

MYANMAR

Country Profile prepared by the ICJ Centre for the Independence of Judges and Lawyers

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Overview

Myanmar has thus far failed to ratify most human rights treaties.

Judicial independence is provided for in law, but not respected in practice. In particular, the degree of control exercised by the Executive over the appointment process and the lack of transparency over criteria for selection and promotion, insufficient security of tenure, executive control over the budget and insufficient pay and training are inconsistent with international standards.

Lawyers lack a self-governing professional body that can defend the profession's integrity and professional interests. Although their independence has increased substantially since 2011, on-going challenges remain, such as interference in politically sensitive and criminal cases. Structural problems such as the poor state of legal education have yet to be addressed.

A. Introduction

1. Legal tradition

Myanmar's legal system is based on the English common law tradition, influenced heavily by the manner of reception and codification of that tradition in British India in the 19th and early 20th century.

The territory of what is today the Republic of the Union of Myanmar was consolidated under British India in the 19th century. It became a formal colony of Britain in 1937. During the Second World War, Japanese occupying forces granted the country independence, though in name only. The British reasserted control following the war. Thereafter, however, the 1947 Aung San-Attlee Agreement¹ provided for the election of a constituent assembly to draft a Constitution² (which was approved the same year), and the Panglong Agreement³ established that contested border areas should at least initially remain part of the country.

The Union of Burma formally became an independent sovereign republic on 4 January 1948. Existing laws, insofar as they were not inconsistent with the new Constitution,

¹ Aung San-Attlee Agreement. 1947. <http://burmestar1010.files.wordpress.com/2011/06/44172419-aungsan-atlee-agreement.pdf> (Accessed 2 December 2013).

² Consulted at <http://www.scribd.com/doc/25420681/1947-Constitution-of-Burma-English-Version> (Accessed 11 December 2013).

³ Consulted at <http://www.encburma.net/index.php/agreements/43-agreements/159-the-panglong-agreement.html> (Accessed 11 December 2013). Parties to the agreement were the Burmese government under Aung San and the Chin, Kachin and Shan peoples.

remained in force. A Laws Revision Committee classified and published both the pre-independence laws which remained in force and the laws enacted up to 1954 in 13 volumes of the Burma Code. These include *inter alia* the Penal Code, Code of Criminal Procedure, Code of Civil Procedure, the Bar Council Act and the Legal Practitioners Act.⁴

Following a *coup d'état* in March 1962, General Ne Win established a Revolutionary Council and the 'Burmese Way to Socialism'.⁵ Existing laws remained in force until repealed. In January 1974, the 1947 Constitution was superseded by the Constitution of the Socialist Republic of the Union of Burma.⁶ Again existing laws remained in force insofar as they were not contrary to the Constitution, until and unless they were repealed.

Following the repression of large-scale pro-democracy protests in September 1988, the military staged another *coup*. It established the State Law and Order Restoration Council (SLORC) and suspended the 1974 Constitution. Martial law was declared and the SLORC decreed a series of emergency measures. Again, existing laws remained in force until annulled or repealed.

After the opposition National League for Democracy (NLD) won the 1990 elections, the SLORC refused to cede power and instead retained martial law and continued to exercise legislative, executive and judicial power. The legislative assembly was transformed into a National Convention tasked with drafting a new Constitution; it met from 1993 through 1995, when NLD delegates walked out and the Convention was adjourned. In November 1997, the SLORC changed its name to the State Peace and Development Council (SPDC); changes to military rule were, however, minimal.⁷

2. Constitutional structure

In August 2003, Prime Minister General Khin Nyunt announced a "Seven Step Roadmap to Democracy".⁸ In September 2007, in the midst of anti-government protests popularly known as the "Saffron Revolution", the National Convention finished drafting a new Constitution. It was approved in a referendum held in the immediate wake of Cyclone Nargis in May 2008.⁹ In November 2010, the first general election in 20 years was organized, which was widely criticized as neither free nor fair; the NLD boycotted the elections because many of its prominent members were barred from standing.¹⁰ In March 2011, Thein Sein assumed the presidency and the new Constitution came fully into force. In April 2012, by-elections were organized in which the NLD participated (and won all but one of the 44 contested seats), and which were generally felt by international observers to reflect the popular will.¹¹

⁴ See overview on http://web.archive.org/web/20110902212056/http://www.blc-burma.org/html/Burma%20Code/Indexes/lr_law_bc_aindex.html (Accessed 11 December 2013).

⁵ The Burmese Road to Socialism is an economic treatise written in April 1962 by the Revolutionary Council as a blueprint for economic development. It aimed to reduce foreign influence in the country and increased the role of the military.

⁶ Consulted at <http://www.thailawforum.com/database1/constmyanmar.html> (Accessed 11 December 2013).

⁷ See Human Rights Watch, *Chronology of Burma's Constitutional Process* (2008).

⁸ Speech by Khin Nyunt, *New Light of Myanmar*, 31 August 2003. <http://www.ibiblio.org/obl/docs/how10.htm> (Accessed 7 January 2014). The steps were: 1. Reconvening the National Convention; 2. Step by step implementation of the process necessary for the emergence of a genuine and disciplined democratic system; 3. Drafting a new Constitution in accordance with basic principles and detailed basic principles laid down by the National Convention; 4. Adoption of the Constitution through referendum; 5. Holding free and fair elections for the legislative bodies (Hluttaw); 6. Convening of the Hluttaw; 7. Building a modern, developed and democratic nation by the state leaders elected by the Hluttaw and the government and other central organs formed by the Hluttaw.

⁹ International commentators unanimously dismissed the entire process as a sham. For a detailed critique of the process, see Human Rights Watch, *Vote to Nowhere: the May 2008 Constitutional Referendum in Burma* (May 2008). Also see International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution* (September 2009), p. 7-9.

¹⁰ See for example International Crisis Group, *Update briefing: Myanmar's Post-Election Landscape*, Asia Briefing No. 118, Jakarta/Brussels (7 March 2011); The Public International Law & Policy Group, *The 2010 Burmese Elections: Neither Free nor Fair* (8 November 2010).

¹¹ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 23; UNDP, *Democratic Governance in Myanmar: Preliminary Situation Analysis* (July 2012), pp. 3-6.

The 2008 Constitution provides for separation and distribution of powers between the executive, legislative and judicial branches, the establishment of judicial and quasi-judicial bodies for Constitutional review and the creation of devolved government structures. It also provides for fundamental rights and the rule of law, although many of those provisions are couched in caveats and qualifiers.¹²

The Constitution codifies immunity for acts committed by the former military regime and its officials in the execution of their duties, including for past human rights violations;¹³ affords the military effective veto power over any Constitutional amendments by reserving for military personnel large numbers of seats in legislative bodies;¹⁴ and provides for exclusive military jurisdiction over members of the military.¹⁵

Existing laws, regulations, by-laws, notifications, orders, and directives and procedures, remain in force insofar as they are not contrary to the Constitution and until and unless they are repealed by Parliament or government.¹⁶ As Myanmar's representatives at its Universal Periodic Review before the UN Human Rights Council conceded, much of the previously applicable law may not be in accord with the new Constitution.¹⁷ A number of existing laws and provisions, many dating from the period of the military dictatorship, also contravene international human rights law and standards.¹⁸

3. [International treaty status](#)

The following table sets out the status of a range of international treaties in Myanmar as of 15 June 2014.

	Status (including ratification, accession and succession)
International Covenant on Civil and Political Rights	No signature or ratification
<i>ICCPR-OP1</i>	No signature or ratification
<i>ICCPR-OP2</i>	No signature or ratification
International Covenant on Economic, Social and Cultural Rights	No signature or ratification
<i>ICESCR-OP</i>	No signature or ratification
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment	No signature or ratification
<i>CAT-OP</i>	No signature or ratification

¹² UNDP, *Democratic Governance in Myanmar: Preliminary Situation Analysis* (July 2012), pp. 6-7; IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), pp. 30-32, 34; DLA Piper, Perseus Strategies and Jacob Blaustein Institute, *Myanmar Rule of Law Assessment* (March 2013), p. 46; Human Rights Watch, *Vote to Nowhere: the May 2008 Constitutional Referendum in Burma* (May 2008), pp. 47-48.

¹³ Constitution, S. 445.

¹⁴ 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.

¹⁵ S. 20(b) establishes that "The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces" and S. 319 establishes that "The Courts-Martial shall be constituted in accord with the constitution and the other law and shall adjudicate Defence Services personnel".

¹⁶ Constitution, S. 446-447.

¹⁷ Human Rights Council, Report of the Working Group on the Universal Periodic Review of Myanmar, 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 (27 May 2011), para. 10. See: UNDP, *Democratic Governance in Myanmar: Preliminary Situation Analysis* (July 2012), p. 7; IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 41.

¹⁸ Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the General Assembly, UN Doc. A/67/383 (25 September 2012), para. 95(c); DLA Piper, Perseus Strategies and Jacob Blaustein Institute, *Myanmar Rule of Law Assessment* (March 2013), p. 29.

International Convention on the Protection of All Persons from Enforced Disappearance	No signature or ratification
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International Convention on the Elimination of All Forms of Racial Discrimination	No signature or ratification
Convention on the Elimination of All Forms of Discrimination against Women	22 July 1997
<i>CEDAW-OP</i>	No signature or ratification
Convention on the Rights of the Child	15 July 1991
<i>CRC-OP1</i>	No signature or ratification
<i>CRC-OP2</i>	16 January 2012
<i>CRC-OP3</i>	No signature or ratification
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	No signature or ratification
Convention on the Rights of Persons with Disabilities	7 December 2011
<i>CRPD-OP</i>	No signature or ratification

	Ratification (including ratification, accession and succession)
Geneva Convention I	25 August 1992
Geneva Convention II	25 August 1992
Geneva Convention III	25 August 1992
Geneva Convention IV	25 August 1992
<i>Additional Protocol I</i>	No signature or ratification
<i>Additional Protocol I</i>	No signature or ratification

Rome Statute	No signature or ratification
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Convention against Corruption	20 December 2012
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In the course of the Universal Periodic Review of its human rights record in 2011, Myanmar 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".¹⁹ Furthermore, it is not yet clear how the government will ensure that provisions of international treaties to which it is a State parts are implemented in practice by administrative, legislative and judicial authorities.

The fact that Myanmar has yet to ratify specific human rights treaties does not necessarily mean that obligations recognised by those treaties do not apply to Myanmar. Some treaty provisions are also rules of customary international law that apply to all states including Myanmar (and some of these are peremptory norms of international law, which apply in all circumstances without exception). In addition, the Constitution of Myanmar contains provisions that set out parallel guarantees to those in some of the above-named treaties. Thus the Myanmar authorities should take note of the authoritative interpretations of human rights law by international bodies set out in General Comments, recommendations,

¹⁹ Human Rights Council, Report of the Working Group on the Universal Periodic Review of Myanmar, 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 (27 May 2011), para. 3.

and views as well as judgments of human rights courts, particularly on provisions that reflect customary law or guarantees in the Constitution of Myanmar.

4. [Court structure](#)

The Constitution establishes three types of courts: civilian courts, Courts-Martial, and the Constitutional Tribunal.

Civilian courts are organized in four levels:

- the Supreme Court of the Union;
- 14 State and Region High Courts;
- 67 District Courts and Courts of Self-Administered Divisions and Zones; and
- 324 Township Courts.

The Constitution also foresees the establishment of “other Courts constituted by law”.²⁰ This judicial structure was maintained from a 2000 Law on the Judiciary, itself introduced in an effort to reorganize the judiciary along the lines of what had existed prior to the 1974 socialist Constitution.²¹ The 2008 Constitution also restored the Supreme Court’s power to issue writs, such as the writ of habeas corpus or the writ of mandamus, which it had lost in the early 1970s.²²

Courts-Martial (i.e. military courts) adjudicate cases involving Defence Services personnel.²³ As noted above, the Constitution provides that the Defence Services have the right to independently administer and adjudicate all affairs of the armed forces.²⁴

The Constitutional Tribunal is empowered to interpret the provisions of the Constitution, to vet whether laws or measures taken by executive authorities are in conformity with the Constitution, and to resolve disputes between the numerous federal sub-entities.²⁵ The Constitution exhaustively sets out a list of the officials (persons) and organizations that have the right to submit matters for interpretation, either directly or subject to further caveats. The first category on the list includes among others the President, the Chief Justice and the Speakers of the Pyidaungsu, Pyithu and Amyotha Hluttaws; the second category includes among others the Chief Ministers of the Regions and States and the Speakers of the Region or State Hluttaw.²⁶ The Constitutional Tribunal does not have jurisdiction to consider complaints by individual citizens about alleged violations of their Constitutional rights.

Village chiefs (or “headmen”) also exercise certain quasi-judicial powers of investigation, arrest and punishment, under the law. First regularized by statute under British rule in 1907, these local arrangements were altered by the Ward or Village Tract Administration Act 2012, which provides for the election by secret ballot of all village level officials.²⁷

[B. Judges](#)

*It is fundamental to the rule of law, to the right to a fair trial, the right to liberty and security of person, and to the right to effective remedy for violations of human rights, that individual judges and the judiciary as a whole must be independent and impartial.*²⁸ The

²⁰ Constitution, S. 293, Judiciary Law S. 7-8, 42. Statistics from UNDP, *Democratic Governance in Myanmar: Preliminary Situation Analysis* (July 2012), p. 26-27.

²¹ UNDP, *Democratic Governance in Myanmar: Preliminary Situation Analysis* (July 2012), p. 26.

²² Constitution, S. 378.

²³ Constitution, S. 319.

²⁴ Constitution, S. 20(b) and S. 319.

²⁵ Constitution, S. 322.

²⁶ Constitution, S. 325-326.

²⁷ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 56.

²⁸ Among others, International Covenant on Civil and Political Rights (ICCPR), Article 14(1); Universal Declaration of Human Rights, Article 10; 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’), Principle 1 and 2; Universal

requirement that courts and other tribunals be effective, independent and impartial "is an absolute right that is not subject to any exception."²⁹

For the judiciary as an institution, the requirement of independence refers in particular to: the procedure and qualifications for the appointment of judges; guarantees relating to security of tenure until a mandatory age of retirement or expiry of term of office; the conditions governing promotion, transfer, suspension and cessation of their functions; and the degree to which the executive and legislative branches of power do or do not in practice interfere with judges and judicial decision-making.³⁰

A number of aspects of the organization, regulation and administration of the judiciary in Myanmar are inconsistent with international standards, which aim to safeguard the independence of the judiciary. In particular, the degree of control exercised by the Executive over the process of appointment of judges to many of the country's courts, and the lack of transparency about the criteria and procedures followed for selection and promotion; insufficient security of tenure for judges; Executive control over the judicial budget; and insufficient judicial pay and training are inconsistent with the protection of the independence of the judiciary.

1. Constitutional and legislative recognition of the principle of judicial independence

The independence of the judiciary must be guaranteed by the State and enshrined in the Constitution or the law.³¹

The Constitution of Myanmar prescribes "as judicial principles": "to administer justice independently according to law; to dispense justice in open court unless otherwise prohibited by law; [and] to guarantee in all cases the right of defence and the right of appeal under law".³² The principle of independence is reinforced through the requirement that judges of the Constitutional Court, the Supreme Court and High Courts be free from party politics.³³

However, these Constitutional provisions have not yet been reflected in actual practice. In his latest report, the Special Rapporteur on the situation of human rights in Myanmar stated he "sees no evidence that the judiciary is developing any independence from the executive branch of government".³⁴ The following sections contain some examples of how the independence of the judiciary from the Executive is neither safeguarded nor respected under ordinary legislation and practice.

2. Appointment and promotion of judges; Security of tenure

To safeguard the independence of the judiciary and the rights to equality before the law and equal access to the profession, international standards clarify that judges should be

Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 1; 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, Value 1 and 2. Generally, see also International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, no. 1* (2007).

²⁹ 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.

³⁰ 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. 19; UN Basic Principles on the Independence of the Judiciary.

³¹ UN Basic Principles on the Independence of the Judiciary, Principle 1.

³² Constitution, S. 19(a); State Peace and Development Council Law No. 20/2010 (The Union Judiciary Law), 28 October 2010 (hereinafter: "Judiciary Law"), S. 3(a)

³³ Constitution, S. 300(a) and 301(f) and Judiciary Law, S. 30(f) for the Chief Justice of the Union and the Judges of the Supreme Court; Constitution, S. 309(a) and 310(f) and Judiciary Law S. 48(f) Judiciary Law for the Chief Justices and Judges of the High Courts; Constitution S. 330(c) and 333(f) for the Justices of the Constitutional Court.

³⁴ 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 (17 April 2013), para. 63.

appointed though an open process on the basis of prescribed criteria based on merit and integrity, and without discrimination.³⁵ To ensure that the composition of the judiciary is essentially reflective of the population and to combat discrimination and ensure equality before the law, steps should be taken to ensure the appointment of qualified women and members of minority communities.³⁶

As regards appointment criteria, the UN Basic Principles on the Independence of the Judiciary stipulate that persons selected must be "individuals of integrity and ability with appropriate training of qualifications in law".³⁷

An appropriate method of appointment of judges is a prerequisite for the independence of the judiciary³⁸ and is a means of ensuring equal access to the profession. On the procedure for judicial appointments, the UN Basic Principles on the Independence of the Judiciary underscore the fact that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives".³⁹ In relation to the appointment and promotion of judges the United Nations Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have repeatedly recommended the use of bodies that are independent from the executive,⁴⁰ plural and are composed mainly (if not solely) of judges and members of the legal profession;⁴¹ they should apply transparent procedures.⁴²

Promotions within the judiciary must be based on objective factors, particularly ability, integrity and experience.⁴³

It is widely accepted that when judges have security of tenure in office they are less vulnerable to pressure from those who can influence or make decisions about the renewal

³⁵ Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides in part: "In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." 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. 19.

³⁶ Gabriela Knaut, Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, UN Doc. A/66/289 (2011), para. 22-33, 92; Human Rights Committee, Concluding Observations on the United Kingdom, UN Doc. CCPR/CO/73/UK (2001), para. 15; Human Rights Committee, Concluding Observations on France, UN Doc. CCPR/C/FRA/CO/4 (2008), para. 26; Human Rights Committee, Concluding Observations on Sudan, UN Doc. CCPR/C/79/Add.85 (1997), para. 21; Committee Against Torture, Conclusions and recommendations on Bahrain, UN Doc. CAT/C/CR/34/BHR (2005), para. 7(h); Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, UN Doc. A/60/18 (pp. 98-108) (2005), para. 5(d); Committee on the Elimination of Racial Discrimination, Concluding Observations on Guatemala, UN Doc. CERD/C/GTM/CO/12-13 (210), para. 8; Committee on the Elimination of Racial Discrimination, Concluding Observations on Colombia, UN Doc. CERD/C/304/Add.76 (1999), para. 13.

³⁷ UN Basic Principles on the Independence of the Judiciary, Principle 10.

³⁸ 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.

³⁹ UN Basic Principles on the Independence of the Judiciary, Principle 10.

⁴⁰ See e.g. Concluding Observations on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations on Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations on Tajikistan, CCPR/CO/84/TJK, para. 17; Concluding Observations on Honduras, CCPR/C/HND/CO/1 (2006), para. 16; Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20. Also see Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 11; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 9.

⁴¹ Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29. See also International Commission of Jurists, International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, no. 1 (2007), pp. 45-48.

⁴² Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 32. See Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Preliminary Report to the Human Rights Commission on a mission to Ecuador, UN Doc. E/CN.4/2005/60/Add.4 (2005), para. 5(d).

⁴³ UN Basic Principles on the Independence of the Judiciary, Principle 13; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 14.

*of their terms of office. Accordingly, international standards prescribe that judges tenure must be guaranteed until a mandatory retirement age or expiry of the term of office.*⁴⁴

While as described below in section 4, judges nonetheless remain accountable throughout their terms of office, as a necessary corollary to the guarantee of security of tenure, international standards specify that during their term of office, judges may be removed only in exceptional, strictly limited and well-defined circumstances provided for by law, involving incapacity or behaviour that renders them unfit to carry out the duties of their office, and following a fair procedure.

Myanmar does not have a Judicial Service Commission or other comparable body entrusted with the appointment, promotion and discipline of judges, and protecting and promoting judicial independence and the efficiency of justice.

Different political institutions manage judicial appointment in Myanmar. The processes used and criteria they apply are opaque.

The President and the Parliament jointly appoint the members of the Constitutional Tribunal.⁴⁵ 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 to approve the appointment of the nominee unless it can clearly be proven that the person does not meet the required qualifications.⁴⁶

The President also nominates the Chief Justices of the High Courts of the Regions and States, 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 appoints the Chief Justices and judges of the High Courts with the approval of the Region or State Parliament, who cannot refuse to approve the appointment of the nominees unless it can clearly be proven that the person does not meet the required qualifications.⁴⁷

Notably, the criteria for appointment do not necessarily require that candidates for judicial office hold a law degree or have professional experience in the legal field (be it as an academic, practicing lawyer, or any other type of legal professional). Instead, being “a person who, in the opinion of the President, is an eminent jurist” can suffice.⁴⁸

The Supreme Court is tasked with appointing lower court judges, which it reportedly has delegated to a Civil Service Selection and Training Board.⁴⁹

It is unclear which criteria or process are applied to promotions.

Many judges in Myanmar lack knowledge of the law and standards on judicial conduct, as well as experience.⁵⁰ In an interview with an ICJ researcher in May 2013, a senior legal adviser to the President acknowledged that “judges lack the knowledge to conduct free and fair trials”.⁵¹ Government officials, however, appear open to programmes organized by the international community that aim to improve the training of judges.

⁴⁴ UN Basic Principles on the Independence of the Judiciary, Principle 12; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 16(b) and 18(c); Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 8.

⁴⁵ 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).

⁴⁶ Constitution, S. 299(c)-(d); Judiciary Law, S. 26-27.

⁴⁷ Constitution, S. 308(b); Judiciary Law, S. 44-45.

⁴⁸ Constitution, S. 301 and 310; Judiciary Law, S. 30 and 48.

⁴⁹ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 57.

⁵⁰ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 58.

⁵¹ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 40.

3. Financial independence of the judiciary

At the institutional level, international standards make clear that it is the duty of the State to provide adequate resources to enable the judiciary to properly perform its functions.⁵² As a safeguard of judicial independence, the courts' budget shall be prepared "in collaboration with the judiciary having regard to the needs and requirements of judicial administration".⁵³

Furthermore, the remuneration and pensions of judges must be secured by law at an adequate level that is consistent with their status⁵⁴ and is sufficient to safeguard against conflict of interest and corruption.

Myanmar's Executive branch exercises considerable control over the judicial budget. The Supreme Court is tasked with submitting a budget for the judiciary to the Government each year,⁵⁵ for inclusion in the Union Budget Bill that is placed before the parliament by the President.⁵⁶ The proposals for salaries and allowances for senior judges and members of the Constitutional Tribunal and those institutions' expenditures can be discussed by Parliament, but not "refused or curtailed".⁵⁷

As to the remuneration of judges, a number of lawyers who spoke with the ICJ pointed out that among other things judges' low pay, which they considered insufficient, makes them susceptible to corruption. Members of international civil society have recommended an increase of judicial salaries as a way to combat corruption.⁵⁸

4. Independence and impartiality; Judicial Integrity and accountability

Respect for the rule of law is founded on public trust of the judiciary and, to maintain that trust, judges must uphold the highest standards of independence, impartiality and integrity, and must be accountable to those standards.

The guarantee of judicial decisions by independent tribunals means that judges must be free to "decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".⁵⁹ Thus, both state actors and non-state actors alike must respect the independence of the judiciary and refrain from action aimed at improperly influencing members of the judiciary, undermining their independence and impartiality. While respecting the hierarchy between the courts of first instance and higher courts international standards clarify that other judges, must also respect the independence of their colleagues within the scope of the exercise of judicial functions: "No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts."⁶⁰

⁵² UN Basic Principles on the Independence of the Judiciary, Principle 7; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 33.

⁵³ Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 34.

⁵⁴ UN Basic Principles on the Independence of the Judiciary, Principle 11; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 16(a); Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 13.

⁵⁵ Constitution, S. 297.

⁵⁶ Constitution, S. 103(a).

⁵⁷ Constitution, S. 103(b)(i).

⁵⁸ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 59; DLA Piper, Perseus Strategies and Jacob Blaustein Institute, *Myanmar Rule of Law Assessment* (March 2013), p. 31.

⁵⁹ UN Basic Principles on the Independence of the Judiciary, Principles 1-7, in particular Principle 2; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Articles 2-8; 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, Value 1; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 1-4.

⁶⁰ Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 4.

In the course of the exercise of judicial functions, judges must be impartial, and be seen to be impartial. Judges "must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other." Further, even where an individual judge might in fact be able to ignore a personal relationship to one of the parties to a case, he or she should step aside from the case to protect against an apprehension of bias: "the tribunal must also appear to a reasonable observer to be impartial."⁶¹

Judges must also ensure that their conduct is above reproach in the view of a reasonable observer. They must avoid impropriety and the appearance of impropriety in all their activities. Their behaviour must reinforce the people's confidence in the integrity of the judiciary.⁶²

A judicial code of conduct, drafted primarily by judges and members of the legal profession and consistent with international standards,⁶³ can help to safeguard judicial integrity and protect against conflicts of interest.⁶⁴ Pursuant to international standards, such a judicial code of conduct, which should be enshrined in the law, should serve as the basis for the determination of cases of alleged judicial misconduct within a fair disciplinary system⁶⁵.

Complaints about judicial misconduct must be processed expeditiously and fairly under an appropriate procedure that is subject to independent review.⁶⁶ The judge in question has the right to a fair hearing before an independent and impartial body. The body responsible for discipline of judges should be independent of the executive,⁶⁷ plural and composed mainly (if not solely) of judges and members of the legal profession.⁶⁸ The judge's rights to a fair proceeding, including to notice of the accusations against him or her, to adequate time and facilities to prepare and present a defence including through counsel, to challenge the evidence against him or her and present witnesses must be respected. Decisions must be based on established standards of judicial conduct, and sanctions must be proportionate. Decisions to suspend or remove a judge must be limited to cases in which the incapacity or behaviour of a judge renders the individual unfit to discharge his or her judicial duties.⁶⁹ Decisions and sanctions in disciplinary proceedings should be subject to independent judicial review (although this may not apply to decisions of the highest court or the legislature in impeachment proceedings).⁷⁰

⁶¹ 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; UN Basic Principles on the Independence of the Judiciary, Principle 2; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 25; 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, Value 2 and 4; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 5.

⁶² 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, Value 3 and 4; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 5-7.

⁶³ See Bangalore Principles of Judicial Conduct; International Bar Association Minimum Standards of Judicial Independence, para. 35-42.

⁶⁴ See Bangalore Principles of Judicial Conduct, Preamble and 'Implementation'.

⁶⁵ UN Basic Principles on the Independence of the Judiciary, Principle 19.

⁶⁶ UN Basic Principles on the Independence of the Judiciary, Principle 17 and 20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 28;

⁶⁷ Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), para. 16; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20.

⁶⁸ Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29.

⁶⁹ UN Basic Principles on the Independence of the Judiciary, Principle 16; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 20; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 10.

⁷⁰ UN Basic Principles on the Independence of the Judiciary, Principle 17-20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 26-31; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 8 and 11.

*In order to safeguard the independence of the judiciary, individual judges should also enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.*⁷¹

Myanmar does not have a Judicial Service Commission or other comparable independent body entrusted with the discipline of judges. Judges sitting on the Constitutional Tribunal, Supreme Court, and High Courts are subject to impeachment proceedings by Parliament. Grounds for impeachment of these judges include "misconduct" and "inefficient discharge of duties assigned by law".⁷² Further, it is not clear that any formal mechanisms exist to ensure the integrity and accountability of lower court judges. The role of the executive and legislature in the removal of superior court judges and the lack of clarity as regards the mechanism applicable to lower court judges threatens judicial independence and undermines security of tenure, which is one of the basic conditions for judges to retain their independence: without it, they are susceptible to undue pressure from different quarters, mainly from those who exert influence and control over their career.

Moreover, political and military influence over judges remains a major obstacle. Depending on the nature of the case, judges render decisions based on orders coming from government officials, in particular local and regional authorities. The most problematic cases are 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 and minority groups; and political activities by high profile individuals.⁷³

Furthermore, corruption in the form of misuse of influence and monetary incentives for particular legal outcomes is prevalent throughout the legal system, and some judges condition favourable decisions on bribes. The lawyers with whom the ICJ spoke about this issue noted that while the degree of corruption varies (being at its worst at the lower rungs of the system), it is never absent from the equation: it is so deeply embedded into the legal system that it is essentially taken for granted.⁷⁴

C. Lawyers

Lawyers fulfill an essential function in protecting human rights and ensuring the fair and effective administration of justice. An independent legal profession is one of the pillars upon which respect for human rights and the rule of law rests.

UN Basic Principles on the Role of Lawyers enumerate duties that lawyers must be able to carry out at all times freely. They include, among others: "advising clients on their rights and obligations and the working of the legal system insofar as it is 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, as well as "seek to uphold human rights and fundamental freedoms, and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. They must "always loyally respect the interests of their clients".

As essential agents of the administration of justice they must also maintain the honour and dignity of their profession.

⁷¹ UN Basic Principles on the Independence of the Judiciary, Principle 16; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 20; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 10.

⁷² Constitution, S. 302(a) and 311(a).

⁷³ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 18, 40.

⁷⁴ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 15-16, 40.

Governments must, among other things, ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. They must recognize and respect that all communications between lawyers and their clients within their professional relationship are confidential. The competent authorities must 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.⁷⁵

1. [The role of lawyers](#)

An independent legal profession is one of the pillars upon which respect for human rights and the rule of law rests.⁷⁶ They have an essential function in protecting human rights and ensuring the fair and effective administration of justice. Among other things, lawyers can 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 can also protect fair trial rights when working to defend individuals charged with criminal offences. They play a crucial part in combating impunity, when advising and representing victims of human rights violations and their relatives, including in the context of criminal cases brought against the alleged perpetrators and in proceedings aimed at obtaining other forms of reparation.

The ICCPR and other international standards guarantee the right of all persons charged with a criminal defence to access to counsel, and the right to defend themselves against the charges with the assistance of counsel. Those who do not have counsel of choice to represent them are entitled to have legal assistance assigned to assist in their defence in any case where the interests of justice so requires, free of charge if the accused cannot afford to pay.⁷⁷ The UN Principles and Guideline on Access to Legal Aid in Criminal Justice Systems and Human Rights Committee have clarified that the gravity of the offence, the complexity of the case, and the severity of the potential penalties are important factors in deciding on the "interests of justice". Effective assistance by a lawyer, free of charge if necessary, is considered to be a fundamental requirement in death penalty cases.⁷⁸ At the regional level, the right to a fair trial has been interpreted as requiring the State to ensure the assistance of a lawyer, again free of charge if necessary, also in at least some non-criminal (e.g., civil) proceedings.⁷⁹

2. [Access to the legal profession](#)

Every person who has the necessary qualifications and integrity should be allowed to practice as a lawyer. No discrimination is permitted on grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth,

⁷⁵ UN Basic Principles on the Role of Lawyers, Principles 12-22.

⁷⁶ 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), Pre-amble.

⁷⁷ ICCPR, Article 14(3)(d).

⁷⁸ UN principles and Guidelines on the Access to Legal Aid in Criminal Justice Systems Proceedings, UN Doc. A/RES/67/187 (2013), Principle 3; 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. 38.

⁷⁹ See the jurisprudence of the European Court of Human Rights on the interpretation of Article 6: *Airey v. Ireland*, Application No. 6289/73 (1979), para. 26; also see *McVicar v. the United Kingdom*, Application No. 46311/99 (2002), *Essaadi v. France*, Application No. 49384/99 (2002), *P. C., and S. v. the United Kingdom*, Application No. 56547/00 (2002), *Steel and Morris v. the United Kingdom*, Application No. 68416/01 (2005). The Inter-American Court of Human Rights has addressed the need to remove obstacles in access to justice that might originate from a person's economic status, including by ensuring free legal assistance, in *Advisory Opinion OC-11/90*; also see *Advisory Opinion OC-18/03* on "juridical condition and rights of undocumented migrants" and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article H explicitly provides for a right to legal assistance in civil cases where the interests of justice so require, to be determined in light of the complexity of the case, the rights that are affected and the likely impact of the outcome of the case on the wider community.

*economic or other status with regard to entry into the profession or continued practice. The prohibition of discrimination does not however necessarily preclude a requirement that a candidate for judicial office must be a national of the country concerned.*⁸⁰

*States 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.*⁸¹

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",⁸² which in turn must be independent (see below).

Independence of the legal profession both implies and includes security for lawyers, their clients and justice. 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 of ensuring the quality and integrity of lawyers. 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. It thus also serves to protect and assure those who call upon lawyers for legal services and enhances the quality of the administration of justice.

Lawyers in private practice in Myanmar fall in one of two categories that date back to British colonial rule: higher-grade pleader and advocate.⁸³ The Legal Practitioners Act governs the admission of higher-grade pleaders, the Bar Council Act governs the admission of advocates, and the Court Manual provides further detail in relation to the qualifications and admissions processes for both classes of lawyers.⁸⁴ Admission to both categories of the profession is restricted to citizens.⁸⁵ 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 discrimination. While in general imposing a nationality requirement for access to the profession is not necessarily prohibited by international standards,⁸⁶ the application of such a requirement in the specific context of Myanmar is another manifestation of the discrimination faced by members of the Rohingya community.⁸⁷

Delays in approval of applications for licenses to practice as a higher-grade pleader or advocate are not uncommon. In an interview with an ICJ researcher, 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 2012.⁸⁸

⁸⁰ 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.

⁸¹ UN Basic Principles on the Role of Lawyers, Principle 11.

⁸² 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.

⁸³ 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.

⁸⁴ Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 9; Legal Practitioners Act 1999, S. 6-8, 36 and 41-44.

⁸⁵ 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 IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 27.

⁸⁶ UN Basic Principles on the Role of Lawyers, Principle 10.

⁸⁷ Furthermore, the reluctance of lawyers to represent Rohingya clients exacerbates the discrimination against this population's access to justice and ability to claim their rights. See International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 20-21.

⁸⁸ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 33-34.

3. Independence of the legal profession

In order for legal assistance to be effective, it must be carried out independently.⁸⁹ To this end, international law establishes safeguards aimed at ensuring the independence of the individual lawyer, as well as the profession as a whole.

The UN Basic Principles recognise that lawyers are 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 are to be elected by its members and are to exercise its functions without external interference.⁹⁰ 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".⁹¹

Lawyers' professional organizations' functions in ensuring the profession's independence include, among other things, maintaining the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession, as well as protecting the intellectual and economic independence of the profession; defending the role of lawyers in society; promoting equal access of the public to the system of justice; promoting and supporting law reform; promoting a high standard of legal education as a prerequisite for entry into the profession, while ensuring equal access for all persons having the requisite professional competence; and promoting the welfare of the members of the profession.⁹²

International standards place a duty on the authorities of 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.⁹³

International standards also underscore that associations of lawyers must, however, cooperate with governments to ensure effective and equal access to legal services, and to 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.⁹⁴

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.⁹⁵

⁸⁹ UN Basic Principles on the Role of Lawyers, Preamble para. 9.

⁹⁰ UN Basic Principles on the Role of Lawyers, Principle 24; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 97; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 17.

⁹¹ 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.

⁹² See International Bar Association (IBA) Standards for the Independence of the Legal Profession (1990), Article 18.

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

⁹⁴ UN Basic Principles on the Role of Lawyers, Principle 25. For a more elaborate list on the functions of lawyers' associations, see International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 18; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 99. Also see General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2012), Principle 10-11.

⁹⁵ UN Basic Principles on the Role of Lawyers, Principles 12 and 23; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 99(g); International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 18.

The current arrangements related to the composition and functioning of the professional association in Myanmar do not appear to meet international standards. The Myanmar Bar Council is a statutorily mandated institution whose primary purpose is oversight of the registration and discipline of advocates. The Bar Council consists of eleven members, appointed directly or indirectly by the President. They are: the Attorney General as Chairman, the Deputy Attorney General as Vice Chairman, the Director General of the Office of the Attorney General as Secretary, a Supreme Court judge nominated by the Chief Justice, the Director General of the Supreme Court, and six advocates nominated by the Supreme Court.⁹⁶

The Bar Council is widely viewed as lacking in independence and instead, a tool of the Executive branch.⁹⁷ It does not participate in furthering legal education; it does not defend the interests of the legal profession; it does not engage in activities to strengthen the independence of lawyers; and it has participated in the arbitrary punishment of lawyers (see further below).⁹⁸

International observers and local lawyers point out that in the past, the Bar Council functioned more independently. From 1929 to 1988, the Bar Council had fifteen members, of whom practicing lawyers elected ten.⁹⁹ The current level of executive control may be a response to (or punishment for) the legal profession's active involvement in the pro-democracy protests of the late 1980s.¹⁰⁰

Numerous international organizations have recommended the establishment of a stronger, independent bar association in Myanmar.¹⁰¹

4. [Non-interference with the work of individual lawyers](#)

*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.*¹⁰²

*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.*¹⁰³ *To this end, international law establishes safeguards aimed at ensuring the independence of the individual lawyer, as well as the profession as a whole.*

*Governments must ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.*¹⁰⁴

⁹⁶ Bar Council Act Amendments of 1989, S. 3.

⁹⁷ See International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 28; DLA Piper, Perseus Strategies and Jacob Blaustein Institute, *Myanmar Rule of Law Assessment* (March 2013), p. 35; IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), pp. 63-64.

⁹⁸ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), pp. 28-29; IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 64.

⁹⁹ S. 4 Bar Council Act.

¹⁰⁰ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 61.

¹⁰¹ 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 (17 April 2013), para. 95; International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 43; IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 73; DLA Piper, Perseus Strategies and Jacob Blaustein Institute, *Myanmar Rule of Law Assessment* (March 2013), p. 39.

¹⁰² See UN Basic Principles on the Role of Lawyers, Principles 12-15.

¹⁰³ UN Basic Principles on the Role of Lawyers, Preamble para. 9.

¹⁰⁴ UN Basic Principles on the Role of Lawyers, Principle 16(a).

Among other things, the authorities must ensure lawyers are granted prompt and regular access to individuals who have been deprived of their liberty, regardless of whether they have been charged with a crime.¹⁰⁵ 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.¹⁰⁶ 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".¹⁰⁷ Delay in granting an individual access to counsel and/or other interference in the lawyer-client however, in particular in a criminal case, can affect the ability of the accused to protect and preserve his or her rights and may prejudice the overall fairness of the subsequent criminal proceedings.

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".¹⁰⁸ Respect for this right requires, among other things that lawyers be permitted adequate time and facilities to meet with their detained clients. 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".¹⁰⁹

Because confidentiality is paramount to an effective lawyer-client relationship, states have the duty to respect and protect the confidentiality of lawyer-client communications, within the professional relationship. In the fulfilment of this duty international standards specify, among other things, that lawyer-client consultations between a detained person and their lawyer "may be within sight, but not within the hearing, of law enforcement officials"¹¹⁰, 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".¹¹¹

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".¹¹² Furthermore, lawyers "must never be subjected to criminal or civil sanctions or procedures which are abusive or

¹⁰⁵ 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.

¹⁰⁶ 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.

¹⁰⁷ UN Basic Principles on the Role of Lawyers, Principle 7.

¹⁰⁸ ICCPR, Article 14(3)(b); 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.

¹⁰⁹ UN Basic Principles on the Role of Lawyers, Principle 8; 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; 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).

¹¹⁰ 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".

¹¹¹ UN Basic Principles on the Role of Lawyers, Principle 21; 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.

¹¹² UN Basic Principles on the Role of Lawyers, Principle 18.

*discriminatory or which would impair their professional functions, including as a consequence of their association with disfavoured or unpopular causes or clients”.*¹¹³ 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”.¹¹⁴

*Further, the authorities must safeguard lawyers’ security where this is threatened as a result of discharging their functions.*¹¹⁵

In Myanmar, a number of practices interfere with lawyers’ independence. Lawyers face obstructions that impede their ability to provide legal assistance and for those acting on behalf of accused persons in criminal cases, to prepare their clients’ defence.

Firstly, lawyers’ ability to obtain clients is constrained by authorities’ refusal to grant initial access to potential clients or to register power of attorney. Sometimes, a bribe or unofficial “fee” is required. These problems are more likely to occur in politically sensitive cases. Further, both clients and lawyers fear being associated with a party that is viewed negatively by the courts.¹¹⁶

Secondly, access to clients deprived of their liberty can sometimes be difficult, particularly before the trial begins and when clients are in prison. Delays are common and again, bribes are often required. If it is possible to meet, the facilities provided for lawyer-client meetings are frequently not conducive to ensuring respect for the privacy of lawyer-client communications.¹¹⁷

A lawyer’s access to documents held by officials, thirdly, may be delayed or denied. Some believe this is motivated by politics. Unnecessarily bureaucratic procedures and disorganization of the courts are other reasons.¹¹⁸

Fourthly, delays and changes in the court schedule compromise legal representation. Some lawyers claim that trial timelines have been purposely manipulated to hinder their participation in the case.¹¹⁹

These problems are reportedly exacerbated in cases involving the government or military, or their interests, while added to them are monitoring and harassment of lawyers by intelligence officers and the politicized use of disciplinary proceedings and criminal charges, including contempt of court, to harass and intimidate lawyers as a result of their efforts to represent their clients in sensitive cases, despite no apparent wrongdoing on the part of the lawyer.¹²⁰

Procedural protections, including the right of lawyers to present evidence and defend themselves during disciplinary hearings, were reportedly often ignored.¹²¹ According to the International Bar Association, more than 1,000 of Myanmar’s estimated 48,000 lawyers¹²²

¹¹³ 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; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 84.

¹¹⁴ UN Basic Principles on the Role of Lawyers, Principle 20; Singhvi Declaration, Article 85.

¹¹⁵ UN Basic Principles on the Role of Lawyers, Principle 17.

¹¹⁶ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 35.

¹¹⁷ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), pp. 36-37.

¹¹⁸ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), pp. 37-38.

¹¹⁹ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 39.

¹²⁰ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), pp. 17-26.

¹²¹ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), pp. 23-25.

¹²² 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.

have been disciplined in Myanmar over the past 20 years,¹²³ with many having their licenses revoked (essentially disbarred) or suspended.

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 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.¹²⁴

Many lawyers, some known for their work on human rights cases or their 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.¹²⁵ 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, recent reports indicate that as many as 200 lawyers, who were disbarred for political reasons, may remain without their licenses.¹²⁶ Notwithstanding assurances from the government that lawyers whose licenses 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”,¹²⁷ the process for securing license restoration remains unclear. 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.¹²⁸

5. [Lawyers’ freedom of expression and association](#)

Like other citizens, lawyers are entitled to enjoyment of their rights 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. They also 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.*¹²⁹

¹²³ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 63.

¹²⁴ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 25.

¹²⁵ See, e.g., Irrawaddy, *Activist Lawyers Have Licenses Returned* (21 November 2012), <http://www.irrawaddy.org/archives/19466>.

¹²⁶ 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 (17 April 2013), para. 67.

¹²⁷ 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>.

¹²⁸ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 25.

¹²⁹ UN Basic Principles on the Role of Lawyers, Principle 23; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 92; 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; International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standard 14.

Furthermore, as set out above in Section 3, lawyers are entitled to form and join self-governing professional associations that represent their interests, promote their continuing education and protect their professional integrity.

a) Freedom of association

Concerns about the lack of independence of the Myanmar Bar Council are set out above in Section 3 on the independence of the legal profession.

Many lawyers in Myanmar are members of independent bar associations or other groups of lawyers that do not have any official, government-mandated functions, but provide an outlet for lawyers to communicate and coordinate with each other. Between 1988 and 2011 some groups, such as the Yangon Bar Association, were forced through government intimidation and interference to abandon most of their activities for more than two decades. Others, such as the Bago Bar Association, were able to carry on many of their activities without registration, even cooperating with local authorities on matters concerning lawyers.¹³⁰

Today, the government has dramatically lessened its harassment of independent bar associations. However, the Unlawful Associations Act and other repressive laws have not been repealed. Further, the government has not allowed lawyers to register independent bar associations with the government, having the consequence of hindering their membership and operations. While the government has publicly expressed a willingness to register the bar associations, but has not taken any action to match this rhetoric.¹³¹

b) Freedom of expression

The right to freedom of speech under the 2008 Constitution of Myanmar is subject to a range of restrictions. Speech may be restricted if it is "contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquillity or public order and morality."¹³² While punishment of lawyers for expression of their views has declined since 2011 and lawyers are now speaking up with greater confidence than in several decades in particular about the need for law and justice reform and enhancing protection and respect for human rights and the rule of law, many members of the profession continue to fear that speaking openly about politically sensitive issues will lead to disciplinary action, prejudicial treatment, criminal accusations, or contempt of court charges.¹³³ This fear chills lawyers' freedom of expression at a time when their leadership is needed.¹³⁴

6. Integrity and accountability of the legal profession

As with judges, a code of professional conduct for lawyers is an essential tool for the maintenance of the integrity of the profession and, consequently, the quality of access to justice in a country. The UN Basic Principles on the Role of Lawyers state that "[c]odes of professional conduct shall be established by the legal profession through its appropriate organs, or by legislation".¹³⁵

¹³⁰ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 29.

¹³¹ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 29; IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (December 2012), p. 65.

¹³² Constitution, S. 354.

¹³³ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), pp. 29-30.

¹³⁴ See Janelle Saffin, New Mandala, *Where are Burma's lawyers in the transition* (18 July 2012), <http://asiapacific.anu.edu.au/newmandala/2012/07/18/where-are-burma%E2%80%99s-lawyers-in-the-transition/>.

¹³⁵ UN Basic Principles on the Role of Lawyers, Principle 26. The International Bar Association (IBA) Standards for the Independence of the Legal Profession (Standard 22) reserve this task for lawyers' associations. See Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 102.

In order to uphold the integrity of the legal profession lawyers must be held accountable in fair proceedings before independent bodies, for breaches of established standards of professional conduct.

Complaints against lawyers for misconduct in their professional capacity should be "processed expeditiously and fairly under appropriate procedures."¹³⁶ They should be decided "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession."¹³⁷

International professional standards prescribe that the body responsible for investigating and adjudicating on allegations of misconduct by lawyers should be independent and impartial, and ensure that proceedings are conducted fairly and following proper procedure.¹³⁸ A lawyer accused of professional misconduct must have "the right to be assisted by a lawyer of their choice".¹³⁹ He or she should be entitled to notice of the complaints against him or her and have adequate time and facilities to prepare and present a defence. Any sanction against a lawyer for misconduct should be proportionate. The lawyer should be entitled to independent judicial review of the disciplinary proceedings.¹⁴⁰

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, with the former being governed by the Legal Practitioners Act¹⁴¹ and the latter by the Bar Council Act.¹⁴²

In Myanmar, 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.¹⁴³ The Supreme Court may also suspend or dismiss higher-grade pleaders "for any other reasonable cause".¹⁴⁴ Judges in subordinate courts are able to initiate investigations into allegations of 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.¹⁴⁵

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".¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

¹³⁶ UN Basic Principles on the Role of Lawyers, Principle 27.

¹³⁷ UN Basic Principles on the Role of Lawyers, Principle 29.

¹³⁸ UN Basic Principles on the Role of Lawyers, Principle 27 and 29; 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.

¹³⁹ UN Basic Principles on the Role of Lawyers, Principle 27.

¹⁴⁰ 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.

¹⁴¹ Legal Practitioners Act 1999, S. 12-15.

¹⁴² Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 10-13.

¹⁴³ Legal Practitioners Act 1999, S. 12-13.

¹⁴⁴ Legal Practitioners Act 1999, S. 13(f).

¹⁴⁵ Legal Practitioners Act 1999, S. 14.

¹⁴⁶ Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 10(1).

¹⁴⁷ Bar Council Act, India Act XXXVIII 1926 (amended 1989), S. 10(2) and 11.

¹⁴⁸ Bar Council Act, India Act XXXVIII 1926 (amended 1989), article 12.

In practice, save for the fact that lawyers are seldom given an opportunity to defend themselves in contravention of international standards, due to deliberate opacity it is unclear how these procedures are implemented and who holds ultimate responsibility for disciplinary actions. As noted above, Myanmar has a history of politically inspired, arbitrary disciplinary proceedings against lawyers.

D. Prosecutors

*Prosecutors play a crucial role in the administration of justice, which they must fulfil fairly, consistently and expeditiously in accordance with the law. International standards underscore that they must respect and protect human dignity and uphold human rights.*¹⁴⁹

*Prosecutors perform an active role in criminal proceedings, including the institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of such investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest. These functions shall be carried out separately from judicial functions.*¹⁵⁰

Every prosecutor must fulfil his or her professional duties in an independent, impartial and objective manner, without discrimination of any kind, and as essential agents of the criminal justice system, maintain the honour and duty of their profession.

*Prosecutors may not initiate or continue prosecution if an impartial investigation shows the charge to be unfounded. Further, they must give due attention to the prosecution of crimes committed by public officials, in particular corruption, abuse of power, grave violations of human rights and other crimes recognized by international law. If prosecutors come into possession of evidence that they know or believe on reasonable grounds was obtained through recourse to unlawful methods that constitute a grave violation of the suspect's human rights, they must refuse to use such evidence against anyone other than those who used such methods or inform the Court accordingly and take all necessary steps to ensure that those responsible are brought to justice.*¹⁵¹

1. Functioning of the prosecutorial services

Prosecutors play a crucial role in the administration of justice, and respect for the rule of law requires a strong prosecutorial authority in charge of investigating and prosecuting criminal offences. Each prosecutor must be empowered to fulfil his or her professional duties in an impartial and objective manner.

*Prosecutors must perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights.*¹⁵² *They perform an active role in criminal proceedings,*¹⁵³ *and must carry out these functions impartially and objectively, protecting the public interest.*¹⁵⁴

This requires, among other things that Prosecutors:

¹⁴⁹ UN Guidelines on the Role of Prosecutors, Guidelines 12-13.

¹⁵⁰ UN Guidelines on the Role of Prosecutors, Guideline 11.

¹⁵¹ UN Guidelines on the Role of Prosecutors, Guidelines 14-16.

¹⁵² UN Guidelines on the Role of Prosecutors, Guideline 12; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1(h) and 4.1.

¹⁵³ UN Guidelines on the Role of Prosecutors, Guideline 11; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 4.2.

¹⁵⁴ UN Guidelines on the Role of the Prosecutor, Guideline 13; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1(g), 3(a) and 3(c).

- *Ensure that victims of crime are provided with information about the proceedings and their rights within them, and consider their views, as appropriate;*¹⁵⁵
- *Do not initiate or continue a prosecution when an independent investigation indicates that the charge is unfounded;*¹⁵⁶
- *Refuse to use evidence gained as a result of unlawful means, including torture or other ill-treatment, except in proceedings against those allegedly responsible for using such unlawful means;*¹⁵⁷
- *Give due attention to the prosecution of crimes committed by public officials, including in particular corruption, abuse of power, violations of human rights and crimes under international law.*¹⁵⁸

*States must ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.*¹⁵⁹ *In particular, the authorities must physically protect prosecutors and their families when their personal safety is threatened as a result of discharging their prosecutorial functions.*¹⁶⁰

*The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.*¹⁶¹ *Further, the law or published rules and regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecutorial process.*¹⁶² *If non-prosecutorial authorities have the right to give general or specific instructions, those should be transparent, consistent with lawful authority, and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.*¹⁶³

In Myanmar, criminal prosecution is carried out under the supervision of the Office of the Attorney General of the Union. The Attorney General supervises 14 Offices of Advocate General of the Region or State, 68 District Law Offices, and 325 Township Law Offices.¹⁶⁴ Besides prosecuting criminal cases, the Attorney General, among other things, also tenders legal advice to the President, the Speakers of the houses of Parliament and ministries; and appears on behalf of the State in certain Supreme Court cases.¹⁶⁵ He also provides preliminary review of draft legislation.¹⁶⁶ The Attorney General is a member of the Government. His many other roles mesh uneasily with his prosecutorial duties.

Further, the Special Rapporteur on the situation of human rights in Myanmar has urged the Attorney General's Office to ensure that State prosecutors act as a check on the practices of the police in their interrogation of suspects and collection of evidence, fulfilling their role in ensuring respect for the rights of suspects.¹⁶⁷ He has also expressed concern about

¹⁵⁵ UN Guidelines on the Role of Prosecutors, Guideline 13 (d).

¹⁵⁶ UN Guidelines on the Role of Prosecutors, Guideline 14.

¹⁵⁷ UN Guidelines on the Role of Prosecutors, Guideline 16.

¹⁵⁸ UN Guidelines on the Role of Prosecutors, Guideline 15.

¹⁵⁹ UN Guidelines on the Role of Prosecutors, Guideline 4; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(a).

¹⁶⁰ UN Guidelines on the Role of Prosecutors, Guideline 5; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(b).

¹⁶¹ International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 2.1.

¹⁶² UN Guidelines on the Role of Prosecutors, Guideline 17.

¹⁶³ International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 2.2.

¹⁶⁴ See <http://www.oag.gov.mm/?q=en/content/organization-setup> (Accessed 11 December 2013). The UNDP and the IBA estimate there are 1,700 prosecutors in Burma, but the source of this number is unclear.

¹⁶⁵ State Peace and Development Council Law No. 22/2010 ("The Attorney-General of the Union Law"), 28 October 2010 (hereinafter: "AG Law"), S. 12.

¹⁶⁶ UNDP, *Democratic Governance in Myanmar: Preliminary Situation Analysis* (July 2012), p. 9-10. See, Republic of the Union of Myanmar, Union Attorney General's Office, Formation of Divisions of Legislative Vetting and Advising Department, <http://www.oag.gov.mm/?q=en/content/legislative-vetting-and-advising-department> (Accessed 11 December 2013).

¹⁶⁷ Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, UN Doc. A/HRC/22/58 (17 April 2013), para. 68.

continuing prosecutions of people exercising their rights to peaceful assembly and association.¹⁶⁸

2. [The prosecutor's career](#)

Persons selected as prosecutors must be individuals of integrity and ability, with appropriate training and qualifications.¹⁶⁹ Accordingly, States must ensure that selection criteria embody safeguards against appointments based on partiality or prejudice, and that prosecutors have appropriate education and training.¹⁷⁰

Promotion of prosecutors must be based on objective factors and decided upon in accordance with fair and impartial procedures.¹⁷¹

Prosecutors must enjoy "[r]easonable conditions of service ... adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations".¹⁷² They must "at all times maintain the honour and dignity of the profession".¹⁷³

The Attorney General must be a citizen born to two citizen parents, and be over forty-five years old.¹⁷⁴ The Attorney General must either possess specified, extensive legal experience or be considered an "eminent jurist" by the President.¹⁷⁵ Once nominated by the President, Parliament can only reject the Attorney General if "it can clearly be proved that the person concerned does not meet the qualification".¹⁷⁶

The President may direct the Attorney General to resign "if he cannot discharge his duties efficiently".¹⁷⁷ If there is a need to impeach the Attorney General, the same procedure for the impeachment of a Union minister is applied.¹⁷⁸ The possible grounds for impeachment are the same as those for Supreme and High Court judges.

Little information is available about the day-to-day operations of prosecutors in Myanmar. The AG Act does not include provisions relating to the promotion, discipline, or training of prosecutors.

3. [Accountability of the prosecutorial services](#)

Like all members of the legal profession, Prosecutors must carry out their roles with integrity and in accordance with the law and in a manner that is consistent with human rights and established standards of prosecutorial conduct. And like other legal professionals Prosecutors must be accountable for professional misconduct. These are imperatives for upholding the integrity of the office of the Prosecutor as well as the legal system and respect for the rule of law.

Disciplinary proceedings must guarantee an objective evaluation and decision.

¹⁶⁸ Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, UN Doc. A/68/397 (23 September 2013), para. 20 and 30.

¹⁶⁹ UN Guidelines on the Role of Prosecutors, Guideline 1.

¹⁷⁰ UN Guidelines on the Role of Prosecutors, Guideline 2.

¹⁷¹ UN Guidelines on the Role of Prosecutors, Guideline 7; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(e).

¹⁷² UN Guidelines on the Role of Prosecutors, Guideline 6; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(c)-(d).

¹⁷³ UN Guidelines on the Role of Prosecutors, Guideline 3; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1(a).

¹⁷⁴ AG Law, S. 10.

¹⁷⁵ AG Law, S. 10.

¹⁷⁶ Constitution. S. 237(a)-(b); AG Law, S. 5.

¹⁷⁷ AG Law, S. 18; Constitution, S. 240.

¹⁷⁸ Constitution, S. 238 jo. 233.

*Disciplinary offences must be defined in law or lawful regulations and complaints alleging misconduct must be processed expeditiously and fairly in the context of fair procedures before an independent and impartial body . The prosecutor whose professional conduct is in question must be afforded a fair hearing and the decision must be based on established standards of professional conduct, and subject to independent review.*¹⁷⁹

The ICJ does not presently have information concerning accountability of prosecutors in Myanmar.

E. Legal education

The availability and provision of quality legal education and continuing education is essential to ensuring that legal professionals are competent and able to play their essential role in contributing to ensuring respect for the rule of law, the protection and promotion of human rights and the fair administration of justice.

The Basic Principles on the Independence of the Judiciary provide that persons selected for judicial office must have "appropriate training or qualifications in law".¹⁸⁰ Furthermore, the Singhvi Declaration places a duty on judges to "keep themselves informed about international conventions and other instruments establishing human rights norms".¹⁸¹ The Bangalore Principles of Judicial Conduct add that "a judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control".¹⁸²

The Guidelines on the Role of Prosecutors likewise specify they shall be individuals "with appropriate training and qualifications".¹⁸³ States must ensure that they meet this criterion and that prosecutors be made aware of the ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.¹⁸⁴ Prosecutors have a duty to "keep themselves well-informed and abreast of legal developments".¹⁸⁵

The 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 and are aware of lawyers' ethical duties and of human rights and fundamental freedoms recognized by national and international law.¹⁸⁶ Further, they should take special measures to provide opportunities and ensure needs-appropriate training for law students from groups whose needs for legal services are not consistently met, particularly including those who have distinct cultures, traditions or languages or have been the victims of past discrimination.¹⁸⁷ Legal education must be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status.¹⁸⁸

¹⁷⁹ UN Guidelines on the Role of Prosecutors, Guideline 21-22; International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 6(f)-(g).

¹⁸⁰ UN Basic Principles on the Independence of the Judiciary, Principle 10.

¹⁸¹ Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 40. See Bangalore Principles of Judicial Conduct, Value 6: Competence and diligence, 6.4.

¹⁸² See Bangalore Principles of Judicial Conduct, Value 6: Competence and diligence, 6.3.

¹⁸³ UN Guidelines on the Role of Prosecutors, Guideline 1.

¹⁸⁴ UN Guidelines on the Role of Prosecutors, Guideline 2(b).

¹⁸⁵ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, Article 1.

¹⁸⁶ UN Basic Principles on the Role of Lawyers, Principle 9. See International Bar Association (IBA) Standards for the Independence of the Legal Profession, Standards 2-4.

¹⁸⁷ UN Basic Principles on the Role of Lawyers, Principle 11.

¹⁸⁸ Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 77.

The UN Special Rapporteur on the independence of judges and lawyers has recommended that magistrates, judges, prosecutors, public defenders and lawyers should be requested to take courses on international human rights law. She also recommended that on-going legal education should be mandatory at all levels.¹⁸⁹ The Singhvi Declaration states that "continuing legal education shall be available to judges".¹⁹⁰

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 out-dated 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.

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 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.¹⁹¹

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.¹⁹² 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.¹⁹³

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.¹⁹⁴ 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

¹⁸⁹ Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Advance report on the global thematic study on human rights education and training of legal professionals, UN Doc. A/HRC/20/20 (2012), para. 112.

¹⁹⁰ Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 12.

¹⁹¹ International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (December 2013), p. 31-32.

¹⁹² Myint Zan, *Legal Education in Burma since the 1960s*, unedited electronic version of articles that appeared in *The Journal of Burma Studies*, p. 14. http://www.niu.edu/burma/publications/jbs/vol12/Legal_Education_in_Burma_Unpublished_Version.pdf (Accessed 11 December 2013).

¹⁹³ *Ibid.*, p. 19.

¹⁹⁴ *Ibid.*, p. 7.

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 content of questions and answers.

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.