

Briefing Paper

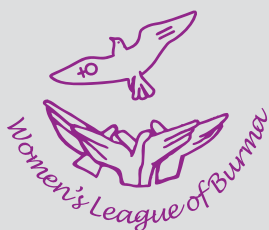
Access to Justice for Women Survivors of Gender-based violence committed by state actors in Burma

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Women survivors of violence face challenges in their attempts to obtain justice. This has been a key finding in the work of the **Women's League of Burma (WLB)** and **Asia Justice and Rights (AJAR)**, as we work on cases of violence against women in Burma's ethnic communities and engage in strengthening and empowering survivors of violence committed by state actors. Military control, entrenched gender discrimination, as well as gaps in the legal and judicial systems, allow state actors to perpetrate gender-based violence with near-complete impunity.

Gender-based violence has been widely and systematically used by military regimes in power since 1962 in Burma. After the shift to a pseudo-civilian government in 2010, Burma's political landscape remained tightly controlled by the military. In ethnic areas, and particularly in conflict zones with high levels of militarization, civil society organizations continued to document widespread abuses by the military, including the use of sexual violence as a means of shaming and destroying ethnic communities.¹ WLB has repeatedly denounced the use of rape as an "instrument of war and repression"² and its members documented 92 cases of conflict-related sexual violence between 2010 and 2015.³

After the election of a pro-democracy government at the end of 2015, many held high hopes for progress in this regard. Although it is too early to assess what the overall situation will be for 2016, in 2015 WLB documented 15 cases of violence against women committed by state actors and 3 cases were reported in early



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¹ WLB, "Long Way to Go - Continuing Violations and Human Rights Discrimination Against Ethnic Women in Burma - CEDAW Shadow Report", July 2016, p. 21, 24-26 (thereafter WLB, "Long Way to Go"); Burma Campaign UK, 'Rape and Sexual Violence by the Burmese Army', Burma Briefing n°34, April-July 2014; WLB, "Same Impunity, Same Patterns", January 2014; WLB, "If They Had Hope, They Would Speak: The Ongoing Use of State-Sponsored Sexual Violence in Burma's Ethnic Communities", November 2014; Global Justice Center & Leitner Center for International Law and Justice, "Promises Not Progress: Burma's National Plan for Women Falls Short of Gender Equality and CEDAW", August 2015, p. 19, 71-72; AJAR, "Opening the Box: Women's Experiences of War, Peace, and Impunity in Myanmar", September 2015, p. 12; AJAR, "The Legacy of Mass Torture and the Challenge for Reform in Myanmar", March 2016, p. 4, 10; Ta'ang Women's Organization (TWO), "Trained to Torture: Systematic War Crimes by the Burma Army in Ta'ang Areas of Northern Shan State", June 2016; Amnesty International, "Myanmar: Briefing to the UN Committee on the Elimination of Discrimination against Women, 64th session, 4-22 July 2016", p. 5; Women Peace Network – Arakan, "Submission to the 64th Session CEDAW Committee for Consideration of Myanmar's Combined Fourth and Fifth Periodic Reports", June 2016, p. 3, 4.

² WLB, "Same Impunity, Same Patterns", January 2014.

³ WLB, "Long Way to Go", Annex 10, p. 63.

2016.⁴ These numbers remain indicative, as cultural taboos and security concerns prevent most women from speaking out. The current intensification of military offensives in certain ethnic areas increases the risk of such abuses and early reports of incidents are highly concerning as it appears that similar patterns are continuing.

WLB's documentation shows that only a handful of these cases received a judicial response. Thanks to the hard work and pressure of local civil society groups, a few cases have been brought to court in the past couple of years, which in itself is a noteworthy change considering the total impunity enjoyed under past military regimes. However, state actors, in particular security forces, largely continue to escape accountability. Institutionalized impunity for crimes committed by military and police personnel encourages abuse and impunity elsewhere: WLB's members are concerned by more reports of violence against women committed by state agents working in administrative institutions.

The new government has made a commitment to fully ensure respect for the rule of law and many new lawmakers are genuinely working hard towards this, raising high hopes among citizens. WLB and AJAR call on the government of Burma to take immediate action to end institutionalized impunity for state actors and ensure access to justice for women survivors of conflict-related violations and other forms of state violence.

1. Burma's legal framework on gender-based violence: institutionalized impunity for state actors and legal discrimination against women

Despite the recent semi democratic transition in Burma, impunity for military and government officials is de facto entrenched in the 2008 Constitution. The controversial amnesty clause in Article 445 has always been interpreted by successive military regimes as providing regime officials blanket amnesty for all crimes committed in the course of their official duties, including acts of gender-based violence. However, this article should be interpreted restrictively and exclude immunity for "serious criminal acts", such as those that violate national or international law and that by definition are outside the scope of "their respective duties".⁵

The Constitution further institutionalizes impunity by providing for military control over its own judicial processes, especially by making the decision of the Commander-in-Chief of the Defence Services a "final and conclusive" one⁶, thus allowing the Commander-in-Chief to arbitrarily overturn any verdict. Additionally, the opaque and partial court-martial system, which gives military courts competence over all Defense Services personnel with no civilian oversight, hinders victims' access to justice and perpetuates the belief for state officials that they are above the law.

As a result of this constitutionalized impunity, acts of gender-based violence committed by state actors almost never end up in civilian courts. In theory, section 72 of the 1959 Defense Services Act allows for military personnel to be tried in civilian courts in cases of murder, homicide and/or rape⁷. Legal limitations to such transfers however (especially the

⁴ WLB, "Long Way to Go", Annex 11, items 82-92, p. 76-80; and documentation by WLB in 2016.

⁵ See WLB, "Same Impunity, Same Patterns", January 2014, p. 29.

⁶ Constitution, Articles 294 and 343(b). See also Amnesty International, "Myanmar: Briefing to the UN Committee on the Elimination of Discrimination against Women, 64th session, 4-22 July 2016, p. 13.

⁷ Section 72 reads: "Civil offences not triable by court-martial. A person subject to this Act who commits an offence of murder

fact that the perpetrator must be out of active duty), coupled with common corruption and executive interference in the judiciary, effectively means that only a very small number of cases are ever transferred. While the government recently stated that between 2011 and 2015, 31 sexual violence cases involving military perpetrators were transferred to civilian courts⁸, due to the opacity of proceedings and the absence of any official publication, civil society organizations cannot verify this claim. Even if this number were accurate, 31 cases over four years remains far from capturing the reality of the gender-based violence perpetrated by state actors in the past few years. As an example, WLB alone reported 92 cases of conflict-related sexual violence between 2010 and 2015, only two of which were tried in civilian courts⁹. For the period 2015-2016, WLB has documented a total of 18 cases of violence against women committed by state actors, only three of which have been prosecuted in civilian courts (one is currently pending), thanks to the tireless work and continuous pressure of CSOs working in the affected communities¹⁰. However, these numbers remain indicative as cultural taboos and security concerns prevent women in most cases from speaking out.

Moreover, Burma's legal framework, drafted solely by men, and with the underlying idea that women must be "protected" as inferior beings, patently discriminates against women in many ways. The Constitution itself limits women's access to certain positions supposedly "unfit" for women¹¹ and refers restrictively to 'mothers'¹². The Penal Code contains many out-dated provisions and its definition of rape does not meet international human rights standards¹³, as it does not prohibit marital rape if the woman is older than 15, and is commonly interpreted as limiting rape to penetration by a male genital organ. In practice, it means that penetration by foreign objects is not considered rape and the police and the judiciary almost never consider cases where there is no evidence of semen.

Moreover, laws passed since 2011 further discriminate against women¹⁴ and despite efforts to work on a comprehensive 'violence against women' law (the long-awaited "Prevention and Protection of Violence against Women Bill"), the process is currently stalled. To date, civil society groups continue to push for the inclusion of provisions on sexual violence in conflict but with no success.

Regarding international law, although Burma is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it fails to properly implement it¹⁵. Lawyers who try to use CEDAW provisions in court are faced with objections from judges, who order them to use "local criminal law" instead.

against a person not subject to military law , or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried-by a court-martial, unless he commits any of the said offences—

(a) while on active service, or

(b) at any place outside the Union of Burma, or

(c) at a frontier post specified by the President by notification in this behalf".

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

9 WLB, "Long Way to Go", Annex 10, p. 63.

10 WLB, "Long Way to Go", Annex 11, items 82-92, p. 76-80; and documentation by WLB in 2016. Out of these 18 cases, 8 led to monetary compensation (refused in 3 cases), 1 public apology by the military and 3 court-martial proceedings.

11 Constitution, Section 352.

12 Constitution, Section 32(a), 351.

13 Penal Code, Section 375.

14 For example the Laws on the Protection of Race and Religion, February 2015, which limit women's right to choose a spouse and the number and spacing of children she could have.

15 NB: General Recommendation No. 19 on violence against women includes gender-based violence against women as a form of discrimination covered by the scope of CEDAW.

Finally, the political structure of the country also negatively impacts women's access to justice. A genuine federal system, as opposed to the system of centralised power currently in place, would lead to better protection for women victims. Legal rights, access to justice, and more generally, services, would be handled more efficiently by empowered local authorities.

2. Access to Justice in practice: an impossible journey for women survivors of gender-based violence committed by State actors

A corrupted judiciary

In addition to a weak legal framework, the lack of an independent, impartial and effective judiciary is another root cause of impunity in Burma and has contributed to the erosion of women's trust in the administration of justice.

The few rights for women that are actually enshrined in law are often not enforced due to corruption in the formal legal system, the police and other governmental authorities. This widespread corruption has been recognized by national authorities¹⁶, the UN Human Rights Council¹⁷, and more recently, by the CEDAW Committee who stated that it was "**particularly concerned at reports of judicial corruption and executive interference in the judiciary**" and called on the government to "**initiate necessary reforms to ensure that the judiciary is independent, impartial, professional and gender sensitive, as a means of safeguarding women's rights**"¹⁸.

Corruption and executive interference occurs particularly in cases of state-sponsored violence against women that is deemed particularly sensitive. Reports of state perpetrators' control and influence over police investigations and court proceedings are all too common: Police investigators refuse to investigate cases, offenders remain at large or are conveniently transferred to remote units, files get stuck at the police station or in court, evidence conveniently disappears, etc. When police officers are accused of abuses against civilians, the Home Affairs Ministry largely uses opaque internal disciplinary administrative sanctions instead of investigating and trying them via ordinary criminal process, thus denying justice to victims¹⁹.

Compounding the problem, WLB and AJAR have found that those few courageous victims who seek justice for acts of gender-based violence committed by state actors face threats, intimidation and retaliation. The UN Special Rapporteur has similarly reported that accusing the military often leads to criminal proceedings against the victim for defamation or for 'providing false information'²⁰.

¹⁶ Judicial and Legal Affairs Complaints and Grievances Investigation Committee. See "Burma's Judicial System Deeply Corrupt, Parliament Told", *The Irawaddy*, 9 December 2015. The committee recognized that the "judiciary remains one of the country's most corrupt institutions" and noted the ability of the executive to "exert influence over the judiciary".

¹⁷ "Situation of human rights in Myanmar", Resolution adopted by the Human Rights Council, United Nations, 2 April 2015, A/HRC/RES/28/23, calling on the government to "address the need for an independent, impartial and effective judiciary" and a self-governing professional organization of lawyers. WLB and AJAR welcome the launch of the Independent Lawyer Association in Myanmar (ILAM), a national professional organization in January 2016 and will closely monitor its actions. It is currently still in the process of adopting its constitution.

¹⁸ Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Myanmar", CEDAW/C/MMR/CO/4-5, adopted by the Committee at its sixty-fourth session, 4-22 July 2016, p. 5 (thereafter "CEDAW Concluding Observations").

¹⁹ "Torture by law enforcers: are Burma's police the new military?", Danilo Reyes, in "Police torture & crackdown on protest in changing Burma", Article 2, Volume 14, N.2, June 2015.

²⁰ "Report of the Special Rapporteur on the situation of human rights in Myanmar", United Nations Human Rights Council, 23 March 2015, A/HRC/28/72.

Additionally, government initiatives towards improving women's rights are plagued by corruption. The Myanmar National Human Rights Commission (MNHRC) still lacks credibility, independence, transparency and capacity, and is not, to date, a reliable interlocutor for women survivors²¹. Government-organized non-governmental organizations ("GONGO"s) such as the Myanmar Women's Affairs Federation (MWAFF) and the Myanmar National Committee for Women's Affairs (MNCWA), the focal point for CEDAW enforcement, are led by men or the wives of high-ranking members of the military, and favour programs focusing on women's protection rather than women's empowerment²².

Additional challenges for women survivors of state-sponsored gender-based violence

If these legal and judicial shortcomings were not enough, women survivors face additional obstacles in their search for justice²³.

Entrenched discrimination and cultural taboos regarding violence against women all too often silence victims even further. Women facing state-sponsored sexual violence do not dare to speak out, for fear of shaming their communities, their families and themselves. Most survivors place the peace and unity of the community before their own wellbeing. In Buddhist communities, the religious concept of karma often impacts their response, as negative experiences in one's life are considered the result of bad behavior in previous lives, and as such, are accepted as fate. The few women who do speak out are often ostracized or even threatened or retaliated against. Customary practices such as "cleaning" a village after a villager has suffered rape or sexual violence are still in place in certain areas²⁴, as well as abusive traditional justice mechanisms such as ordering marriage between a rapist and victim²⁵.

Women are also often silenced by "compensations", usually a very small sum of money, offered by the perpetrator/s in exchange for a guarantee that no further action will be taken. Once the compensation is accepted by the victim, or more often by her family without consulting her, customary authorities and the community enforce the arrangement and prevent women victims from accessing the formal justice system. In ethnic areas, the practice of discriminatory customary law also hinders women's will to speak up and any attempt to find justice for themselves²⁶. These customary laws are not codified, and rest in the hands of village authorities, who are almost exclusively men.

The long duration and relatively high cost of legal proceedings are also an important factor preventing women survivors from accessing justice. Criminal proceedings last between one and two years for first instance only, with frequent adjournments. The cost of hiring a lawyer, and the time spent travelling and attending court hearings can be overly burdensome for many women, especially in ethnic areas where farming is the main source of livelihood.

The medical response to gender-based violence too is often very poor and discriminatory. Hospitals refuse to examine the victim, analysis and examinations are delayed and critical

²¹ CEDAW Concluding Observations, p. 4.

²² Global Justice Center & Leitner Center for International Law and Justice, "Promises Not Progress: Burma's National Plan for Women Falls Short of Gender Equality and CEDAW", August 2015, p. 20.

²³ UN Women and Justice Base's research report, "Women's Access to Justice in the Plural Legal System of Myanmar: Voices from the Intersection", 2016, p. 80-87 (thereafter "UN Women and Justice Base's 2016 Report").

²⁴ A woman victim of gender-based violence is considered "unclean" and ostracized from the community. This can be cured if the survivor and her family pay tributes and put on feasts and festivals for the village in order to "clean" it; WLB, "Long Way to Go", p. 7, 86.

²⁵ CEDAW Concluding Observations, p. 7, UN Women and Justice Base's 2016 Report, p. 62, 63.

²⁶ For a recent analysis of the impact of traditional justice mechanisms on women's access to justice, see UN Women and Justice Base's 2016 Report. Answers to cases of rape and sexual harassment are specifically discussed at p. 60-67.

evidence ends up tampered with or destroyed. The lack of standardized practices is especially detrimental to women, many of whom face abuse and re-victimization at the hands of the medical personnel who should be responsible for their primary medical care. International standards have been put in place and should be implemented in Burma²⁷.

In ethnic areas, language itself can constitute a barrier to accessing court proceedings. Often interpreters are unavailable, or simply choose to not attend court due to the sensitive nature of gender-based violence cases and their fear of participating in such proceedings.

Finally, many women across Burma still lack awareness of their rights, and do not act due to their lack of basic legal knowledge and low education.

As a result of these cumulative factors, women survivors find no benefit in trying to obtain justice through the formal legal system and almost never even try to lodge a case. The government must ensure that these challenges are immediately overcome and in particular should fight the root causes of women's fear to speak out through the range of actions detailed below.

Case studies:

Offer of compensation²⁸

A five year old Buddhist girl from Rakhine State was raped by a soldier of the Burmese army in March 2016. Her family reported the case to the police and as soon as the perpetrator was arrested and sent to the police station, the Commander came and tried to give 1,000,000 kyats to the girl's family. A local CSO advised them not to take the compensation. When the family refused the money, the Commander took the perpetrator from the police station and, to date, it is not known whether he was charged and/or prosecuted by a court-martial, or even arrested by military authorities.

A difficult access to Justice²⁹

A 17 year old Kachin student was raped by a government school teacher in November 2015. Under pressure from the school administration and local authorities, the family felt compelled to accept monetary compensation and sign a document "officially" ending the case. The community, including other school teachers, youth and local CSOs, pressured restlessly to have the case opened. Eventually the teacher was charged with rape and a trial is currently ongoing. Language barriers and transportation issues are slowing down the proceedings as the victim speaks only the local Kachin language and lives in a very remote area, far from the Court. An accomplice might be prosecuted as well thanks to the efforts of the civil society to obtain justice for the girl. Despite obtaining what seems to be a genuine access to justice, the girl has been banned from her local church when she and her family refused to confess their "guilt" in front of the congregation. Religious leaders see her as guilty of breaking the church's rule that church members not engage in sexual intercourse outside of marriage.

²⁷ UNFPA, "Minimum Standards for Prevention and Response to Gender-Based Violence in Emergencies", 2015; international standards: <http://www.endvawnow.org/en/articles/1560-clinical-management-of-sexual-assault-survivors.html>.

²⁸ Case documented by Rakhine Women Union (RWU).

²⁹ Case documented by Kachin Women Association Thailand (KWAT).

Absence of justice³⁰

A Ta'ang woman was brutally gang-raped by several soldiers of the Burmese army in March 2016. At that time, only women remained in her village because the Army had threatened to arrest and kill all the men. She did not dare to report the case to the police or file a complaint because of her overwhelming fear. She also could not afford to hire the lawyer.

RECOMMENDATIONS

Ending impunity and achieving access to justice for women survivors of gender-based violence committed by state actors will require a long-term sustained effort by the new government. As a necessary first step, the State should immediately put an end to ongoing armed conflicts throughout the country and withdraw all troops from ethnic areas.

Additionally, the Government must act without delay to end institutionalized impunity and promote access to justice for women survivors, including by:

Ending institutionalized impunity for state actors through legal and institutional reforms

1. Amend the 2008 Constitution, including article 445, to ensure accountability and civilian control and oversight of security forces;
2. Facilitate cases of gender-based violence committed by state actors to be heard and decided in civilian courts;
3. Enact or amend relevant laws to provide a comprehensive legal framework to answer to acts of gender-based violence. To this end, adopt the long delayed Violence Against Women Law, including specific provisions on gender-based violence in conflict, and ensure a CSO perspective by consulting with local organisations, and full compliance with CEDAW and other international human rights standards;
4. Review and immediately repeal all laws, provisions and regulations that discriminate against women;
5. Undertake legal and institution reforms focused on creating an independent, impartial and effective civilian judiciary;
6. Reform the Myanmar National Human Rights Commission to ensure it is able to discharge its functions fully and independently in accordance with international standards;
7. Amend the Constitution to include a provision on the applicability of international treaties in national law and ensure enforcement of binding international instruments;
8. Eliminate all customary laws and practices that discriminate against women, and ensure that informal justice systems comply with CEDAW and international human rights standards.
9. Reform the political structure of the country and put in place a genuine federal system.

³⁰ Case documented by Ta'ang Women Organization (TWO).

Promoting access to Justice for women survivors of gender-based violence by state actors

10. Acknowledge past and present acts of gender-based violence perpetrated by state actors and publicly commit to ending this entrenched criminal pattern of behaviour;
11. Eliminate economic barriers to women's access to justice by providing competent gender-sensitive legal aid for survivors of gender-based violence;
12. Enforce mechanisms to guarantee safe access to justice for survivors of gender-based violence committed by state actors by ensuring that women are protected from threats, harassment, retaliation, and other forms of harm and intimidation before, during, and after legal proceedings,
13. Provide for competent translators in all court proceedings and develop programs of community-based paralegals to support and advise women survivors through the judicial process;
14. Develop and implement gender sensitivity training for justice personnel and public officials, in particular law-enforcement personnel and health-service providers, in order to ensure that they are sensitized to all forms of violence against women and can provide adequate gender-sensitive support to victims;
15. Develop and implement public education campaigns about women's rights, conduct comprehensive awareness-raising events on women's rights throughout Burma, and officially acknowledge and support CSOs and CBOs' related initiatives;
16. Develop and implement standardized good practices in medical responses to gender-based violence;
17. Develop a reparations policy to address the urgent needs of survivors, including:
 - a. access to health care for injuries and illnesses resulting from gender-based violence.
 - b. psychosocial support in the form of appropriate mental health counseling, including community-based trauma healing strategies that facilitate peer-to-peer support.
 - c. addressing the socio-economic consequences of violations and livelihood needs, including access to education or vocational training, employment opportunities, and capital.

Reparative measures for survivors must be included in peace process discussions and a final agreement.