authorized to take evidence.<sup>126</sup>

Delays in approval of applications for licenses to practice as a higher-grade pleader or advocate are not uncommon. One lawyer stated that: “higher-grade pleaders after three years can apply to the Supreme Court to become advocates, but it takes at least two years to get approval”. Two others with whom the ICJ researchers met had applied for advocate’s licenses in 2005 and 2008 but did not receive them until 2012.

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<sup>115</sup> See UN Basic Principles on the Role of Lawyers, Principle 10.

<sup>116</sup> See Courts Manual 1999, S. 7(4).

<sup>117</sup> See Courts Manual 1999, S. 7(5)(i).

<sup>118</sup> See Courts Manual 1999, S. 7(5)(ii).

<sup>119</sup> See Courts Manual 1999, S. 7(8).

<sup>120</sup> See Courts Manual 1999, S. 7(2). See also International Bar Association’s Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 61.

<sup>121</sup> See Courts Manual 1999, S. 3(1)(a)(i), S. 3(1)(b)(ii) and S. 3(1)(c)(iii).

<sup>122</sup> See Courts Manual 1999, S. 3(1)(a).

<sup>123</sup> See Courts Manual 1999, S. 3(1)(b)(i).

<sup>124</sup> See Courts Manual 1999, S. 3(1)(c).

<sup>125</sup> See Courts Manual 1999, S. 3(4)-3(7).

<sup>126</sup> See Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 14(1).

## VIII. LEGAL PRACTICE

Several factors constrain the ability of people in Myanmar to obtain, access, and actually receive effective legal representation. Despite improvements since 2011, these challenges violate the right to legal representation and also serve as impermissible constraints on the independence of lawyers.

### 1. Retaining clients

Historically, successive military governments in Myanmar have denied people detained on suspicion of criminal offences and/or charged with criminal offences initial access to lawyers and rejected lawyers' applications for power of attorney ("power *ko sa le lwe sar*", or "transfer of power" in Myanmar), particularly in those criminal cases considered to be particularly politically sensitive.

One lawyer with whom the ICJ spoke mentioned two cases in which she was explicitly denied permission to represent a potential client—one in which the accused detainee alleged that he had been subjected to police misconduct, the other involving an individual accused of having ties to a non-state armed group.

Several lawyers indicated that they continue to need to pay bribes or unofficial "fees" in order to register power of attorney with courts or to gain initial access to clients detained in prison or at police stations. In other cases, prison officials will deny lawyers access on their first visit to a detained client, until such time as the latter has signed a power of attorney letter provided by the prison official and paid an "additional fee".

Further, the establishment of lawyer-client relationships is also hampered—although less so than under military rule<sup>127</sup>—by two related concerns: first, concerns by lawyers of being associated by the authorities with the cause of their client; and second, by fears of clients of being associated with their lawyers' political affiliation. Regarding the first concern, many lawyers expressed the opinion that authorities view the "causes" or politics of lawyers and clients as being one and the same, with criminal defence lawyers perceived as essentially a "co-accused." This association of lawyers with the cause or alleged crime of their clients is particularly strong in cases involving politically sensitive parties or subject matters, including disputes over land rights. As a result, many lawyers remain reluctant to take on certain cases, citing fears of arrest, harassment and monitoring by intelligence forces, and even negative implications for family members who are civil servants. Regarding the second concern, a lawyer who is also a member of the opposition National League for Democracy (NLD) stated that, "clients respect the lawyers from the NLD for their minds, but they are scared to hire them because the courts do not respect them". Lawyers told the ICJ that prosecutors and judges had made statements to their clients such as, "be careful, this one is advocating for political parties" and "why do you ask help from this kind of people?"

Some individuals refrain from engaging a lawyer to represent them in civil and criminal cases because they believe that the mere presence of a lawyer will have negative consequences on the outcome of the case in the courts.

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<sup>127</sup> One lawyer told the ICJ that "After the Thein Sein government came to power, we have not been threatened or harassed because of our representation of clients."

## 2. Access to clients who are deprived of their liberty

In criminal justice matters, special safeguards apply in order to guarantee that lawyers are able to represent and advise their clients and assist in the preparation of their defence. As set out above, the right to be represented by a lawyer constitutes an integral part of the right to fair trial as recognized in international law.<sup>128</sup> Governments must ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their choice upon arrest or detention or when charged with a criminal offence.<sup>129</sup>

Further, all persons arrested or detained, with or without criminal charge, must be allowed prompt access to a lawyer; any delays must be determined and justified on a case by case basis and must in any case not exceed 48 hours. Those arrested or detained, as well as persons who are imprisoned, must be provided with adequate opportunities, time and facilities to be visited by and to communicate and to consult with a lawyer, without delay, interception or censorship and in full confidentiality. These consultations may be in sight, but not within the hearing, of law enforcement officials.<sup>130</sup>

Sections 19 and 375 of the Myanmar Constitution set out the guarantee of the right of defence for accused persons in criminal cases.<sup>131</sup>

The right of defence described in Myanmar's Constitution implies a right of an accused person to access to their lawyer, in particular so they can prepare the defence in advance of a trial. Section 40 of Myanmar's Prisons Act requires that provision be made for the visitation of accused persons in Myanmar's prisons by various people, including "qualified legal advisors without the presence of any other person".<sup>132</sup>

Under military rule, a lawyer's access to his or her detained clients prior to their trial on criminal charges, especially in political cases, was often barred without explanation or means of recourse. This remains the case occasionally, but has lessened significantly in recent years. Lawyers representing individuals charged with criminal offences in Myanmar still face a number of difficulties, however, when trying to consult with their detained clients and when preparing a defence, owing to limitations placed on their access to detained clients, and the inability to consult with their detained clients confidentially in police custody or prison, due to a lack of adequate facilities and or the presence of an official within hearing during lawyer-client meetings.

Lawyers describe that accessing clients accused of criminal offences is most difficult before trials begin and when clients are in prison, particularly when the case is considered to be politically sensitive. Access is easier while the suspect is held in police custody, or in the case of those detained in prisons, once a trial is underway. This may be due to an inadequate understanding by prison authorities of the (pre-trial) rights of individuals

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<sup>128</sup> See ICCPR, Article 14(3)(d); UN Basic Principles on the Role of Lawyers, Principle 1; UDHR, Article 11(1); Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 31-41.

<sup>129</sup> See UN Basic Principles on the Role of Lawyers, Principle 5.

<sup>130</sup> See UN Basic Principles on the Role of Lawyers, Principles 7 and 8. Also see, among others, General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), Principles 17 and 18.

<sup>131</sup> See Constitution, S. 19 and 375.

<sup>132</sup> Prisons Act (India Act IX, 1894), S. 40 ("Due provision shall be made for the admission, at proper times and under proper restrictions, into every prison of persons with whom civil or unconvicted criminal prisoners may desire to communicate, care being taken that, so far as may be consistent with the interest of justice, prisoners under trial may see their duly qualified legal advisers without the presence of any other person.").

suspected of criminal offences, and doubtless in some cases authorities do not recognize or respect their rights, or even purposefully deny them.

As a result of problems with accessing clients detained in prisons prior to trial, many lawyers state that their ability to prepare a defence is limited: they must rely solely on brief conversations with their client in court when preparing a client's defence. Access by lawyers to prisons is often limited to certain days of the week. The timing and length of access periods varies greatly from prison-to-prison. For example, lawyers are able to visit clients in Bago Prison only on Sunday, but they are permitted to visit clients held in Pyay Prison on any day except Sunday. Lawyers have reported that they have sometimes been successful in obtaining permission from prison authorities to visit clients on days other than the official day for such visits.

Lawyers report that bribes are often required to obtain information from the police about the whereabouts of their detained clients, to gain access to clients detained in prison or police custody, to speed up approval for a visit by the prison authorities, or to ensure an adequate period of time for consultation. Delays in approval for lawyer-client visits are common, and are considered by lawyers to be an intentional means of restricting their interaction with clients or a means of soliciting a bribe.

Several lawyers said that the policies of particular prisons appear to be tied to the temperaments and wishes of individual prison authorities. In certain prisons there has been no improvement in lawyers' ability to gain access to their clients since 2011 and some have even instituted new procedural hurdles.

Those lawyers who are able to gain access to detained clients also report obstacles to ensuring the confidentiality of their conversations with their clients, particularly when the client is detained in a prison rather than in police custody. Lawyers and their clients are often forced to meet in the same rooms where other inmates are receiving visits, and in places or situations in which the physical layout usually makes confidential communication impossible. For example some have been forced to have to speak across an uncomfortable distance or through a screen. Lawyers are most concerned that prison guards or police are frequently present during their meetings with their detained clients; more often in high profile or political cases, police and prison officials have even taken notes during conversations. One lawyer told the ICJ that she was not allowed to bring an interpreter when meeting with her foreign client in prison, and was instead assigned one by the prison. A lawyer representing a client in a politically sensitive case told of having to speak with his client for 15 minutes through jail bars while three or four police officers stood directly by his side.

### **3. Access to documents**

The UN Basic Principles on the Role of Lawyers emphasize "the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."<sup>133</sup>

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<sup>133</sup> UN Basic Principles on the Role of Lawyers, Principle 21. See also International Commission of Jurists, Geneva Declaration: Principles on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (2008), Principle 8.

In criminal cases, respect for the defence rights of an accused person requires the authorities to ensure not only the right to access to counsel but also adequate time and facilities to prepare the defence, including access to relevant documents.<sup>134</sup>

In Myanmar, the Supreme Court is empowered to set fees and rules relating to court documents,<sup>135</sup> which it regularly updates and publishes via the Courts Manual.<sup>136</sup>

The Courts Manual specifies the procedures and fees required to submit and obtain documents from court officials.<sup>137</sup> These relate to various types of documents, such as complaints, case files and judgments, which must be certified or given official stamps to demonstrate validity. Importantly, the Courts Manual protects the right of parties to litigation to the “inspection of the records of pending and decided cases” with permission from a judge, and provides that lawyers may inspect court records without permission for cases in which they are engaged.<sup>138</sup>

The information received by the ICJ indicates that lawyers’ ability to access documents relevant to the preparation of their client’s case in recent times has varied broadly- some noting considerable improvement versus some reporting experiencing procedural delays and the continued need to pay bribes to gain access.

The current rules specify that court copyists are entitled to keep two-thirds of the revenue from fees, essentially making them self-employed entrepreneurs.<sup>139</sup> However, it appears to be well understood and even accepted among the legal profession that “the court clerk cannot ask for the fees openly, but by tradition we have to give it”. Official fees do not cover – and are not seen among lawyers as covering – the costs associated with producing copies of court documents, making “unofficial fees” necessary for meeting the lawyers’ requests and for earning the clerks an income.

Moreover, although the Courts Manual does provide for “urgency fees”,<sup>140</sup> the line between such official fees and additional ‘customary’ fees – needed to simply ensure that request are honoured and handled promptly (rather than urgently) – is far from clear. One lawyer specified that payment of a “bribe” to the court clerk would ensure the documents are received within the usual one-to-two-week period, but failure to pay would result in it taking “much longer”. Because delays in the receipt of court documents can cause filing deadlines to be missed – especially in appeals, when certified copies of judgments are necessary within a brief period – lawyers and clients generally just pay the fee without question so as to keep the case moving forward.

Some believe that the delay or denial of access to court documents is as political as financial, used by authorities to hamper lawyers involved in politically sensitive cases, or in cases in which they are representing clients charged with criminal offences. This sort of abuse, though decreasing overall in Myanmar, is still a factor lawyers must consider when seeking documents to prepare their clients’ cases.

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<sup>134</sup> See ICCPR, Article 14(3)(b); Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 33.

<sup>135</sup> See Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 73.

<sup>136</sup> See, e.g., Courts Manual 1999, S. 76 (setting fee for submission of a complaint at five kyat—approximately USD 0,05) and S. 103(44) (setting stamp fee for inspection of court document at one kyat).

<sup>137</sup> See Courts Manual 1999, S. 76 et seq.

<sup>138</sup> Courts Manual 1999, S. 103(43).

<sup>139</sup> See Courts Manual 1999, S. 103.A(51).

<sup>140</sup> See, e.g., Courts Manual 1999, S. 103A(42)(d).



#### 4. Delays in process and justice

Delays in the administration of justice impede the parties' access to justice and may violate the right to trial within a reasonable time at least in criminal cases.

In all cases, civil and criminal, international standards require that "there shall not be any inappropriate or unwarranted interference with the judicial process".<sup>141</sup> The judiciary in particular is required to ensure that it administers justice in a timely manner. Indeed, a judge is required to "perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness".<sup>142</sup>

In criminal justice matters, international law specifies that everyone charged with a criminal offence has the right to be tried without undue delay.<sup>143</sup> This guarantee is designed not only to avoid keeping people in a state of uncertainty about their fate and to ensure deprivation of liberty does not last longer than necessary in the case of pre-trial detention, but also to serve the interests of justice. The delay that is reasonable is determined in the circumstances of each case, and relates to the time between the formal charging of the accused and the time until the final judgment on appeal.<sup>144</sup>

It is the State's duty to provide adequate resources to enable the judiciary to properly perform its functions.<sup>145</sup> It should be a priority of the highest order for the State to provide sufficient funds to allow for appropriate physical facilities throughout the country, an adequate number of qualified judges and other judicial and administrative personnel and suitable infrastructure.<sup>146</sup>

Legal representation of clients is often seriously compromised because of delays and changes in the schedule of hearings. While the justice system may operate slowly in many countries, in Myanmar lawyers told the ICJ that in many instances trial timelines continue to be purposely manipulated to hinder the effectiveness of legal representation or impede their involvement; "Mostly it's just delay, delay."

At the most basic level is a lack of punctuality and dependability on the part of court staff, prosecutors, police and expert witnesses and judges, whether intentionally or simply due to negligence. Prosecutors call for – and are granted as a matter of course – repeated adjournments; witnesses (particularly the police) do not show up; and judges are sometimes late by several hours. These delays have a material effect on the administration of justice. When lawyers – whose presence is not seen as imperative – are not able to attend hearings, prosecutors and judges normally progress more quickly through procedures, including those in which legal representation is most critical.

The effect of this "adjournment tactic" is exacerbated by the fact that many lawyers must often travel to remote courtrooms. Lawyers with whom the ICJ spoke recounted traveling long distances only to have hearings cancelled or postponed.

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<sup>141</sup> UN Basic Principles on the Independence of the Judiciary, Principle 4.

<sup>142</sup> Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Principle 6.5.

<sup>143</sup> See ICCPR, Article 14(3)(c).

<sup>144</sup> See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 35.

<sup>145</sup> See UN Basic Principles on the Independence of the Judiciary, Principle 7.

<sup>146</sup> See Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 33.

## 5. Judges and courtroom practice

Courtroom procedures in Myanmar are inconsistent with international fair trial standards and the requirements set out in domestic laws and regulations. While not within the scope of this report to provide a comprehensive description of the judiciary and courtroom practice in Myanmar, certain factors directly influence the ability of lawyers to independently and effectively provide legal representation.

One is the unfamiliarity of many judges, particularly at the lower rungs of the judiciary, with law and court procedures: "The judges are often young and lack work experience. The lawyers have more knowledge about courtroom procedure." U Sit Aye, Senior Legal Advisor to President Thein Sein, agreed that "judges lack the knowledge to conduct free and fair trials", although he also noted that programs are to be undertaken by the government with international assistance that should improve capacity.

The President and the Parliament jointly appoint the members of the Constitutional Tribunal.<sup>147</sup> The President nominates the Chief Justice of the Union and, in co-ordination with the latter, the judges of the Supreme Court; they are appointed with the approval of Parliament, who cannot refuse the nomination unless it can clearly be proven that the person does not meet the required qualifications.<sup>148</sup> The President also prepares the nomination of the Chief Justices of Regions' and States' High Courts, in co-ordination with the Chief Justice of the Union and the pertinent Region or State Chief Minister. Other judges of the High Courts are nominated by the Chief Minister of the Region or State concerned, in co-ordination with the Chief Justice of the Union. The President again appoints the High Courts' Chief Justices and judges with the approval of the Region or State Parliament, who cannot refuse the nomination unless it can clearly be proven that the person does not meet the required qualifications.<sup>149</sup> Notably, the criteria for appointment do not require a candidate for judicial office to hold a law degree or have experience as a legal professional. Instead, being "a person who, in the opinion of the President, is an eminent jurist" may suffice.<sup>150</sup> The Supreme Court is tasked with appointing lower court judges, which it reportedly has delegated to a Civil Service Selection and Training Board.<sup>151</sup>

Another factor is corruption. Lawyers repeatedly told the ICJ that some judges condition favourable decisions on bribes. Thus, lawyers who are providing legal aid or taking cases on a *pro bono* basis often find themselves having to provide payment to a judge out of their own pockets to have a chance of success. Pleadings submitted by poor clients without representation are often dismissed outright.

Political and military influence over judges remains a major impediment to lawyers' ability to practice their profession effectively. Depending on the nature of the case, judges render decisions based on orders coming from government and military officials, in particular local and regional authorities.

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<sup>147</sup> See Constitution, S. 321. The President and the two houses of Parliament nominate three Justices each, who are appointed for five-year terms concurrent with the term of the Pyidaungsu Hluttaw (see Constitution, S. 335).

<sup>148</sup> See Constitution, S. 299(c)-(d); Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 26-27.

<sup>149</sup> See Constitution, S. 308(b); Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 44-45.

<sup>150</sup> Constitution, S. 301 and 310; Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 30 and 48.

<sup>151</sup> See International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 57.

Largely on account of this, the lawyer-judge relationship in Myanmar remains adversarial, rather than one of mutual respect, and can result in decisions inconsistent with the rule of law and even inconsistent with domestic law. Some judges are prejudiced against older lawyers (who are often better-educated and more experienced than younger judges) or those from geographically distant locations. Others interfere in lawyers' questioning of witnesses without just cause, either altering or excluding certain answers from the court record, or simply putting a capricious end to questioning altogether (e.g. "You are speaking [too] long"; "You have asked enough questions").

One lawyer described the situation to the ICJ as follows:

"We are junior lawyers, so if we want to make a complaint about some wrongdoing in the courtroom, we let our senior lawyer know. Since the beginning there is a socialization process. We are to make the complaint to the senior lawyer and he will make the complaint. If we make the complaint the judge will harass us or punish us in the future. We are afraid that we will be discriminated against the next time that we are before the same judge."

## **IX. RECOMMENDATIONS**

Despite significant improvements since 2011 in the respect for the rule of law and for the independence of the legal profession and lawyers in Myanmar, major challenges remain. Authorities continue to take action against lawyers, and particularly against those involved in cases that are considered to be politically sensitive and in cases in which lawyers are representing individuals charged with criminal offences. Additionally, systemic barriers to independence of the legal profession, long veiled by previous military governments' persecution of lawyers, are now apparent and need addressing.

The ICJ makes the following recommendations to the authorities in Myanmar with a view to assisting in the continuing efforts to bolster the rule of law, which requires strengthening the independence of the legal profession and ensuring respect for the role of independent lawyers.

### **Corruption**

The following recommendations are identified for the purpose of eliminating both individual acts of corruption and the structural elements of the legal system that facilitate it.

The Union Supreme Court should:

1. Raise the official rates for obtaining certified copies and other documents within the court registry to a level that realistically and reasonably corresponds with the actual cost involved.
2. Subsequently, strictly apply the rules and regulations applicable to obtaining documents from the court registry, including the reset official rates and the time delays, so as to enhance the predictability and fairness of the system.

The Union Supreme Court, an established Ministry of Justice (see below), and Union Parliament should:

3. Set the salaries and pensions for judges at a level that is adequate and commensurate with the status, dignity and responsibility of their office, in order to decrease the incentive for corruption. Those salaries and pensions should be periodically reviewed to minimize the effect of inflation.
4. Ensure court proceedings and judgements are, except in the case of permissible exceptions described in the International Covenant on Civil and Political Rights, made public.

The Union Attorney-General and Union Parliament should:

5. Create a specialized, independent mechanism mandated with the prompt and effective criminal investigation of allegations of corruption. The mechanism should also be mandated to investigate and make recommendations concerning combating systemic corruption. Consistent with respect for the rule of law and the independence of the judiciary, each case should be investigated individually and dealt with according to due process of law. Further, the mechanism should be mandated to investigate and make recommendations concerning combating systemic corruption.

### **Bar Council and associations of lawyers**

The following recommendations aim to increase the ability of lawyers to exercise their right to form and join self-governing professional associations to represent their interests and promote their integrity, as well as more generally their rights to freedom of expression, belief, association and peaceful assembly.

The Union Attorney-General and Union Parliament should:

6. Consult with and consider the recommendations of the legal profession in the finalization of the amendment of the Bar Council Act, with a view to ensuring that the Bar Council becomes an independent, self-governed association that represents lawyers' interests and protects their professional independence and integrity.
7. Reform the Bar Council into a self-governing professional association, by ensuring that its executive body is freely elected by its members and is able to exercise its functions free from interference of any kind from any other body or person. The Bar Council's executive body should not include representatives of the executive, legislature or judiciary.
8. Review and amend the Bar Council Act, Legal Practitioners Act and other regulations applicable to access to the legal profession and obtaining a license to practice law, so that responsibility lies with the reformed Bar Council as the profession's self-governing professional association. The process should ensure free access to the profession for all persons holding the requisite professional competence, without discrimination of any kind, including on the grounds of citizenship.
9. Clearly define the Bar Council functions to include, at a minimum:
  - a) Promoting and upholding the cause of justice, without fear or favour, and protecting and defending the dignity and the independence of the judiciary;
  - b) Defending the independence of the profession and the role of lawyers in society;
  - c) Maintaining the honour, integrity, competence, ethics, standards of conduct, and accountability of the profession, including through the adoption of a professional code of conduct and a fair and impartial disciplinary system; and protecting the intellectual and economic independence of the lawyer from his or her client;
  - d) Ensuring and maintaining the quality and integrity of the profession through the operation of an independent and fair disciplinary procedure;
  - e) Ensuring free access to the profession for all persons holding the requisite professional qualifications, skills, and competence, without discrimination of any kind, and protecting the integrity of the processes by which lawyers become licensed to practice law;
  - f) Promoting and supporting law reform, through providing technical expertise, as well as fostering public discussion on the law, the administration of justice and the promotion and protection of human rights;
  - g) Promoting effective access of the public to the system of justice, including through cooperation with the government on the provision of free legal aid and advice;
  - h) Promoting the welfare of members of the profession and rendering assistance to members of their families in appropriate cases;
  - i) Affiliating with and participating in the activities of international organizations of lawyers.
10. Ensure that lawyers are able to form, join and participate in the activities of local, national or international organizations. In particular, allow independent associations or networks of lawyers to register, and recognize these as stakeholders in the field of the administration of justice. And ensure that lawyers' rights to freedoms of association, assembly, and expression are subject only to restrictions that are necessary to protect aims permissible under international human rights law and are proportionate to such aims.

### **Harassment and discipline**

The following recommendations aim to enhance the ability of lawyers to perform their professional duties independently and without improper interference. These recommendations are particularly relevant in the context of reprisals and sanctions against

lawyers who represent individuals in cases that are considered to be politically sensitive, or in criminal cases.

All branches of government must:

11. Take all necessary measures to ensure the protection by the competent authorities of lawyers against any reprisals, including violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action or sanctions as a consequence of their professional functions or legitimate exercise of human rights.

The Union Parliament should:

12. Reform the contempt of court laws in a manner that ensures respect for the right to freedom of expression and ensures that lawyers enjoy civil and criminal immunity for statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority. Lawyers must never be subjected to criminal or civil sanctions or procedures that are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients. Any resort to the use of contempt of court powers must be consistent with the right to freedom of expression.

The Union Attorney-General and Union Parliament should:

13. Reform the Bar Council Act, Legal Practitioners Act and regulations applicable to disciplinary proceedings so that allegations of professional misconduct by lawyers are determined in accordance with a code of professional conduct and other recognized standards and ethics of the legal profession, solely for the purpose of disciplining lawyers for misconduct determined in accordance with those standards and in the light of the Basic Principles on the Role of Lawyers and other international standards. Disciplinary proceedings should be adjudicated before an independent and impartial disciplinary committee established by the legal profession, in procedures that respect the rights of the lawyer, including to a fair hearing, and guarantee the right of the lawyer to an independent judicial review of any adverse decision and sanction imposed. The law should also require that penalties and sanctions for misconduct are proportionate to the offence.

Subsequent to its reform making it a self-governed professional association, the Bar Council should:

14. Reform the code of professional conduct, ensuring that it is in line with international standards; enforce its provisions through a fair and expeditious disciplinary mechanism such as described in Recommendation 13; and undertake to promote these professional standards so that all lawyers and the public are aware of their ethical and legal obligations.
15. Establish an impartial committee to review all applications for restoration of revoked licenses in an expeditious manner, in the course of a fair procedure that respects the rights of the lawyer, including to a fair hearing, and guarantees the right of the lawyer to an independent judicial review of any adverse decision and sanction imposed. Applications for reinstatement of licenses must be determined in accordance with the code of professional conduct and in line with international standards, and sanctions must be proportionate to the offence.

## **Access to clients and information**

The following recommendations intend to ensure that lawyers are able to advise and represent their clients, defend their rights and engage in all essential elements of the defence in criminal cases. To this end:

Detaining, prosecuting, and court authorities, and police should:

16. Ensure lawyers' access to information, files and documents in their possession or control, at the earliest appropriate time, so as to enable lawyers to provide effective representation to their clients.

Detaining and court authorities should:

17. Ensure that lawyers have access without delay to their clients who are deprived of their liberty, including in particular those in police custody or in prison; ensure that they have access to counsel before and assistance of counsel during questioning; and ensure that regular access is granted thereafter, including throughout any period of pre-trial detention, during the trial, pending appeals and following any conviction and imposition of sentence.
18. Ensure and respect the confidentiality of communications between lawyers and their clients, including by ensuring that lawyers are able to meet and otherwise communicate with their clients out of the hearing of police, prison officers and other officials, and ensuring that they are given as well adequate time and provided with adequate facilities for holding such consultations.

The Union Attorney-General and Ministry of Home Affairs should:

19. Standardize and streamline rules concerning lawyers' access to detained clients in line with above recommendations, and ensure that they are uniformly implemented in all places where people are deprived of their liberty, thus removing overly broad discretionary powers from prison administrators.

## **Legal education**

While it is understood that resources are limited and demands on the Myanmar State budget are high, the improvement of legal education is essential to the further development of the rule of law. The Myanmar government should note the need for an effective legal infrastructure in establishing its budgetary priorities and in seeking international cooperation and assistance. Additionally,

The Ministry of Education should, in consultation with representatives of the legal profession:

20. Reform legal education, through:

- a) Raising the standards of admission, with a view to ensuring that the student body will have the academic potential to study and practice law at a level commensurate with the needs of the country;
- b) Designing a rationalized curriculum and teaching methodology that provide for comprehensive study of domestic and international law, instruction in ethics and mandatory courses on international human rights law with a focus on implementation in domestic practice; and equip students with essential professional skills including critical thinking, legal research, analysis and writing, and advocacy skills;
- c) Ensuring that rigorous, transparent and fair methods are used to assess student performance, which test for an understanding of the law, legal procedure, legal research, professional ethics, and attainment of professional skills;

- d) Adapting the languages of instruction and materials for legal education so as to ensure that Myanmar nationals, including those from minority groups, are able to fully comprehend instruction and related materials and undertake credible assessments;
- e) Improving students' and faculty's access to the full range of laws and legal materials relevant to the curriculum and eventual practice;
- f) Undertaking steps with a view to ensuring that faculty possess the required knowledge and competence in their subjects to provide a quality legal education, as evidenced by academic qualifications, scholarly publications, practical experience and strong teaching skills. To this end, faculty hiring and promotion should be based on fair and transparent criteria and procedures, and compensation paid should be adequate and aim to attract and retain qualified and dedicated staff;
- g) Fostering a climate of collaboration between Myanmar's higher learning institutions teaching law and equivalent institutions in other countries, including the promotion of international exchange opportunities for students and faculty.

### **Administration of justice**

The following general recommendations intend to help improve the administration of justice and respect for the rule of law.

The Union Parliament should:

21. Establish a Ministry of Justice that is responsible for administering the courts system, including the setting of judges' salaries and pensions.

The Union Parliament should:

22. Accede to and implement the full range of international human rights instruments, including the International Covenant on Civil and Political Rights and its two Optional Protocols; the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; the optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the International Convention on the Protection of All Persons from Enforced Disappearance; and the Additional Protocols to the 1949 Geneva Conventions.



## **X. METHODOLOGY**

This report presents a snapshot of the independence of lawyers in private practice in Myanmar, in light of international standards and in the context of the country's rapid and on-going transition. The research and writing of this report was undertaken by Matthew Bugher, an ICJ Consultant on this project<sup>152</sup>; as well as by Benjamin Zawacki, Senior International Legal Adviser with the ICJ's Asia and Pacific Regional Programme; and Laurens Hueting, Associate Legal Adviser with the ICJ's Centre for the Independence of Judges and Lawyers. This report was reviewed by Jill Heine, ICJ Senior Legal Adviser for Law and Policy; Alex Conte, Director of the ICJ's International Law and Protection Programmes; and Sam Zarifi, ICJ's Regional Director for Asia and the Pacific.

In preparation of this report, the ICJ met with 60 lawyers in private practice in Myanmar over the course of 37 interviews conducted in Yangon, Mandalay, Bago and Pyay in April through July 2013. The ICJ sought to speak with a diverse group of the country's legal profession: the oldest is 78 years old, the youngest 25; 41 are men and 19 are women; they profess Buddhist, Muslim, Christian or no religious beliefs; and some are members of or sympathize with political parties, while others are not affiliated with any political movement. Some of the interviewees practice law individually, while others are members of law firms; collectively, they have experience on a wide spectrum of criminal, civil and commercial cases.

This research builds on the ICJ's on-going engagement with various segments of the legal profession in Myanmar, including government lawyers at the highest levels, the senior judiciary, members of both houses of the Myanmar parliament, dozens of lawyers working in private practice, and Myanmar and international lawyers engaged in human rights issues. The ICJ also spoke to a number of legal academics and to members of the National Human Rights Commission.

In discussing this report in Naypyidaw, the ICJ met with U Sit Aye, Senior Legal Adviser to the President, and Khin Myo Myint, Legal Adviser to the President; U Nanda Kyaw Swe, Chairperson of the Pyithu Hluttaw (Lower House) Commission on the Assessment of Legal Affairs and Special Issues; and U Htay Oo, Vice-Chairperson of the Pyithu Hluttaw (Lower House) Committee on Fundamental Rights of Citizens, Democracy and Human Rights.

The ICJ wishes to thank all those who met with its researchers. Except where quotations appear, most information and views shared with the researchers have not been individually attributed in this report. This confidentiality was necessary to ensure that interlocutors felt they could speak frankly and without fear of reprisals.

The content of this report is based on information collected through the interviews, together with desk research and analysis of the applicable domestic legal framework, in light of its compatibility with international human rights standards. It takes account of developments up to July 2013.

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<sup>152</sup> Mr Bugher is Project Manager for Myanmar of Justice Base, an organization that aims to promote the rule of law in transitional and post-conflict societies by building the capacity of local lawyers and supporting nationally-owned rule of law initiatives. It is registered as a company limited by guarantee operating on a not-for-profit basis. See [www.justicebase.org](http://www.justicebase.org).



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