MONITORING IN MYANMAR

AN ANALYSIS OF MYANMAR'S COMPLIANCE WITH FAIR TRIAL RIGHTS

JUSTICE BASE

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Justice Base promotes the rule of law in transitional and post-conflict societies by building the capacity of local lawyers and supporting nationally owned rule of law initiatives. We endeavour to strengthen the capacity of lawyers to engage in – and guide – the national discussion on rule of law needs and priorities, develop domestic rule of law initiatives, and lead legal and institutional reform efforts in emerging democracies.

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Monitoring in Myanmar: An Analysis of Myanmar's Compliance with Fair Trial Rights

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EXECUTIVE SUMMARY

This report describes the findings of Justice Base's courtroom observations in Yangon Region's Township and District Courts from 12 June 2013 to 30 April 2014 and 11 January 2015 to 28 December 2016.

To date, there have been no detailed reports assessing the implementation of fair trial rights in criminal proceedings in Myanmar. Although the Constitution of the Republic of the Union of Myanmar ("2008 Constitution") enshrines the right to a public hearing,[1] court officials often limit access. While lawyers typically appear with other lawyers in a courtroom, the regular presence of independent observers is unprecedented in Myanmar's courts. Observing court proceedings enables independent observers to assess courts' adherence to international and domestic fair trial rights, encourages judges to conduct proceedings fairly and informs justice sector reform.

This report analyses Myanmar's compliance with five key domestic and international fair trial rights: the right to a defence, the right to adequate time and facilities to prepare a defence, the right to a hearing without undue delay, the right to a hearing by a competent, independent and impartial tribunal and the right to a public hearing.

Analysis of questionnaire data revealed specific areas of concern, including threats to the five rights mentioned above. Many defendants had no legal representation prior to trial, especially during key pretrial proceedings such as remand hearings, where they are particularly vulnerable to abuse or coercion by the authorities.[2] When defendants were represented, lawyers were not always effective. Some failed to make motions concerning defendants' treatment while in custody and the length of time they spent in detention. This was reportedly due in part to lawyers' lack of awareness that they could assert such applications and because lawyers feared judicial retaliation if they made applications on behalf of their clients.

Even with representation, defendants faced significant systemic problems, such as the inability to access case documents or speak confidentially with legal counsel. In almost all observed cases, private consultation with a client was unattainable. Certain documents, particularly prosecution witness lists, were often provided to lawyers but others, such as court diaries[3] or case files, including the police report ("First Information Report"),[4] were difficult to obtain. Lawyers were rarely in possession of a case file during all phases of a particular case.

Judges adjourned more than half of all scheduled court hearings and data from observed cases showed that many key actors—including judges and clerks—were absent for all or significant portions of hearings. Judges answered phone calls during hearings, talked to third parties unconnected to cases in the middle of proceedings, and, in some cases, pressured defendants to admit guilt.

The payment of unofficial fees implicated all actors, including defendants and defence lawyers. Unofficial fees were reported to impact all aspects of criminal proceedings, including obtaining release on bail, accessing documents, seeking adjournments and receiving reduced sentences.

Despite the existence of a constitutional right to a public hearing, the public still struggles to access courthouses and courtrooms. This occurs through outright exclusion and informal barriers such as the limited size of courtrooms. Further, the public lacks awareness of their right to attend court hearings and remains fearful of entering courtrooms so rarely asserts the right to do so.

Justice Base's findings cut across individual Townships and Districts in Yangon Region and demonstrate that defendants in Myanmar's criminal justice system struggle to receive fair trials despite the rights and safeguards that exist under law.

Given the long history of military rule and executive control over the judiciary, the types of problems identified in this report are not entirely surprising. However, the Office of the Supreme Court of the Union has made significant strides toward achieving justice sector reform, including through its Judiciary Strategic Plan, by developing a new code of ethics for Myanmar judges and by increasing transparency through the publication of its annual report. Justice Base hopes that by identifying specific practices that infringe upon fair trial rights and contradict domestic law, this report will assist and further efforts taken by the Myanmar government, judges and lawyers toward achieving their goal of improving the rule of law.

KEY RECOMMENDATIONS

Justice Base recommends that the Myanmar government address the concerns described above through a comprehensive reform program that includes the following actions and initiatives:

(i) Ensure that all detainees are informed of their right to a lawyer immediately upon arrest or detention. Create posters and leaflets detailing an accused's right to a lawyer and display them in police stations, remand locations, jails and courts.

(ii) All police officers and jail officials should provide a separate room and sufficient opportunities for defendants to communicate with counsel in a confidential manner. These requirements should be included in operating guidelines for police officers and jail officials and reviewed during trainings to express the importance of confidential communications between defendants and counsel. Judges and defence lawyers must confirm that defendants have been informed of and given the right to privately consult with their representatives.

(iii) The Ministry of Home Affairs in consultation with the Office of the Supreme Court and the Union Attorney General's Office should develop a standard pretrial detention record for all defendants and require every police station to complete it for each defendant.

(iv) Provide all relevant court documents to defendants without delay and in no case more than twenty-four hours after each document is available and/or an application for copies is made.

(v) Halt proceedings any time a presiding judge leaves the courtroom, no matter the cause.

(vi) The Office of the Supreme Court, the Union Attorney General's Office, the Myanmar Police Force, the Ministry of Education and civil society organisations should train lawyers, judges, non-judicial court staff, police officers and other officials on fair trial rights, particularly pretrial rights. Funding should be allocated to establish mandatory training programs that all actors must complete on an annual basis. Such programs should be developed in consultation with civil society, lawyers and experts on fair trial rights and if funding is not readily available, implemented with the assistance of those actors. The Ministry of Education, in particular, should incorporate fair trial rights into required legal curriculum. The Independent Lawyers Association of Myanmar and other state and regional bar associations should incorporate fair trial rights curriculum into continuing legal education programs.

(vii) The Office of the Supreme Court and the Union Attorney General's Office should ensure that all judges and law officers are trained on the new codes of ethics and establish appropriate enforcement mechanisms for failure to comply with such codes.

(viii) The Office of the Supreme Court should include in the mandate of the Public Relations Division a requirement to work with community based organisations to promote awareness of fair trial rights and make information on fair trial rights publicly available at all Public Intake Counters and places of detention.

(ix) Introduce uniform case management systems in all courts, such as those introduced in Myanmar's Pilot Courts by USAID's Promoting the Rule of Law Project. These systems should include the use of pretrial conferences to determine trial dates and witness availability in advance, standard case forms and case tracking systems to monitor resolution of cases.

(x) All courts should publicly post and regularly update official court fees.

(xi) Ensure that the right to a public hearing is upheld for all courtroom proceedings and clearly post a notice of the right to a public hearing outside every courtroom door. Provide training to non-judicial court staff on the right to a public hearing.

(xii) The Office of the Supreme Court should allocate funding to expand the size of courtrooms and to provide seating areas for public attendance.

(xiii) Allow regular, transparent, and independent monitoring of court proceedings by individuals trained in domestic and international fair trial rights.

(xiv) The Office of the Supreme Court should issue guidance to all courts explaining the laws discussed herein and how they should work in practice to be consistent with domestic and international law, including the International Covenant on Civil and Political Rights.

OVERVIEW OF MYANMAR'S JUDICIAL SYSTEM

A. DEVELOPMENT OF LAW AND THE JUDICIARY

Myanmar inherited a combination of pre-colonial customary and Buddhist law, colonial law and legislation promulgated during successive military regimes.

Much of the territory that constitutes present-day Myanmar was ruled by absolute monarchs. Traditional sources of law can be traced to kings' royal edicts and ordinances, the *dhammathats* (jurisprudence later compiled into twentieth century reports as Myanmar customary law),[5] judicial decisions by the royal parliament (*hluttaw*) and other formal court proceedings established by the monarchy.[6]

Through the Anglo-Burmese wars in 1824-1826, 1852-1853 and 1885, England annexed the lands that now comprise Myanmar, named them Burma and incorporated them into the colonial administration of India,[7] including the common-law system already in place in that colony. The British also extended to Burma statutory codes used to govern India, including the Code of Civil Procedure (1908), the Penal Code (1860) and the Code of Criminal Procedure (1898), which remain in effect with minor amendments.[8]

The period immediately following independence from colonial rule was a high point for judicial independence, during which the courts asserted their concerns with procedural justice and upheld a number of challenges to executive action. However, the military takeover in 1962 "eroded and extinguished the independence of the judiciary in Burma."[9] The military government abolished the higher courts and replaced them with newly constituted bodies, often staffed with judges who were members of the ruling party. From 1972, politically-appointed lay-judges administered the lower courts and made decisions in the ruling party's interests rather than according to law. The 1974 Constitution "rejected the separation of powers and an independent judiciary in legal thinking, education, and practice."[10] The State Law and Order Restoration Council continued to tightly control judges after coming to power in 1988. As recently as 2010 it was said that the courts were "more integrated into the army-dominated executive than at any time in their recent history."[11]

Changes in legal education introduced during the 1970s also played a significant role in the development of today's judiciary. From approximately 1963 to 1996, there was only one law department in the entire country.[12] By 1976, the government introduced distance education courses for law students, where students were only taught in person once or twice a year for a few days immediately before exams.[13] Admission standards were low and methods of instruction included reading aloud from pre-designed course materials, providing students with exam questions in advance and giving high exam marks to students who wrote down the course material verbatim.[14] Critical thinking skills were not encouraged. Courses and examinations were conducted in English while Burmese is used in court proceedings.[15] These problems persist today.

Myanmar still formally adheres to a common law legal system and in keeping with this tradition, selected decisions of the Supreme Court are compiled in the

Myanmar Law Reports and published annually. In terms of criminal matters specifically, the Penal Code, Code of Criminal Procedure, Evidence Act, the Courts Manual and, where applicable, the Child Law, are the main laws concerning criminal proceedings. Lawyers are governed by the Legal Practitioners Act (1999) (for higher grade pleaders, with some provisions also applicable to advocates)[16] and the Bar Council Act (1989) (advocates).[17] The Union Judiciary Law (2010) implements the judicial system established by the 2008 Constitution, which provides for a multilevel judiciary with powers to decide cases and interpret laws.[18] While the government amended many of these laws, in large part the judiciary continues to adjudicate cases and follow procedure from outdated codes and legislation.

While sources of law include case law and applicable legislation, a judge has the discretionary power to adjudicate in accordance with "justice, equity and good conscience" in the absence of relevant provisions.[19] A 2016 Justice Base report on women's access to justice described the widespread perception that judges "wield enormous freedom and authority to determine charges, sentencing and penalties based upon personal inclination or political motivation."[20]Although the public perceives the judiciary as having significant power to determine what happens in Myanmar's courts, the International Commission of Jurists reported last year that:

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

B. THE COURT SYSTEM

The judicial system generally consists of four levels: Township Courts, District Courts, High Courts and the Supreme Court. In addition, the judicial system includes courts of special jurisdiction ("special courts"), such as Juvenile Courts, Municipal Courts and Traffic Courts, as well as two specific courts: Courts Martial (to adjudicate Defence Services personnel) and the Constitutional Tribunal.[21]

Cases may be initiated in Township or District Courts and, depending on the court of origination, lower court verdicts may be appealed to the District or High Courts and thereafter to the Supreme Court.

Judges at the Township and District level can hear both original criminal and civil cases.[22] District Court judges also have appellate jurisdiction.[23] In criminal cases, Township Court judges preside over disputes involving charges with a maximum sentence of up to seven years of imprisonment and District Court judges hear "serious" disputes. [24] Township judges may also exercise jurisdiction over juvenile cases.[25]

Cases are classified as warrant or summons cases.[26] In warrant cases, sentences range from imprisonment for more than six months to death.[27] Summons cases are described as "not" warrant cases and presumably entail sentences that are six months or less or fines.[28] Offences are divided along two lines. First, offences are either cognizable or non-cognizable. Cognizable offenses are those that do not require a warrant for arrest compared to non-cognizable

offences which do require a warrant for arrest.[29] Second, offences are bailable or non-bailable, which determine whether and how an arrested individual may secure release on bail.[30] Schedule II to the Code of Criminal Procedure lists offences and provides, among other things, whether each offence requires a warrant or summons, whether it is cognizable and if it is bailable or non-bailable.

Law officers (prosecutors) generally prosecute criminal cases but a complainant may hire a private lawyer (herein complainant's lawyer) to represent him or her in a criminal case under the direction of the law officer.[31] A complainant is a private citizen who has filed a grievance under the Penal Code either to a police officer or, if the offence is eligible, directly to a judge.[32]

METHODOLOGY

Justice Base implemented its court monitoring project in two phases: the first phase, carried out in 2013-2014, included observations in Township Courts and District Courts in Yangon Region. The second phase, carried out in 2015-2016, placed a particular emphasis on observing District Court proceedings and expanded the criteria for observation. The activities during phase two allowed Justice Base to collect more detailed data regarding adjournments, pre-trial procedures and the impartiality of all actors.

Justice Base targeted Township and District Courts because those courts had a greater volume of cases and were generally more accessible. Moreover, Justice Base felt that it was important to observe hearings at courts of first instance because whether courts implement fair trial rights at a defendant's first appearance can significantly impact how the accused moves forward in the justice system.

To conduct observations, Justice Base hired three Myanmar lawyers (one advocate and two higher grade pleaders) with experience representing criminal defendants to observe proceedings alongside partner lawyers. Partner lawyers were those who were already representing defendants or complainants in ongoing cases. Observers did not represent any of the clients in the cases they followed.

To ensure the quality and credibility of observations, Justice Base conducted numerous trainings to familiarise local lawyers, including observers, with substantive domestic and international fair trial rights.

In addition, Justice Base designed a Code of Conduct for observers to reinforce the principles of objectivity, impartiality and nonintervention in the judicial process.[33] This was particularly important due to the use of partner lawyers as Justice Base wanted to ensure, to the extent possible, that observers remained neutral regardless of a partner lawyer's view of a proceeding or case.

Observers used questionnaires to collect quantitative and qualitative data relevant to each proceeding.[34] Each questionnaire provided space for additional comments. Justice Base held subsequent data validation sessions with observers and partner lawyers prior to publication to confirm the accuracy of the data discussed below.

In total, observers followed 155 cases and observed 1,158 individual court hearings in Yangon Region's Township and District Courts.[35]

A. LIMITATIONS TO COMPREHENSIVE DATA

Independent trial observations generally require that a trial observer announce his or her presence to the court, specifically make judicial actors aware that they are under scrutiny, maintain neutrality and refrain from aligning with any party.[36] Prior to implementing this project, Justice Base had extensive discussions with lawyers, members of civil society and other key stakeholders to assess the feasibility of adhering to the standard model of trial observation. Justice Base determined that, due to safety and confidentiality concerns, as well as the ability to gain access to court hearings and relevant court files, observers

should partner with lawyers already representing clients and attend proceedings with them.

Thus, observers did not announce their presence to the court and only attended hearings with partner lawyers identified for this project. They did not have access to key documents or case files, except to the extent that partner lawyers provided such information to them.

Due to the project's methodology and the challenge of attending court hearings in Myanmar, even for independent lawyers, Justice Base was not able to choose hearings at random.

In addition, observers were generally unable to observe a case from start to finish for two main reasons: unpredictable adjournments and the time at which representation began, as many partner lawyers (and thus observers) missed early proceedings because their representation of defendants or complainants started after the first day of inquiry. Long delays caused by waiting for witnesses to appear in court or for judges to return from meetings and other obligations often required that an observer move from one courthouse to the next without observing a hearing. Because observers were unable to attend cases in their entirety, the data below relates primarily to procedural matters rather than substantive aspects of cases.[37]

Due to safety and confidentiality concerns, specific facts, such as case names, case numbers and names of defendants and lawyers, are not included in this report. References to specific dates or particular identifying information concerning a hearing are also excluded.

ANALYSIS OF FAIR TRIAL RIGHTS

Fair trial rights are a complex bundle of interlinked rights and norms derived from a range of international human rights treaties and principles, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT), the United Nations Convention Against Corruption (UNCAC), the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Accountability and the UN Basic Principles on the Role of Lawyers.[38]

Although the UDHR is a declarative document, the core fair trial rights articulated under Article 10 are widely considered to have binding legal status under customary international law.[39] Article 10 of the UDHR states:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Articles 5, 9 and 11 of the UDHR enumerate other rights related to the administration of justice, such as the right to be presumed innocent until proved guilty. The ICCPR's Article 14 elaborates on the fair trial provisions of the UDHR. Although Myanmar has not yet ratified or acceded to the ICCPR, it provides an authoritative and persuasive set of international guidelines on fair trial rights and, as such, serves as the basic framework of this report.

Below is an analysis of Myanmar's compliance with five key fair trial rights. Justice Base has identified the relevant international standards and, to the extent it exists, domestic law applicable to each right.

A. RIGHT TO A DEFENCE

1. International Standards

A defendant has the right to a defence against any criminal charge.[40] This includes the right to legal representation of one's own choosing.[41] A lawyer's duty is to protect his or her client's interests, and as such, a lawyer must inform his or her client concerning the nature of the charges and his or her rights at trial and must advocate for those rights in court.[42]

Early representation is essential to safeguarding a defendant's rights during pretrial proceedings, particularly when he or she is in police custody, as a lawyer can identify, advise and push for the rights of individuals eligible for pretrial release.[43] Making appropriate decisions at the pretrial phase significantly impacts how defendants move through the criminal justice system. Early intervention helps to minimise the use of pretrial detention and ensures that officials take relevant procedural steps in a timely fashion.[44]

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems affirms this, requiring states to ensure that "anyone who is detained, arrested, suspected of, or charged with a criminal offence . . . is entitled to legal aid at all stages of the criminal justice process."[45] It is during the earliest moments of police custody that accused individuals are at the greatest risk of unfair treatment and unlawful action from the authorities, including torture and forced confessions.[46] All persons arrested or detained must have prompt access to a lawyer and, in any case, no later than 48 hours from the time of arrest or detention.[47]

Where a defendant does not have sufficient means to obtain legal representation, the government should freely provide such representation when he or she faces charges that could result in imprisonment or other deprivation of liberty.[48]

2. Domestic Standards

The 2008 Constitution establishes the right to a defence as both a basic principle and fundamental right.[49] The Code of Criminal Procedure Section 340(1), the Courts Manual Sections 455(1) and 457(1) and the Prisons Act Section 40 reiterate that every person has the right to a defence. In cases where the potential punishment is death, the government must provide a lawyer if the accused does not have one and cannot afford one.[50] The state may suspend fundamental rights, including the right to a defence, if public safety requires it in times of war, insurrection or foreign invasion and the President and Commander-in-Chief may do the same in areas under a state of emergency.[51]

Myanmar enacted a new legal aid law in 2016 (amended in 2017) designed to expand access to representation with the objective of, among other things, ensuring "fair and equal legal rights."[52] If properly implemented, individuals who are detained, arrested, charged with a crime or convicted of a crime would be eligible to receive free legal assistance.[53] Justice Base understands that the government is currently debating plans for implementation.

The right to a defence also includes the right to have effective representation. The High Court can suspend or dismiss any lawyer who, among other things,

takes instructions from someone other than his or her client or acts fraudulently or "grossly improper" in representing his or her client.[54]

3. Findings and Analysis

(i) Right to legal representation[55]

In 135 cases out of 155, the defendant did not receive legal representation until the first day of the inquiry stage or later. This means that in 87 percent of observed cases, partner lawyers were not present during remand hearings, which determine whether the court will detain an accused during the investigation period. This is a crucial moment for a defendant's liberty and without representation, it is likely that most accused individuals are detained without an argument on their behalf.[56] In 67 of those cases, representation only began after the law officer had begun presenting the prosecution's case.

Even when a defendant is aware of the right to a lawyer, he or she may face significant obstacles to representation, such as threats or discouragement from the authorities.

Observers both heard directly from defendants and received reports from partner lawyers of police officers discouraging defendants from retaining legal counsel after arrest in four observed cases. For example, in one instance, a police officer told the defendant: "when you hire a defence lawyer, it is useless." In all four cases, instead of retaining legal counsel, police officers reportedly suggested that the defendant confess to a judge in open court to receive a reduced sentence. In one such case, an officer told the defendant that a confession would result in a one-year sentence; without it, she would receive three years. Defendants were also told that, if they retained a lawyer and asserted their right to a trial, they would not only be convicted but would receive a harsher sentence.

In one observed case, a young defendant was granted a remand hearing within 24 hours of arrest. The defendant did not have legal representation until after the law officer began presenting police testimony in court. The defendant was brought to the courthouse detention quarters for a scheduled hearing after over two months in police custody. Through the court clerk, the defendant's lawyers learned that the hearing was delayed due to the unavailability of a scheduled police officer witness. The bench clerk also told the lawyers that if the police officer later appeared, the hearing might commence on the same day. Hours later, one of the defendant's family members approached the defence lawyers. She said that the defendant had publicly confessed to facts underlying the charges in a hearing suddenly called by the presiding judge. Neither lawyer was aware the hearing had occurred. The defence lawyers had no knowledge of the defendant's desire to confess. They were not in contact with the defendant on the day of this hearing. The defendant was convicted the following day.

(ii) Right to effective legal representation

As discussed in the standards above, the right to counsel requires not only that the defendant have a lawyer but that the lawyer advocate for his or her client's rights in court.

Justice Base found that representation did not guarantee effective advocacy. Lawyers often failed to make relevant and necessary applications. For example, in one observed case, lawyers did not raise the issue of a juvenile defendant's age, which would have invoked special privileges under the Child Law, or the possibility of the defendant's mental illness with the court. Similarly, lawyers rarely challenged the admissibility of potentially prejudicial evidence. For 40 observations for which data is available, lawyers from either side only objected to the submission of evidence in six separate instances.

This failure to make assertive motions or to object to injustices extended to applications concerning serious allegations, such as abuse suffered by a defendant while in detention. Observers noted reluctance on behalf of partner lawyers during this project to bring the issue of suspected abuse to the attention of the court in extended comments on questionnaires. In subsequent conversations, observers reported that this hesitation was due in part to the difficulty of proving that the client suffered abuse while in police custody. But even where lawyers had proof of such abuse, they had low expectations that a judge would address the matter. Lawyers told observers that they feared retaliation in future cases from the offending judge if they raised such issues in court, as many lawyers come before the same judge for different cases.

The data confirms this. In twelve cases where a defendant was forced to sign a search form[57] or confess before a judge[58] or reported that he or she had suffered ill-treatment by police authorities while in custody, observers only saw one lawyer raise the issue of his or her client's treatment in court.[59] In two of those cases, it was alleged that police officers beat the accused until he confessed. In a third case, the defendant reported being regularly beat and kept in leg-irons. In a separate example, the accused had a previous drug conviction. Police officers used knowledge of that conviction to say that they had information on the accused and his sentence would be much longer if he did not confess to the charge. The defendant's lawyers knew about this tactic but did nothing. In the one case where the lawyer raised the issue of abuse, he only did so by informally speaking to the judge in court. The judge ignored him and did not respond.

B. RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

1. International Standards

Fair trials require judges to abide by the principle of "equality of arms," which means that all parties to a proceeding must have the same procedural rights and advantages.[60] Courts must ensure that:

> *the defence has a genuine opportunity to prepare and present its case, and to contest the arguments and evidence put before the court, on a footing equal to that of the prosecution.*[61]

A state must ensure defendants have the opportunity to mount a defence meaning they have adequate time and facilities to prepare their defence at all stages of a proceeding.[62] Factors such as the number of charges, the complexity and technicality of evidence and the number of witnesses must be considered.[63] The court is required to grant "reasonable" requests for adjournment where additional time to prepare an appropriate defence is needed.[64]

Adequate facilities include prompt access to the information necessary for a defendant to understand the charges against him and the ability to confidentially communicate with and receive visits from his or her lawyer.[65] Private consultations between an accused and his or her legal representative should occur before the accused's first interview with authorities and in any case, promptly after arrest.[66]

2. Domestic Standards

An accused has the right to time to prepare his or her defence and the facilities to do so, including access to documents or evidence that may assist his or her defence.[67] Lawyers must have "sufficient time" to "study the necessary documents" for capital offences.[68] The accused may request copies of any relevant witness statement made to a police officer but the court may limit such access on the grounds of relevance, the interests of justice and expediency.[69] Parties are also entitled to obtain copies of police papers once admitted as exhibits and copies of confessions "at any stage."[70]

In addition to access to documents, an accused in prison "under trial" may have confidential communications with his or her representative.[71] Officials may require the name and address of the lawyer and conduct a security search.[72] Officials may deny access to a client if the lawyer refuses to provide this information or permit the inspection.[73] While the right to confidential communication with an accused's lawyer should attach promptly after arrest, the law does not state explicitly whether the right exists when an accused is in police custody but has not yet been remanded into jail.

3. Findings and Analysis

(i) Denial of sufficient time to adequately prepare a defence

Adequate time to consult with the defendant is particularly crucial for a defence because lawyers must understand the key facts, conduct investigations, identify defence witnesses and prepare for potential counterarguments before presenting their case to the court.

Judges denied lawyers sufficient time to prepare in several cases. In one case, the defendant's family retained counsel for the defendant only three days prior to the observed hearing (testimony of an arresting police officer). At the start of the hearing, the senior defence lawyer requested an adjournment in order to acquire a copy of the case file and meet with her client. The presiding judge denied this request without providing a reason. The judge then admonished the defence lawyers for speaking with their client during the hearing and directed the lawyer to conduct a cross-examination of the witness.

(ii) Delays in obtaining files

Adequate access to documents was a considerable problem faced by defendants and defence lawyers. Defence lawyers rarely received documents submitted by a law officer to the judge. They had difficulty obtaining a number of key files, including a copy of the court diary, records of proceedings and case files, which generally include search forms, First Information Reports, police indictment forms and witness lists. Defence lawyers typically faced delays of one to two weeks after submitting a request for access to documents. Even when lawyers obtained such documents, there were discrepancies – in the case of records of proceedings, court clerks transcribed hearings by hand in almost all observed cases, resulting in numerous inaccuracies.

As described more fully in Section D below, clerks also requested additional "tea money" above official fees in exchange for copying files or transcribing hearings, further hindering access to important case documents.[74]

(iii) Inability to confidentially communicate with legal counsel

In approximately 44 percent of observed cases, defendants reported having to convey all messages to their defence lawyers in the presence of a police officer. Further, observers reported that lawyers often do not visit clients in custody. Only one lawyer regularly visited her clients in detention while all other lawyers communicated with clients in detention through friends and family members. More commonly, lawyers communicated with their clients at the courthouse (either in the courtroom or while the defendant was detained in courthouse custody before and after the defendant's hearing). Law enforcement or courtroom officials were always within hearing distance during lawyer-client communications and, when present, third parties without a connection to a case were also privy to such communications. In all observed cases, the defendant did not have access to facilities that would permit confidential communication with his or her lawyer.

(iv) Denial of equality of arms

Judges frequently requested defence counsel to "hurry up" while allocating sufficient time to law officers and complainant lawyers to present their cases.

In one case, when the defendant's lawyer asked the complainant a question during cross-examination, the judge hurried the lawyer by telling him to "please ask [the question] quickly." The defence lawyer requested to ask a second quick question but was not allowed. Instead, the judge continued to ask the lawyer to "please [go] faster" and "ask quickly." Similar cases include one hearing in which a judge ordered the defence lawyer to "quickly" conduct a

cross-examination of a witness because the judge had an appointment elsewhere.

In another example, defence counsel sought to examine a physician as a recall witness, but the judge said first, it would be unusual to call a physician and second, if the defence lawyer did call the witness, it would delay the court process. The defence lawyer rescinded his request based on the judge's statement, failing to call a key witness in the defendant's trial. This is both an example of a judge pressuring defence counsel to present his case quickly and a failure of effective representation.

Judges also seemed to hurry defence counsel along depending on who was testifying. In one case, a judge was testifying in a non-judicial capacity as a witness. During the defence counsel's cross-examination of the judge who was serving as a witness, the witness said he could not answer the question posed by the lawyer. The presiding judge responded by saying that there was "no need to ask this question" and tried to move defence counsel along. In a second case, when the defence lawyer sought to ask questions of the witness (who was a judge testifying in a non-judicial capacity), the judge ordered him to stop because the witness did not want to answer. In another case, the presiding judge rebuked a defence lawyer for wasting a witness's time during the cross-examination of a police witness. Giving preferential treatment to official witnesses or those with certain backgrounds contravenes the right of both parties to have equal opportunities to present and question witnesses.

While several cases were conducted in a manner that left the judge's impartiality open to doubt, only in one case did the defendant, through his defence lawyer, raise the issue of impartiality to the court. In that case, the judge granted several sequential adjournments at the request of a complainant, which the defence lawyer believed indicated that the judge was favoring the complainant's case. The court granted the defence lawyer a transfer to another judge in a different courthouse.

C. RIGHT TO A HEARING WITHOUT UNDUE DELAY

1. International Standards

Every individual facing criminal charges is entitled to be tried without "undue delay" to avoid prolonged uncertainty as to his or her fate.[75] What constitutes "undue delay" depends on the specific facts of each case, such as the nature and seriousness of the alleged offences, the complexity of the charges, the number of witnesses and whether or not the defendant is in custody.[76] A court may also consider the accused's conduct when determining what constitutes a reasonable delay.[77] States are responsible for the fair administration of justice and a lack of funds or judicial backlog are insufficient justifications for unreasonable delays.[78]

2. Domestic Standards

An accused must have his or her case tried "as early as possible."[79] The law is clear on this issue and the Courts Manual contains numerous sections discussing the need for judges to administer cases in an expeditious manner.[80] Judges are to bear in mind that "punctuality, courtesy, patience, observance of the prescribed procedure and avoidance of delay are essential."[81]

Judges have considerable discretion to postpone or adjourn proceedings for "reasonable" cause but must prepare an order detailing the reasons for such delay in writing.[82] Subordinate judges must make immediate reports to the District Judge if the adjournment lasts longer than 15 days.[83] The Courts Manual limits postponements, particularly for reasons such as the court's lack of time, and states that the mere consent of parties is not necessarily a sufficient reason for an adjournment.[84] Hearings must "continue[] from day to day until all the witnesses in attendance have been examined."[85] The practice of adjourning a case because a lawyer cannot attend (for the prosecution or defence side) should be rare and generally only under conditions of sudden illness.[86]

Courts have the power to issue summons to compel witness attendance.[87] Judges may issue a warrant for the arrest of a witness if they have proof the witness was served and the witness fails to appear without a reasonable excuse.[88] A judge may also issue a warrant if the court has reason to believe the witness "will not obey the summons."[89]

3. Findings and Analysis

(i) Frequent adjournments due to non-attendance of witnesses

More than half of all scheduled hearings were adjourned. The most commonly stated reason for an adjournment was because a witness, usually a police officer, was absent from the hearing, followed by the explanation that a judge was "missing" or too "busy" to preside over hearings (63 observations for which data is available). Other stated reasons included the absence of a defendant, law officer or defence lawyer.[90] Judges overwhelmingly called for adjournments compared with any other party or official involved in the case for which data is available, requesting it 147 times compared to a mere 3 times for law officers, 10 times from clerks and 46 times for the defence. Observers did not report any objections to adjournments.[91]

Hearings were typically delayed between one or two weeks but rarely exceeded 15 days, perhaps because judges must notify their superiors if they adjourn a case for longer than 15 days.[92] Hearings lasted from five minutes (for the submission of documents) to roughly one hour (for the examination of two witnesses). Most hearings involved the testimony of one witness for between 15 minutes and half an hour, after which the next hearing would be scheduled to occur within the following two weeks. This practice unnecessarily led to cases lasting for months in criminal court, often while the defendant remained in state custody.

One case lasted for over a year and a half due to numerous adjournments (17 of which were attended by an observer). The defendant, now out of custody, suffered numerous delays in her case because of a court backlog initially related to a leave taken by the presiding judge. Subsequent adjournments were the result of delays related to the long absence of an assigned judge prior to the arrival of the judge's replacement. The defence lawyer stated that other cases in the same courtroom were also severely delayed.

As noted above, police officer witnesses called on behalf of law officers frequently do not appear in court when summoned. Judges enable this problem by freely granting adjournments due to the absence of witnesses. Frequent adjournments are especially concerning where defendants are denied bail pending the outcome of a trial. Such delays may also facilitate corrupt practices among testifying witnesses or create the perception of such practices occurring, undermining public trust in the judiciary. In one case, the defendant reportedly paid for a police officer witness to appear in court to testify against him after numerous adjournments, simply to move his case along. The adjournments were solely due to the police officer's failure to attend court despite being summoned as a witness. The judge did not attempt to compel the witness's attendance, despite having the power to do so.[93]

D. RIGHT TO A HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

1. International Standards

All criminal proceedings are to be heard by a competent, independent and impartial tribunal.[94] Competence demands that judicial officials are suitably qualified and professional to determine the matters before the court. Independence requires that both the judiciary as a whole,[95] as well as the individual judge, be free from undue interference from the government, third parties (such as members of the public or media)[96] and parties to the proceedings.[97] The requirement of impartiality is more specific: it demands that judges render judgments without influence of personal bias, prejudice or any preconceptions regarding the guilt of the accused.[98] The public must also perceive the tribunal itself to be impartial, meaning that the system is free of bias.[99] For example, the public would likely view a tribunal that fails to disqualify a judge with a personal interest in a case as lacking impartiality.

Fair trial standards demand at a minimum that a judge reach a verdict based exclusively on the evidence presented during court proceedings and in accordance with court procedure.

Judicial corruption, particularly in the form of bribery, undermines both the independence and impartiality of the judicial decision-making process.[100] The UNCAC requires state parties to "take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary."[101]

2. Domestic Standards

The Constitution sets out independence as one of its three judicial principles.[102] Under Section 11(a), it requires the separation of power among the legislative, executive and judicial branches "to the extent possible."[103] Each branch checks and balances the other two. Judicial power is only shared among various listed courts, including the Supreme Court of the Union, High Courts of the Regions and States and courts of "different levels."[104]

The Office of the Supreme Court's 2017 Judicial Code of Ethics contains numerous provisions detailing the requirements of judicial independence, including that judges must be free from influence by the executive and legislative branches and from "any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason."[105] A judge must render decisions based only on his or her assessment of the facts and understanding of the law.[106]

The Constitution demands that the Chief Justice and Judges of the Supreme Court be free of political affiliation and "loyal to the Union and its citizens."[107]

In terms of impartiality, judges are to perform their duties without "favor, bias, or prejudice" and must refrain from making any comment that might "reasonably be expected to affect the outcome" of a proceeding or the fairness of the judicial process.[108] Indeed, "justice must not merely be done but must also be seem to be done."[109]

Myanmar ratified the UNCAC in 2012, and the Myanmar Anti-Corruption Law (2013) was subsequently enacted to comply with the convention.[110] Under this

law, all public servants, including judges and law officers, are subject to penalties including imprisonment and a fine if they engage in bribery.[111] An Anti-Corruption Commission (ACC) was established to investigate bribery complaints in compliance with the new law.[112] The Penal Code also criminalises corruption offences relating to public servants.[113] The Judicial Code of Ethics states clearly that judges are not allowed to accept or receive gifts, money or any other items from anyone involved in a case and includes a list of detailed requirements relating to the propriety of judges.[114]

Finally, a judge is responsible for the "general management and control" of the courtroom.[115] The Courts Manual provides some guidance on the role of judges, particularly emphasising that the observance of court procedure is essential.[116] Judges are required to "maintain and enhance their legal knowledge, skills and personal qualities necessary for the proper performance of judicial duties."[117]

3. Findings and Analysis

(i) Right to a competent judiciary

Observers identified numerous instances of conduct by judges that did not conform to fair trial standards.

During one observation, a judge spoke with third parties who were not connected to the case in the courtroom during the proceeding. Observers reported judges talking on their phones during hearings for between five and 15 minutes (5 observations). Judges also appeared inattentive during hearings (8 observations). For example, during one hearing, a presiding judge appeared to be asleep for 15 minutes. On many occasions, including at least ten observations, judges were not present for entire hearings. When a judge was recorded absent, court clerks continued to transcribe the hearing but varied in their abilities to do so. In all but one courtroom, observers saw court clerks recording proceedings by hand, resulting in vague, paraphrased transcripts.

Actions such as these violate courtroom procedure and call into question whether the judge can properly determine the matters before the court. Even the appearance of inattentiveness can undermine the public's trust in a court's ability to provide a fair trial.

In one egregious example, the presiding judge was observed holding three separate hearings, one criminal and two civil hearings, at the same time and in the same courtroom.[118] While the defendant testified on his own behalf, the presiding judge also allowed civil lawyers to proceed with their cases. The observer reported that the courtroom was small and she had difficulty hearing the defendant's testimony. In addition, although the lawyers involved in the civil cases spoke quietly, the fact that they spoke during the defendant's testimony also made it difficult for the observer to hear. The judge did not make any rulings or intervene in any of the cases.

In all of the observed hearings, once a hearing had begun, hearings were not delayed or adjourned due to the absence of the presiding judge in the courtroom. In one case, a complainant made arguments concerning the framing of the charge while the judge was absent. He had left to attend a meeting and the arguments continued without objection from either side. In another, the

judge left during the defendant's testimony to go into his chamber room for 20 minutes. Neither the defence lawyer nor the law officer objected to the judge's absence.

In fact, in hearings in which a judge arrived late to the courtroom, a law officer or court clerk initiated the proceedings without the presence of a judge. In one instance, a law officer began the direct examination of his witness as scheduled in the absence of the presiding judge. The judge subsequently arrived 15 minutes later. Although the judge did not speak, she appeared attentive to the testimony for five minutes before leaving the courtroom again. The judge did not return until the hearing had finished. Such behaviour is not atypical.

The law officer or clerk should not be permitted to begin or continue proceedings in the absence of a judge. Judges must be present for every hearing and must adjourn proceedings they cannot attend.

Similarly, other actors are indispensable and must be present at every hearing. Aside from the defendant, the judge has a responsibility to ensure that the law officer and clerk are present. Just like the absence of a presiding judge, the tardiness or absence of a law officer or court clerk undermines the integrity of the court. In three observed cases, law officers arrived late to proceedings or did not appear at all. In one hearing where a law officer was late, his witness simply began testifying in a narrative fashion without proper questioning. In several cases, court clerks were absent for entire proceedings. In one particularly blatant incident, both the presiding judge and law officer arrived late to a hearing involving the testimony of a defence witness.

A judge's responsibility to manage his or her courtroom and ensure that the accused receives a fair trial includes making decisions concerning the behaviour of all judicial actors. During one observation, a law officer continuously obstructed the defence lawyer's questioning of a witness by saying "you shouldn't ask those sorts of questions." The judge failed to make a ruling or comment on the interruption. In a separate case, the complainant said the defence counsel was a "liar" and a "bad lawyer" in court in front of the judge. The judge similarly did not admonish the complainant or respond to his behaviour in any way.

To the observers' knowledge, no motions were brought to the attention of a supervising judge, or through other appropriate avenues of complaint, for conduct that did not conform with fair trial standards during court proceedings.

(ii) Right to judicial impartiality and independence

a. Judges predetermined case outcomes

In at least 35 separate cases, observers reported that judges were not impartial. For example, based on what judges said in court, observers stated that judges predetermined the outcome of cases prior to hearing evidence. In one example, the judge said that the case would be dismissed because of a "new announcement from above," but did not clarify who made the announcement or what it entailed.

In a different case, after a hearing in which a defence witness testified, the judge explained to the defence lawyer, in the presence of the observer and the

defendant, that the defendant could already be sentenced because he signed a search form.

In another example, the defendant, in custody at the time of the hearing, was brought to court in handcuffs.[119] In the middle of the direct examination of the arresting police officer, the presiding judge interrupted and spoke directly to the defendant before the court, saying: "There is a lot of evidence here and you were arrested on the street. Whether or not this case takes a long time, you will get sentenced so it is better to admit now." All parties in the courtroom, including the testifying witness, defendant, and defence lawyer, remained silent. The defence lawyer was observed speaking with the defendant but no one responded directly to the judge's comment.

These events occurred before the prosecution had finished presenting their evidence and thus before the judge could determine whether the prosecution met their burden to make out every element of the offence. In addition, they occurred before the defence had the opportunity to present evidence to the judge. Such statements by a judge disregard the presumption of innocence and the defendant's right to due process. The defence lawyer explained to the observer that he did not object to the judge's statements because he was worried it would upset the judge.

In a separate case, the judge told the defendant that if he admitted guilt, he would only spend one year in jail and if he did not admit guilt, he would spend three years in jail. The defendant admitted guilt and later told his defence lawyer that he did so because he was afraid.

(iii) Payment of Unofficial Fees

Unofficial fees undermine both the independence and impartiality of courts. Given the secretive nature of such payments, the extent to which they play a role in court proceedings has been difficult to identify during this project.[120] As reported to observers, to many lawyers, the process of paying a judicial official in exchange for, among other things, release on bail or simply a case file may be routine but it is also not necessarily openly discussed. Observers largely learned of unofficial payments through defence lawyers, defendants or related family members and reported such payments on questionnaires to Justice Base. As defence lawyers had little incentive to disclose that they themselves paid or encouraged the payment of unofficial fees, some were reluctant to discuss the issue with observers. However, the data available implicates every actor involved in the judicial process, including judges, defence lawyers, clerks and police officers.

Based on reports from observed cases, unofficial fees were typically paid to clerks and law officers and, slightly less commonly, directly to judges. While a lawyer may advise his or her client to approach an officer with an offer, lawyers are not usually involved in the transfer of money. Family members and friends are typically the bearers of money on the defendant's behalf.

a. Unofficial fees paid to judges or law officers

In five observed cases, observers were informed that either the judge or law officer was paid to release the defendant on bail.[121] Bail hearings were only granted by request. According to observers, when a defendant is charged with a

nonbailable offence, a common practice is to pay the judge and law officer to reduce the charge from nonbailable to bailable so that the defendant is automatically eligible for bail within certain limitations. Although observers did not monitor many bail hearings, they reported this practice in three instances. Defendants were also required to provide medical records as justification for release on bail in two cases. During at least ten observations, defendants paid for a reduced sentence.

b. Tea money paid to clerks

Court clerks, given the responsibility to administer courtroom proceedings under a judge's supervision, are key courtroom actors.[122] A clerk's duties include scheduling cases, managing case files and distributing court documents. According to one observer, "the clerk can be the most important person in the courtroom."

In eight cases during the first phase of the project, observers reported that court clerks extorted either complainants or defendants for unofficial fees for writing an accurate record of proceeding or rescheduling cases upon request. In four instances, observers saw clerks adjourn cases in exchange for payment. In one matter, the observer reported 16 adjournments in a case that was filed over three years prior to the final verdict. In another, a defendant repeatedly paid for adjournments because he believed that he would be convicted and was not ready to serve jail time.

In the second phase of the project (2015-2016), observers did not report any cases of unofficial payments solicited and/or paid to facilitate scheduling or adjournments. This could mean that such payments no longer occur, that observers were not present at certain hearings where those payments took place, or that observers failed to notice the transfer of money related to scheduling issues even if they happened.

Lawyers also reported that they paid court clerks for copies of records of proceedings in order to file an appeal. Case files may cost roughly 5,000 Myanmar kyat (approximately USD $3.70) depending on the demands of the clerk and the size of the file despite the estimated official price of 500 or 600 Myanmar kyat (approximately USD $0.37) that appears on receipts. Certified copies (necessary for cases on appeal) are subject to additional unofficial fees. In three observed cases, lawyers paid such fees to obtain case files.

In eight observed cases, defendants paid clerks to "take the case seriously;" in other words, to ensure that the clerk recorded the hearing completely and accurately. Based on observed hearings and estimates from two observers, the price to "take a case seriously" may vary from 3,000 to 5,000 Myanmar kyat per hearing, which amounts to a single day's wage for some people. According to some lawyers, case files are only retrieved from the court as a matter of practice when the client has the financial means to cover unofficial costs.

A few partner lawyers interviewed argued that the payment of unofficial fees is a means by which to avoid harsh sentences. In their view, punishments would likely be much more severe if judges strictly applied the law. However, most offenses do not have minimum sentences. The payment of unofficial fees, regardless of whether it is true that defendants would receive harsher sentences without such payments, results in inconsistent sentencing and lack of equal

treatment. Indeed, observers reported that defendants do not always pay the same price for the same result. Instead, defendants often pay in accordance with how much they can afford or borrow.

Similar unofficial payments continued to occur in the project's second phase, although they may be decreasing. Observers reported payments in 44 out of 314 observations. Payment does not guarantee results, however. In one observed case, a judge accepted 5,000,000 Myanmar kyats (approximately USD $423.00) from the defendant. Both the defendant and the defendant's lawyer told the observer that it would be good to pay the judge. At the end of the proceeding, the defendant was convicted. The observer was told the judge later returned the money to the defendant.

E. RIGHT TO A PUBLIC HEARING

1. International Standards

"In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing."[123] A court may only exclude media and members of the public in exceptional circumstances to the extent strictly necessary, such as for reasons of national security or when the interest of the private lives of parties so requires, such as in juvenile cases.[124] If a court wishes to restrict the right to a public hearing, the judge must determine that it is necessary in accordance with law based on specific findings announced in open court.[125] Reasonable security checks (such as searching for weapons) are permissible if they do not prohibit and/or deter public access to court hearings in general. Restrictions may not be limited to a specific category of person and must be assessed on a case-by-case basis.[126]

The right to a public hearing also requires courts to provide adequate facilities for interested parties to properly observe hearings and post, in a public place, the time and venue of a hearing.[127]

2. Domestic Standards

According to Section 19(b) of the 2008 Constitution, and Section 3(b) of the Union Judiciary Law 2010, justice must be dispensed "in open court unless otherwise prohibited by law." Other domestic law contains general discretionary powers to exclude the public from court proceedings as well as specific restrictions dealing with certain types of cases.[128]

Section 352 of the Code of Criminal Procedure provides:

> The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them: [provided] that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

The Courts Manual confers a similar discretion upon judges to close the courts with the rationale of ensuring the courts' security. Section 48(1) reaffirms presiding judges' "discretionary power" under the Code of Criminal Procedure to "exclude the public generally, or any particular person, from the room or building used by him as a Court during the enquiry into, or trial of, any particular case," and confers upon judges the power to take steps necessary to maintain order and prevent disturbances in Court. Judges are specifically empowered to forbid the introduction of weapons into courtrooms and to require searches of all those who would enter. Section 48(2) provides that "[i]n civil cases a Judge may take precautions . . . by excluding undesirable persons from the Court room or building" and to make the same orders for searches and weapons bans.

The law also establishes a limited number of specific restrictions to the right to a public hearing. Section 42(b) of the Child Law 1993 excludes public access

to cases in which persons aged 16 or younger are tried, other than by special permission.[129] Section 14 of the Burma Official Secrets Act 1923 creates another exception, permitting courts to exclude the public from proceedings brought under the Act upon the prosecution's request.[130]

However, all evidence must be recorded in open court.[131] In particular, confessions must occur in open court and during court hours unless for exceptional reasons.[132] Judges must publicly pronounce final judgments.[133]

The cause list, which provides the time for each hearing, should be posted in a public place.[134]

3. Findings and Analysis

(i) Obstacles to entry and challenges to remaining inside a courtroom or courthouse once entry was permitted

Observers faced obstacles at the gates of courthouses and while entering (and remaining inside) individual courtrooms.

In one case, an observer was stopped by a police officer at the entrance of a courthouse and asked to provide identification and explain her presence. She provided official identification and identified herself as a lawyer. In response to further police questioning, she explained that she did not have a connection to any particular case but simply came to observe the proceedings. The police officer refused her entry into the courthouse. The observer noted that there were individuals protesting the case of a famous political prisoner, with hearings to be held around the time she attempted to enter the courthouse. The scheduled hearing she was to attend was later adjourned. No official reason was provided.

Observers reported three instances in which individuals were asked to leave a courtroom during a hearing. In one case, the presiding judge required that all non-government officials present in the courtroom submit a power of attorney to prove their relation to the scheduled hearing.[135] Since the observer could not comply by signing a power of attorney, she was told by the presiding judge to leave the courtroom.

The reasons for the observed removals were not always officially apparent nor were they recorded in a court diary. Certain courtrooms were reported to have worse reputations for restricting members of the public. For example, one court clerk was extremely diligent in demanding the identity of individuals present in the courtroom to ensure that only those directly connected to the case were inside. The door of this courtroom was closed on most occasions to prevent individuals from seeing or hearing proceedings from the hallway.

Of the 678 hearings observed in the second phase, the data available identifies 40 occasions on which observers were required to show identification documents before being granted entry to the court. In 28 cases, observers also had to sign their names and record their details in official records retained by the court. While such requirements are not in and of themselves exclusions, they create the impression that the courts are not freely open to the public and may deter individuals from attempting to access court proceedings.

(ii) Logistical challenges to courtroom access

In addition to direct restrictions and removals, numerous logistical hurdles effectively closed proceedings to the public.

With the exception of one courthouse, which does not appear to post cause lists as a matter of practice, cause lists were almost always publicly posted. However, it was rare for cause lists to provide accurate hearing times. Judges sometimes informally announced a time for the next hearing at the end of a hearing. More commonly, defence lawyers appeared at a courthouse at 10:00 a.m. or 10:30 a.m. and waited until their case was called. Often lawyers used cell phones to coordinate with other lawyers at different courthouses.

Aside from the lack of notice, frequent adjournments (amounting to more than half of all scheduled hearings) made access to court hearings challenging.

Certain physical attributes, such as small courtrooms, also made public access difficult.

Figure 1: Estimated size of courtrooms[136]

Size	Courtroom location
1.8 metres by 3 metres	Kamayut, Kyauktan, Mingala Taungnyunt
3 metres by 3 metres	Bahan, Dallah, Hlaing, Kamayut, Kyaukada, Mayangone, North Okkalapa, Thanlyin
3 metres by 4.6 metres	Ahlone, South Dagon, Tontae
4 metres by 4.6 metres	Pabedan
4.6 metres by 4.6 metres	Dagon, Insein, Latha, North Dagon, Pazundaung, Tamwe, Thaketa, Thanlyin
6 metres by 6 metres	Kyauktada

Courtrooms varied in size but most were approximately 10 square metres or smaller. There was generally only one court clerk in a courtroom. This court clerk sat on either side of the witness' seating area or, less commonly, next to the judge. The witness usually sat at an angle, facing the presiding judge, while the lawyer conducting a witness examination often stood in order to see the witness's face. There may be room for three chairs on each side of the table but there were rarely seats for outside observers.

In addition to the Justice Base observer, the following individuals were usually in attendance for most hearings: judge, clerk, law officer, defendant, one to two defence lawyers and the testifying witness (or witnesses). Police were generally present only if the defendant was in custody or if the officer was in court to testify as a witness.

With a few exceptions, observers did not report individuals without a connection to the case seated inside a courtroom during a hearing.[137] In one courthouse, although four to six extra chairs were often available, only individuals with a personal connection to the case were observed in those seats.

To the extent that cases did have other parties present, observers stood in the courtroom entrance or in a corridor by the entrance when possible. At times, hearings were too quiet to be heard from outside the courtroom. The view of proceedings was usually obscured. Some hearings included individuals who observed through open windows, although their ability to hear was likely minimal.

Observers conversed with individuals outside courtrooms to determine their connection to the case as much as possible. Individuals interviewed by observers expressed uncertainty and fear of entering courtrooms without official permission. Fear of exclusion or judicial retaliation, in particular, were the main reasons articulated by individuals for not entering courtrooms.

In the second phase of the project, family members, friends or individuals without an obvious connection to proceedings (including members of the media) were accounted for inside courtrooms for only 126 observations out of 678. The data collected during the second phase showed that the biggest obstacle to observing court proceedings was the lack of space inside courtrooms. In 590 hearings observed, no obstacles were recorded 285 times and obstacles due to space recorded 305 times.

CONCLUSION AND RECOMMENDATIONS

The five fair trial rights addressed in this report—the right to a defence, the right to adequate time and facilities to prepare a defence, the right to a hearing by a competent, independent and impartial tribunal, the right to be tried without undue delay and the right to a public hearing—are not the only areas of concern in Yangon Region's Township and District Courts. Nonetheless, the data related to each of these rights reveal significant failures in the administration of justice in criminal cases.

Defence lawyers commonly began representation subsequent to the inquiry phase, after crucial proceedings in court had already occurred. Even when a defendant was able to retain a lawyer, numerous systemic barriers interfered with an effective defence, including lack of professional capacity. Many defence lawyers remain hesitant to challenge judges out of fear of repercussions.

The conduct of judges did not always conform to fair trial standards as evidenced by leaving in the middle of hearings, answering phone calls during hearings or otherwise appearing inattentive. In addition, judges granted adjournments in more than half of all scheduled hearings, largely for avoidable reasons.

Unofficial fees, in addition to the lack of public access to courts, compounds these problems. Allegations of unofficial payments were reported during every stage of the formal judicial process including obtaining release on bail, accessing documents, seeking adjournments, receiving reduced sentences and securing certified records necessary to file an appeal.

Adhering to the highest standards of professional behaviour would go a long way toward improving the rule of law and the public's trust in the judiciary. Township Courts are the first, and usually only, contact that defendants and their family, friends, and other participants (such as testifying witnesses) have with the formal court system. If defendants and others perceive the court system as biased, they will be less likely to comply with fair trial standards themselves, further undermining the judiciary.

Publicity through the presence of media and, in particular, the presence of trained observers knowledgeable in applicable fair trial rights, can serve as an essential public confidence-building measure.[138]

To address the concerns discussed above, Justice Base calls on the Myanmar Government, including the Office of the Supreme Court of the Union, the Union Attorney General's Office and the Ministry of Home Affairs to implement a comprehensive reform program that includes the following actions and initiatives:

GENERAL RECOMMENDATIONS

The Government should accede to and implement the ICCPR and its two Optional Protocols, as well as the Convention Against Torture.

The Office of the Supreme Court, the Union Attorney General's Office, the Myanmar Police Force, the Ministry of Education and civil society

organisations should train lawyers, judges, non-judicial court staff, police officers and other officials on fair trial rights, particularly pretrial rights. Funding should be allocated to establish mandatory training programs that all actors must complete on an annual basis. Such programs should be developed in consultation with civil society, lawyers and experts on fair trial rights and if funding is not readily available, implemented with the assistance of those actors. The Ministry of Education, in particular, should incorporate fair trial rights into required legal curriculum. The Independent Lawyers Association of Myanmar and other state and regional bar associations should incorporate fair trial rights curriculum into continuing legal education programs.

The Office of the Supreme Court should include in the mandate of the Public Relations Division a requirement to work with community based organisations to promote awareness of fair trial rights and make information on fair trial rights publicly available at all Public Intake Counters and places of detention.

The Office of the Supreme Court should undertake a review, in consultation with representatives of civil society, lawyers and experts on domestic and international fair trial rights, concerning whether the Code of Criminal Procedure and Courts Manual are compatible with the ICCPR, consistent with the Constitution and reflective of modern Myanmar society.

The Office of the Supreme Court should issue guidance to all courts explaining the laws discussed herein and how they should work in practice to be consistent with domestic and international law.

The Office of the Supreme Court, the Union Attorney General's Office and the Ministry of Home Affairs should support these recommendations including by sanctioning those who fail to comply with the law and developing relevant strategies in their yearly Action Plans.

RIGHT TO A DEFENCE

Ensure that all detainees are informed of their right to a lawyer upon arrest or detention. It is the responsibility of law officers, police officers, presiding judges and defence lawyers to confirm that accused individuals have been informed of this right. Create posters and leaflets detailing an accused's right to a lawyer and display them in police stations, remand locations, jails and courts.

The Ministry of Home Affairs should develop a standard pretrial detention record and require every police station to complete it for each defendant and distribute it to court officials, lawyers and the defendant. The record should describe the time and place of arrest, the names and contact information of the arresting police officer(s), the place of detention, the date of bail and/or remand hearing, detailed reasons for remanding the defendant into custody and confirmation that the defendant has been informed of his or her rights, particularly the right to a lawyer during questioning by both police and judicial authorities. All law officers and judges should ensure that a pretrial detention record is completed in every case.

The Office of the Supreme Court, the Union Attorney General's Office, judges, clerks and law officers should ensure that pre-trial detention only occurs if necessary, in accordance with international and domestic rights such as the right to liberty and the right to be free from torture.

Parliament and the Union Attorney General's Office should consider amending the Code of Criminal Procedure and the Courts Manual to include a specific provision affirming the principle of the presumption of innocence. Guidance on the standard of proof and evidentiary burden for prosecutions should also be considered to protect the presumption of innocence and help ensure that decisions are based on credible and admissible evidence.

Judges should ensure that an accused person is never brought into court wearing handcuffs, unless there is a reasonable expectation that the accused will use violence or attempt to escape. Such procedures constitute degrading treatment and undermine the presumption of innocence.

The government should begin implementing the legal aid system as conceived by the Legal Aid Law as soon as possible and ensure that it is properly funded.

RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

All police officers and jail officials must ensure individuals in custody have access to a phone and are able to call lawyers, family members and others.

All police officers and jail officials should provide a separate room and sufficient opportunities for defendants to confidentially communicate with their legal representative. These requirements should be included in operating guidelines for police officers and jail officials and reviewed during trainings to express the importance of confidential communications between defendants and counsel. Judges and defence lawyers must confirm that defendants have been informed of and given the right to privately consult with their representative.

The Myanmar Police Force should train police concerning the right of defendants to communicate confidentially with counsel.

The Office of the Supreme Court should introduce uniform case and court management systems in all courts, such as those introduced in Myanmar's Pilot Courts by USAID's Promoting the Rule of Law Project, including by ensuring the use of pretrial conferences to determine trial dates and witness availability in advance, standard case forms and case tracking systems to monitor resolution of cases.

The Office of the Supreme Court and all courts under its supervision should, to the extent possible, computerise all courtroom records promptly upon receipt, including case files and documents submitted by the law officer to the court, such as the witness list.

All judges should ensure that court clerks transcribe everything said in all hearings on a computer or at the very least, on a typewriter, to the extent possible, and readily provide the record of proceedings to all parties.

The Office of the Supreme Court should enforce reasonable standard rates for court fees that cover the actual costs incurred by the court. It should ensure that all courts post these rates at the courthouse, ensure that they are publicly available and discipline court officials who charge in excess of the official rates.

All courts should publicly post and regularly update official court fees. Each official document should bear a stamp of the amount paid in lieu of a receipt.

Judges, clerks and law officers should provide all relevant court documents to defendants without delay and in no case more than twenty-four hours after each document is available and/or an application for copies is made.

Judges should adjourn hearings upon request when the defendant has not received a case file. The provision of case files to counsel should be considered a priority to avoid undue delays. Preliminary hearings should set clear deadlines for the disclosure of evidence by police officers and law officers.

RIGHT TO A HEARING WITHOUT UNDUE DELAY

The Office of the Supreme Court should introduce uniform case and court management techniques to ensure that hearings are timely and court schedules are reliable.

All judges and clerks should ensure that adjournment records are publicly posted and available upon request. Records should include the case number, date of adjournment, date of next hearing and the reason for the adjournment.

The Office of the Supreme Court should require Township and District Court judges to enforce summonses and dismiss witnesses who fail to appear more than two times except where the interests of justice may otherwise require it.

The Office of the Supreme Court should require all judges to report to a supervising judge all cases where a case is adjourned more than two times in a row without sufficient reason. The Office of the Supreme Court should also develop clear guidance on circumstances in which cases may be adjourned and the appropriate amount of time between adjourned hearings.

RIGHT TO A HEARING BY A COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL

The Office of the Supreme Court and Union Attorney General's Office should implement a comprehensive training plan for judges and law officers on the new codes of ethics and establish appropriate enforcement mechanisms for failure to comply with such codes.

Parliament and/or the Office of the Supreme Court should create an independent commission empowered to receive and investigate complaints against all judicial officials. The commission's mandate should include the power to recommend administrative disciplinary action or criminal prosecution.

The Office of the Supreme Court should prohibit the use of cellphones to make calls in courtrooms, including by judges, and regularly enforce this rule.

The Office of the Supreme Court and all courts under its supervision should ensure that judges are unable to consult with any external parties during trial deliberations and halt proceedings any time a presiding judge leaves the courtroom, no matter the cause.

The Office of the Supreme Court and all courts under its supervision should require court clerks to note any time a judge is absent from a courtroom and provide these records to a supervising judge and/or oversight body.

RIGHT TO A PUBLIC HEARING

The Office of the Supreme Court should implement the recommendations in Justice Base's report "Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts" published in June 2017, including discontinuing the practices of acting as if members of the public can only (or should only) observe a hearing if they have a personal connection to a particular hearing and requiring permission of a judge to enter a courtroom.

Judges should, in accordance with Section 19(b) of the 2008 Constitution and Section 3(b) of the Union Judiciary Law 2010, administer courts on the basis that courtrooms, courthouse buildings and court premises are open to the public. The right to a public hearing and access to either a courtroom or the courthouse generally should only be restricted in exceptional circumstances, such as when it is strictly necessary to protect the interests of justice or when a security threat exists.

The Office of the Supreme Court should permit and cooperate with regular, transparent and independent monitoring of all court proceedings by individuals or organisations trained in domestic and international fair trial rights.

[1] 2008 Constitution, Section 19(b).
[2] A remand hearing is a hearing in which police are required to bring a detained defendant to appear before a judge within 24 hours of his arrest so that the judge may determine whether or not the defendant should be remanded into custody or released. *See Id.* at Section 376; Code of Criminal Procedure [India Act V, 1898] (as amended 2016), Sections 167 and 344 (explaining what constitutes reasonable cause for remand). For definitions, *see* Appendix A.
[3] A court diary contains the procedural history of a case such as the name of a witness who testified or the reason for an adjournment.
[4] A First Information Report ("FIR") is created by a police officer and comprised of information that forms the basis of the charges against the defendant. *See* Code of Criminal Procedure Sections 154 and 155(1); *see also* Courts Manual Section 594 (describing the information taken under Code of Criminal Procedure Section 154 as the "First Information Report.").
[5] See Andrew Huxley, "The Importance of the Dhammathats in Burmese Law and Culture," vol. 1, The Journal of Burma Studies (1997), at pp. 1-17, available at: http://www.burmalibrary.org/docs19/AH-Huxley-The_Importance_of_the_Dhammathats-ocr.pdf.
[6] *Id.*
[7] Jared Downing, "Myanmar History 101: How Britain defeated Burma," Frontier Myanmar, (February 21, 2017), available at: http://frontiermyanmar.net/en/myanmar-history-101-how-britain-defeated-burma. Common-law systems apply case law precedent in the absence of statutory law to the contrary.
[8] *See* Code of Civil Procedure [India Act V, 1908] (as amended 2014]; Penal Code [India Act XLV, 1860] (as amended 2016); Code of Criminal Procedure [India Act V, 1898] (as amended 2016); *see also, e.g.*, Code of Civil Procedure (Amendment) Act of 1956; Criminal Law Amending Law (1963); Code of Criminal Procedure Amending Law (1973); Law Amending the Code of Civil Procedure (Pyidaungsu Hluttaw Law No. 29/2014); Law Amending the Penal Code (Pyidaungsu Hluttaw Law No. 6/2016); Law Amending the Code of Criminal Procedure (Pyidaungsu Hluttaw Law No. 16/2016).
[9] Myint Zan, "Judicial Independence in Burma: No March Backwards Towards the Past," 1 Asian- Pacific Law & Policy Journal 5 (2000), at 13.
[10] *Id*. at p. 25.
[11] Nick Cheesman, "Thin Rule of Law or Un-Rule of Law in Myanmar?" (2010) 82(4) Pacific Affairs 597 at p. 612.
[12] Myint Zan, "Legal Education in Burma since the Mid-1960s," 12 *Journal of Burma Studies* 63 (2008) at p. 4.
[13] *Id*. at pp. 14, 16 (likely to discourage students from protesting the government).
[14] *Id*. at pp. 17-18; *see also* International Commission of Jurists (ICJ), "Myanmar: Legal Education, 20 March 2014, available at: https://www.icj.org/cijlcountryprofiles/Myanmar-introduction/legal-education/.
[15] *Id*. at pp. 24, 31.
[16] *See generally* The Legal Practitioners Act [India Act XVIII, 1879] (amended 1999).
[17] The Bar Council Act [India Act XXXVII 1926] (amended 1989), Sections 10-13. The Courts Manual provides guidance in relation to the Legal Practitioners Act and the Bar Council Act. *See generally* The Courts Manual, 4th ed. (1999), Part I, Chapter I.
[18] 2008 Constitution, Chapter VI; *see* Union Judiciary Law (2010).
[19] Burma Laws Act (1898), Section 13(3) (related to "any question regarding succession, inheritance marriage or caste, or any religious usage or institution.").
[20] Justice Base, "Voices from the Intersection: Women's Access to Justice in the Plural Legal System of Myanmar," (2016), available at: http://asiapacific.unwomen.org/en/digital-library/publications/2016/04/womens-access-to-justice-in-the-plural-legal-systems.
[21] The Constitutional Tribunal, among other things, shall interpret the Constitution and scrutinize whether laws are in conformity with its provisions. *See id*., Chapter VI, Sections 46, 293 and 322 (Section 322 uses the term "vet" rather than "scrutinize").

[22] The Union Judiciary Law (2010), Sections 53 and 56.
[23] *Id*. at Section 54.
[24] The Supreme Court of the Union, "Township Courts," available at: http://www.unionsupremecourt.gov.mm/?q=content/township-courts; The Supreme Court of the Union, "District Courts," available at: http://www.unionsupremecourt.gov.mm/?q=content/district-courts
[25] "Township Courts" above n. 24.
[26] Warrant and summons cases have different inquiry stages under the Code of Criminal Procedure. *See* Code of Criminal Procedure Sections 251-259 and 241-249.
[27] *Id.*, Section 4(1)(w).
[28] *Id*., Section 4(1)(v).
[29] *Id*., Sections 4(1)(f) and 4(1)(n).
[30] *Id*., Section 4(1)(a).
[31] *Id*., Section 493; *see also* The Attorney General of the Union Law (The State Peace and Development Council Law No. 22/2010, 28 October 2010) at Sections 34 and 36(c). The law officer is responsible for "supervising" the complainant's lawyer. *See id.* Section 36(m).
[32] *See* Code of Criminal Procedure, Section 200. For definitions, *see* Appendix A.
[33] A copy of the Code of Conduct is reproduced in Appendix B.
[34] For logistical reasons, each questionnaire is hearing-based rather than case-based. Best practice often mandates hearing-based questionnaires in contexts where court schedules are unpredictable and lawyers frequently do not represent clients during pretrial detention and the early stages of trial. Justice Base did not directly observe a defendant's case during pretrial detention or conduct additional investigation into any case at that stage.
[35] In the first phase, observers followed 69 warrant cases comprising 480 separate observations in 22 different Township Courts. In the second and most recent phase, observers followed 86 cases comprising 678 separate observations in 10 District Courts and 76 Township Courts in Yangon Region.
[36] International Commission of Jurists (ICJ), "Trial Observation Manual for Criminal Proceedings" (22 July 2009), at pp. 4, 17-18, available at: https://www.icj.org/criminal-trials-and-human-rights-a-manual-on-trial-observation/.
[37] For example, the determination of whether or not sufficient evidence exists for a conviction would require complete access to relevant documents and the attendance of an observer at all relevant hearings to make an informed assessment.
[38] Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, adopted 16 December 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987; United Nations Convention Against Corruption, adopted 31 October 2003, GA Res. 58/4, U.N. Doc. A/58/422, entered into force 14 December 2005; "Basic Principles on the Independence of the Judiciary, endorsed 29 November 1985," G.A. Res. 40/32, and 13 December 1985, G.A. Res. 40/146; "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, 25-26 November 2002; "Basic Principles on the Role of Lawyers," adopted by the 8th U.N. Congress on the Prevention of Crime and Treatment of Offenders, 27 August to 7 September 1990.
[39] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." Restat. 3d of the Foreign Relations Law of the U.S., Section 102; *see also* International Human Rights Law, Oxford University Press (2d ed.) (12 February 2014) at p. 271 (the "fundamental principles of fair trial form part of customary international law," including Article 10 of the UDHR).
[40] ICCPR Article 14(3)(d).
[41] *Id.*
[42] U.N. Basic Principles on the Role of Lawyers, above n. 38 at Principles 1, 13.

[43] Ed Cape, "Improving Pretrial Justice: The Roles of Lawyers and Paralegals," Open Society Foundations (April 2012), at Sections 4.1-4.4, 4.7, available at: https://www.opensocietyfoundations.org/reports/improving-pretrial-justice-roles-lawyers-and-paralegals; U.N. Office of the High Commissioner for Human Rights (OHCHR), "Preventing Torture: An Operational Guide for National Human Rights Institutions," HR/PUB/10/1, (May 2010) at p 32.
[44] Cape, above n. 43, Section 4.2.
[45] U.N. General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, adopted 28 March 2013, GA Res. 67/187, Principle 3, para 20.
[46] Preventing Torture, above n. 43 at pp. 3-4.
[47] U.N. Basic Principles on the Role of Lawyers, above n. 38 at Principles 5, 7.
[48] Principles and Guidelines on Access to Legal Aid, above n. 45, Principle 3, para. 20-21. Legal aid can ensure that those who face criminal charges without sufficient resources can access the justice system on an equal basis. According to the former United Nations Special Rapporteur on the Independence of Judges and Lawyers, legal aid is both "a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy." U.N. Human Rights Council, "Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul," A/HRC/23/43 (15 March 2013), at para 20, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43.
[49] 2008 Constitution, Sections 19(c) and 375.
[50] The Courts Manual, Part IV, Section 457(1).
[51] 2008 Constitution, Sections 379, 420 and 414(b).
[52] The Legal Aid Law, Pyidaungsu Hluttaw Law No. 10/2016, Amendment of Legal Aid Law No.8/2017.
[53] *Id*.
[54] Legal Practitioners Act, above n. 16, Sections 13(a) and (b).
[55] This report only addresses cases in which a defendant secured legal representation. Observers did not monitor death penalty cases and therefore did not observe the implementation of government-sponsored legal assistance.
[56] This also resonates with reports from partner lawyers that defence lawyers are rarely retained during earlier stages, particularly when the defendant is relatively poor or lacks sufficient connections to one of only a few available pro bono lawyers or legal aid services. *See* ICJ, "Right to Counsel: The Independence of Lawyers in Myanmar" (2013) at p. 35, available at: www.icj.org (discussing that whether or not a defendant can retain access to counsel sometimes depends on the defendant's ability to pay unofficial fees).
[57] A search form is a form, usually completed by an arresting officer, that describes items found at a particular place or on a particular person. *See* Code of Criminal Procedure, Sections 103(2) and (4).
[58] No statement or record made to a police officer may be used as evidence at trial, if it pertains to the offence that is under investigation at the time the statement was made. Code of Criminal Procedure, Section 162(1); *see also* The Evidence Act [India Act I, 1872] (as amended 2015), Sections 25, 27-28. Nonetheless, confessions in "open court" before a judge are admissible, which may explain why the police use coercive tactics on a defendant to confess before a judge in court. *See* Evidence Act, Section 26.
[59] Judges have a responsibility to scrutinize the length of detention and the presiding judge is responsible for ensuring that a confession is voluntarily. *See* The Courts Manual Part IV, Sections 600-603; Code of Criminal Procedure, Section 164.
[60] Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial,* CCPR/C/GC/32 (23 August 2007) at para. 13.
[61] Amnesty International Fair Trial Manual, Chapter 19, 2d ed. (2014) at p. 119, available at: https://www.amnesty.org/en/documents/POL30/002/2014/en/.
[62] ICCPR Article 14(3)(b).
[63] Amnesty International Fair Trial Manual, above n. 61, at pp. 75 and 78.
[64] It is incumbent on the defendant or defence counsel to notify the court when more time is needed unless it is manifestly obvious to the judge that defence counsel acts in a way that is incompatible with the interests of justice. *General Comment No. 32*, above n. 60 at para. 32.

[65] *Id.* at para. 33-34. *See also* U.N. Basic Principles on the Role of Lawyers, above n. 38 at Principle 8.
[66] Principles and Guidelines on Access to Legal Aid, above n. 45, at Guideline 3, para. 43(a) and (d).
[67] 2008 Constitution Section 19(c).
[68] Courts Manual Part IV Section 457(2).
[69] Code of Criminal Procedure, Section 162(2).
[70] Courts Manual, Part II, Section 103(A), Chapter 3, Articles 10-11.
[71] The Prisons Act 1894 [India Act IX, 1894] Section 40.
[72] *Id.* at 41(1).
[73] *Id*. at 41(2).
[74] The Court Fees Act (2014) details the fees for access to documents, including fees for making copies. *See* Court Fees Act [India Act VII, 1870], (as amended 2014); *see also* Courts Manual, Part II, Chapter V, Sections 76-97.
[75]ICCPR Article 14(3)(c); *see General Comment No. 32*, above n. 60 at para. 35.
[76] *General Comment No. 32,* above n. 60 at para. 35; *see also* Amnesty International Fair Trial Manual, above n. 61 at p. 144.
[77] *General Comment No. 32*, above n. 60, at para. 35; *Yasseen and Thomas v Guyana*, HRC Communication 676/1996, UN Doc CCPR/C/62/D/676/1996 (30 March 1998) at para. 7.11 (finding delay of two years to violate ICCPR Article 14(3)(c), despite defendants' own requests for adjournments); *see also* Legal Digest of International Fair Trial Rights, OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2012) at p. 127.
[78] Amnesty International Fair Trial Manual, above n. 61 at p. 144; Legal Digest, above n. 77 at pp. 126, 128-129; *see* Basic Principles on the Independence of the Judiciary, above n. 38, at Principle 7.
[79] The Courts Manual, Part IV, Section 466.
[80] *Id.* at Part IV Sections 462-468 ((discussing reasonable cause for postponement or adjournment in criminal cases); *see also id.* at Part II Sections 13-15, 20, 22-27 (requiring expeditious treatment of all criminal and civil cases).
[81] *Id.* at Part II, Chapter III, Section 13. *See also* The Code of Judicial Ethics for Myanmar Judges, Office of the Supreme Court of the Union (2 August 2017) at Chapter 3, Article 2.
[82] Code of Criminal Procedure, Article 344(1).
[83] The Courts Manual, Part IV, Section 466.
[84] *Id*. at Sections 465-466 and Part II, Section 23.
[85] *Id.* at Part II Section 24.
[86] *Id*. at Part IV, Section 465.
[87] Code of Criminal Procedure, Sections 68 and 69.
[88] Code of Criminal Procedure, Section 90(b).
[89] *Id*. at 90(a).
[90] In separate instances, observers saw court hearings proceed without a defence lawyer, law officer or even a judge.
[91] Observers were not uniformly present for announcements of delays or adjournments because, whenever possible, partner lawyers would update Justice Base by cellphone.
[92] The Courts Manual, Part IV, Section 466.
[93] *See* Code of Criminal Procedure, above n. 87-88.
[94] ICCPR Article 14(1); *see* UDHR Article 10. This right may not be limited. *See General Comment No. 32* above n. 60 at para. 18.
[95] Institutional independence is outside the scope of this report.
[96] A judge's ability to exercise professional duties without undue interference from any individual other than a party to the case was not observed and is therefore outside the scope of this report.
[97] Legal Digest, above n. 77 at p. 58; *see* Amnesty International Fair Trial Manual above n. 61 at p. 110.
[98] Basic Principles on the Independence of the Judiciary, above n. 38, at Principle 2; *General Comment No. 32*, above n. 60, at para. 21.
[99] *General Comment No. 32*, above n. 60, at para 21.

[100] Bribery is defined as the intentional giving, offer or promise of an undue advantage, directly or indirectly, to a public official in exchange for that official to act, or refrain from acting, in a certain manner in the exercise of his or her official duties. UNCAC Article 15(a). The acceptance or mere solicitation of bribery by an official also falls under the UNCAC definition. *See id.* Article 15(b).
[101] UNCAC Article 11(1). Myanmar ratified the UNCAC on 20 December 2012.
[102] 2008 Constitution, Section19(a).
[103] *Id.* at Section11(a).
[104] *Id.* at Section18(a).
[105] Judicial Code of Ethics, above n. 81 at Chapter 1, Articles 2 and 3.
[106] *Id*. at Article 2.
[107] 2008 Constitution, Sections 300(a) and 301(e).
[108] Judicial Code of Ethics, above n. 81, at Chapter 4, Articles 1 and 4.
[109] *Id*. at Chapter 5, Article 2.
[110] Anti-Corruption Law 2013, Pyidaungsu Hluttaw Law No. 23/2013.
[111] *Id*. at Chapter 10.
[112] ACC representatives have reportedly warned that individuals filing complaints without "concrete evidence" will face legal action. Furthermore, only a few verified complaints have reportedly been filed with the ACC against judicial authorities. *See* Democratic Voice of Burma (DVB), "Anti-Corruption Commission tackles Regional Administrations" (12 April 2014), available at: http://www.dvb.no/news/anti-corruption-commission-tackles-regional-administrations-burma-myanmar/39577. As of August 6, 2017, the ACC has received over 3,200 complaints. The ACC looked into 41 of those, mostly relating to civil servants' mismanagement, land issues and judiciary issues, and transferred over 760 to state or regional governments. *See* Eleven, "Corruption complaints top 3,200" (6 August 2017), available at: http://www.elevenmyanmar.com/local/9903.
[113] The Penal Code, Sections 161-171.
[114] Judicial Code of Ethics, above n. 81 at Chapter 6, Article 2.
[115] The Courts Manual, Part II, Section 13.
[116] *Id.*
[117] Judicial Code of Ethics, above n. 81 at Chapter 3, Article 4.
[118] Partner lawyers expressed that defendants may also request holding multiple hearings at the same time to ensure that a particular witness, such as a police officer who usually fails to come to court, testifies when available.
[119] Bringing the defendant into court in handcuffs may also give rise to a violation of the presumption of innocence under both international and domestic standards. *See* The Courts Manual, Part IV, Section 477(1) (handcuffs should be removed during trial unless there is a reasonable expectation the accused will escape or act violently). According to the Human Rights Committee, a defendant should not normally be shackled during trial. *See General Comment No. 32*, above n. 60, at para. 30. The fact that observers reported that all defendants in custody were brought to court in handcuffs suggest that handcuffs are a matter of practice.
[120] Corruption in Myanmar's judiciary can be understood in terms of public and hidden transcripts, a theoretic framework attributed to James C. Scott. *See* Nick Cheesman, "Myanmar's Courts and the Sounds Money Makes," in Nick Cheesman, Monique Skidmore and Trevor Wilson (ed.), *Myanmar's Transition Openings, Obstacles and Opportunities*, Singapore: Institute of Southeast Asian Studies (ISEAS) (2002) at pp 231-248.
[121] Amounts ranging from between 30,000 kyat to 300,000 kyat.
[122] *See* Right to Adequate Time and Facilities to Prepare a Defence, *supra* p. 10, and Right to a Hearing without Undue Delay, *supra* p. 13.
[123] ICCPR, Article 14(1); UDHR, Article 10 (Article 10 does not describe grounds for restriction); UDHR Article 11 concerns itself with criminal proceedings and speaks of the right of every person to be presumed innocent until proved guilty according to law "in a public trial...". This does not necessarily apply to pretrial proceedings or appellate procedures but does include the right to a public final judgment. *General Comment No. 32*, above n. 60 at para. 28.

[124] ICCPR Article 14(1). There is a presumption in favour of closed hearings for juveniles. *See also* U.N. Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," E/CN.4/1985/4, (28 September 1984), para. 38(a).
[125] *Id*.
[126] *General Comment No. 32*, above n. 60, at para. 29. For guidance regarding the scope of restrictions on the right to a public hearing, *see* The Siracusa Principles, above n. 103.
[127] The burden on the court to provide facilities for the public is within reason. For example, a court may be expected to take into consideration the number of individuals interested in attending the court proceedings. *General Comment No. 32*, above n. 60, at para. 28.
[128] For further information concerning the right to a public hearing and the practice of Myanmar's judiciary, *see* Justice Base's 2017 report entitled "Behind Closed Doors: Opportunities and Obstacles for Public Access to Myanmar's Courts" detailing the extent to which members of the public can access court proceedings in courts in Yangon Region. Justice Base, "Behind Closed Doors: Opportunities and Obstacles for Public Access to Myanmar's Courts," (2017), available at: http://user41342.vs.easily.co.uk/wp-content/uploads/2017/06/Justice-Base-Behind-Closed-Doors.compressed.pdf.
[129] The Child Law, SLORC Law No. 93 (1993).
[130] Section 14 applies to any offence under the Act. The Act criminalizes a number of actions concerning prohibited places, defined largely as any work of any arm of the military, any place used for the purpose of the State and any railway or channel or other communication by land or water, including approaching it or making any model or note of it that may be useful to an enemy. The Official Secrets Act [India Act XIX, 1923], Sections 2(8), 14.
[131] The Courts Manual, Part IV, Section 616.
[132] *Id*. at Section 602(1).
[133] *Id*. at Section 653
[134] *Id*. at Part II, Section 41.
[135] Since the observer had to leave the hearing because she refused to submit "a power of attorney" form, this case is not reflected in any of the above data except as an example of an obstacle to attending a court hearing.
[136] Observers estimated the size of courtrooms when attending proceedings. These estimates do not reflect actual measurements.
[137] These exceptions include lawyers for unrelated upcoming hearings or individuals observed speaking with the judge for reasons unrelated to the hearing. Since observers attended hearings with participating lawyers and observers did not inform the court of their presence as official observers, this report does not consider observers as members of the public for the purposes of this analysis.
[138] *See, e.g.,* Organization for Security and Co-operation in Europe (OSCE), *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, para.12, 29 June 1990, available at: http://www.osce.org/odihr/elections/14304.

APPENDICES

A. DEFINITIONS

Advocates	An Advocate is entitled to appear before any Court and tribunal in the Union. A lawyer is eligible to become an advocate after three years of practice as a high-grade pleader. See Higher Grade Pleader.
Bailable offence	A category of offence in which a defendant is eligible for bail. See nonbailable offence.
Bribery	According to the United Nations Convention against Corruption (UNCAC) Article 15 (a), bribery is defined as the intentional giving, offer or promise of an undue advantage, directly or indirectly, to a public official in exchange for that official to act, or refrain from acting, in a certain manner in the exercise of his or her official duties. The mere solicitation or acceptance of bribery is also incorporated under the UNCAC. *See* Article 15 (b).
Cognizable offence	An offence in which a police officer may arrest an individual without a warrant. See noncognizable offence.
Complainant	A "complainant" is a private citizen who has filed a grievance under the Penal Code either to a police officer or, if the offence is deemed eligible, directly to a judge.
Complainant's lawyer	A complainant may hire a private lawyer (complainant's lawyer) to represent him or her in a criminal case under the direction of the law officer.
Court diary	A court diary contains the procedural history of a case such as the name of a witness who testified or the reason for an adjournment.
District Court	The district courts are courts of first instance with jurisdiction over serious criminal and civil cases. District courts also have appellate jurisdiction over township cases. See Township Court.
First Information Report	A report created by a police officer comprised of information that forms the basis of the charges against the defendant.
Higher grade pleaders	A higher-grade pleader is licensed to practice only in courts subordinate to the Supreme Court. After receiving a law degree and completing a year internship under the supervision of another lawyer(s) ("chamber-reading"), one can become a higher-grade pleader. See Advocate.
Law officer	Public prosecutors from the Union Attorney General's Office (UAGO). Law officers must have a university degree and complete a recruitment program.
Nonbailable offence	A defendant charged with a nonbailable offence may not be released on bail if there appears to be

	reasonable grounds for believing that he or she is guilty of the alleged offence. See bailable offence.
Noncognizable offence	An offence for which a police officer may not arrest without a warrant. See cognizable offence.
Partner Lawyers	Lawyers who represent the defendants or complainants in the observed hearings. Partner lawyers also facilitate observers' courtroom attendance.
Remand hearing	A hearing that requires the police to bring every detained defendant to appear before a judge within 24 hours of his or her arrest so that the judge may determine whether or not the defendant should be remanded back into custody or released.
Search form	A search form is a form, usually completed by an arresting officer, that describes items found at a particular place or on a particular person.
Summons case	A summons case addresses offences where the punishment is imprisonment of six months or less, or a fine. See warrant case.
Township Court	The township courts are courts of first instance with jurisdiction over charges that face a maximum sentence of up to seven years of imprisonment. See District Courts.
Warrant case	A case relating to an offence punishable for more than six months, including the death penalty. See summons case.

B. CSA (OBSERVER) CODE OF CONDUCT

I. Professionalism

Courtroom Support Analysts (CSA or "observers") shall:

- Be familiar with all project guidelines and be diligent with their responsibilities.
- Attend all trainings, including weekly staff meetings at Friday at 1pm at the Justice Base office.
- Coordinate with partner lawyers to attend courtroom proceedings, including the date and time of the hearing to be observed, the location of the court building, and the identities of the legal representatives.
- Arrive promptly at a meeting place determined by courtroom lawyer;
- Pay full attention to the proceedings and take notes diligently;
- Strictly obey the court rules;
- Shall behave in a dignified manner;

II. Non-interference (non-intervention)

CSAs shall:

- Not influence a proceeding in any way; and
- CSAs must never ask a lawyer or other court official their opinion on a case or advise them with regard to a course of legal action to take.

III. Objectivity and impartiality

CSAs shall:

- At no time in observing or reporting express bias;
- Not make any statement to court officials, parties to a case or any other third party, including the media, on the proceedings.

IV. Confidentiality

CSAs shall:

- Not disclose to court officials, parties to a case or any other third party, including the media, observations or their findings; and
- Ensure safety and confidentiality of handwritten notes, data handled electronically and of other collected information, especially when they contain personal data or private or confidential sources.

V. Security

CSAs shall:

- Report security-related incidents or serious concerns immediately to the team leader, and discontinue observation immediately if they feel unsafe at any point, for whatever reason.