

# Handbook on Habeas Corpus in Myanmar



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## Introduction and Executive Summary

International law guarantees the right of all individuals deprived of their liberty to an expeditious judicial procedure in which an independent and impartial court reviews the legality of their detention and orders the release of individuals wrongfully detained.<sup>1</sup> This right is commonly referred to as ‘habeas corpus’ in legal systems that are based on common law.<sup>2</sup> The right entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.<sup>3</sup>

The right to challenge the lawfulness of detention before a court is a self-standing human right, the denial of which constitutes a human rights violation.<sup>4</sup> Habeas corpus protects personal liberty or physical integrity by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee ordered.<sup>5</sup>

In Myanmar under military rule from 1962 until 2008, there was no effective mechanism to challenge the lawfulness of detention before a court.<sup>6</sup> One of the major (and unanticipated) improvements in Myanmar’s 2008 Constitution was the reintroduction of the writ of habeas corpus.<sup>7</sup> Since then, the government has passed an “Application of Writs Act 2014” and the Supreme Court has promulgated rules and procedures for its implementation.<sup>8</sup>

In order to assist and propel the process of judicial reform and strengthen the protection of human rights, the International Commission of Jurists provides this discussion of the law relevant to the writ of habeas corpus under international law as well as Myanmar’s current national law. The following are of particular significance:

- Analysis of international standards for challenging arbitrary or unlawful arrest or detention (including that which results in torture and ill-treatment of detainees);
- Analysis of Myanmar’s current legal framework for the Constitutional writ of habeas corpus;

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1 Report of the Working Group on Arbitrary Detention (Hereinafter: WGAD): United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court. UN Doc: A/HRC/30/xx (Hereinafter: WGAD Principles and Guidelines) para.1.

2 This procedure will be referred to as Habeas Corpus in the rest of this report, as it is identified in Myanmar jurisprudence. A common law system was established by the Raj in colonial Burma and followed until 1962, when military rule effectively ended the rule of law. See: International Commission of Jurists, *The Burmese Way: To Where? Report of a Mission to Myanmar (Burma)* (Geneva, Switzerland, 1991) Chapter 3. (Hereinafter: ICJ, *The Burmese Way: to Where?*) Members of the judiciary and legal profession still identify the country as a common law legal system, though in practice Myanmar’s legal system lacks written, well-reasoned and distributed decisions that could serve as precedent. See: International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar* (Geneva, Switzerland 2013) pp. 12-14. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/MYANMAR-Right-to-Counsel-electronic.pdf>; Burmese Language: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/MYANMAR-Right-to-Counsel-Publications-Thematic-Report-2015-BUR.pdf>. (Hereinafter: ICJ, *Right to Counsel*).

3 Human Rights Committee, General Comment No. 35, Article (Liberty and Security of Person). UN Doc: CCPR/C/GC/35 para.39.

4 Report of the WGAD (A/HRC/19/57, para.61).

5 Inter-American Court, Advisory Opinion OC-8/87, §33.

6 ICJ, *The Burmese Way: To Where?* pp. 41-54.

7 Constitution of the Republic of the Union of Myanmar 2008, Art. 18, 296, 378. In addition to Habeas Corpus, the Supreme Court has the power to issue the writs of Mandamus, Prohibition, Quo Warranto and Certiorari. (Hereinafter: Constitution of Myanmar 2008).

8 Constitution of Myanmar 2008; The Application of Writs Act 2014, Pyisdaunsu Hluttaw (Act no. 24/2014) (Hereinafter: Writs Act 2014); Procedural Rules and Regulations for Applications of Writs (Union Supreme Court Notification no. 117/2013) (Hereinafter: Writs Rules 2013).

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- Analysis of the seemingly forgotten and underutilized procedure for challenging arbitrary arrest and detention (similar to the writ of habeas corpus) under Section 491 of the 1898 Code of Criminal Procedure;
- Analysis of the few publicly available recent petitions for the writ of habeas corpus;
- Analysis of relevant existing precedents (pre-1962) from the Myanmar judiciary's case law on habeas corpus.

This analysis (and recommendations based thereon) is important because notwithstanding some reform, there are still multiple credible reports of arbitrary arrest and detention in the country, particularly as a tool to suppress political dissent.<sup>9</sup> Despite the 1898 Criminal Procedure Code (CrPC) setting out the procedures for arrest and detention, in practice, security forces adhere to these laws irregularly at best.<sup>10</sup> The development and implementation of the right to habeas corpus in a manner consistent with international standards is essential to the protection of human rights and the promotion of the rule of law in Myanmar.

It is important not to confuse the state obligation to provide a fair trial with the right of a detainee to a habeas corpus procedure. The right to a trial is distinct from habeas corpus.<sup>11</sup> The right to challenge the lawfulness of detention<sup>12</sup> differs principally because it is initiated by the detainee or on the detainee's behalf, rather than by the authorities.<sup>13</sup> Some judges in Myanmar have dismissed petitions on the grounds that the detainee has appeared in another court, even though the appearance did not involve reviewing the basis of the detention. Some experienced lawyers in Myanmar have told the ICJ that they assume that habeas corpus petitions will be dismissed and will simply await an eventual trial.<sup>14</sup>

Likewise, the availability of habeas corpus or other such procedures does not excuse a State's failure to bring detainees promptly before a judicial authority.<sup>15</sup> The State still has an obligation to ensure that people arrested or detained are brought before a court promptly,<sup>16</sup> regardless of whether detainees challenge their detention.<sup>17</sup>

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9 "Increase in arbitrary arrests in Burma", *Mizzima News*, 28 September 2012, <http://www.mizzima.com/news/prisoner-watch/8125-increase-in-arbitrary-arrests-in-burma-report.html>; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Tomás Ojea Quintana, UN Doc: A/HRC/25/64. Para.4. There are also credible reports of the military unlawfully detaining those suspected of being members of ethnic armed groups. Ibid. Para.8.

10 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, 2 April 2014, A/HRC/25/64. Many arrests are conducted without warrant and those arrested are not informed of their alleged charge. United States Department of State, *2013 Country Reports on Human Rights Practices - Burma*, 27 February 2014, available at: <http://www.refworld.org/docid/53284b4fb.html>; Assistant Association for Political Prisoners, *Torture, Political Prisoners and the Un-Rule of Law: Challenges to Peace, Security and Human Rights in Burma*, 14 October 2010, p. 17; Even in cases in which the detainee is brought to court, and charged and tried, trials are not often open to the public. Ibid. pp. 17-18; Detainees are routinely denied access to either legal counsel or their family members, and the duration of their detention is often unclear and unknown. "Increase in arbitrary arrests in Burma", *Mizzima News*, 28 September 2012, <http://www.mizzima.com/news/prisoner-watch/8125-increase-in-arbitrary-arrests-in-burma-report.html>; Amnesty International, *Myanmar: Human rights defender arrested and detained: Ko Htin Kyaw*, 9 May 2014, ASA 16/008/2014, available at: <http://www.refworld.org/docid/5371d2f24.html>.

11 Amnesty International Fair Trial Manual, 2nd Edition (2014) pg. 58.

12 ICCPR. Art. 9.4.

13 Amnesty International Fair Trial Manual, 2nd Edition (2014) pg. 58.

14 ICJ Lawyer Interview Yangon, 12 November 2015; ICJ Lawyer Interview Yangon, 13 November 2015.

15 *De Jong, Baljet and Van den Brink v. the Netherlands* (8805/79, 8806/79, 9242/81), European Court (1984) §§51, 57; See *Berry v. Jamaica*, HRC, UN Doc. CCPR/C/50/D/330/1988 (1994) §11.1.

16 ICCPR 9.3: Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

17 European Court of Human Rights: *McKay v. United Kingdom* (543/03), Grand Chamber (2006) §34; *De Jong, Baljet and Van den Brink v. the Netherlands* (8805/79 8806/79 9242/81), (1984) §§51, 57; *Jecius v. Lithuania* (34578/1997), (2000) §84.

Habeas corpus should serve as an effective remedy for individuals subjected to unlawful or arbitrary arrest or detention, and other serious human rights violations including torture and other ill treatment and enforced disappearance.<sup>18</sup> It is one of the procedures through which the legality of an individual's detention may be challenged. If properly implemented, it also serves as an effective check on the abuse of executive power, ensuring that the rule of law is upheld.<sup>19</sup>

The habeas corpus procedure should apply to people held under any form of detention by any agent of the State, at all times, including during emergencies.<sup>20</sup> In all cases that an arrest or detention is unlawful or arbitrary under international law, the habeas corpus procedure should result in securing release from detention, whether the detention was ordered by the highest powers of the state, imposed by state armed forces or police and other security agencies.

The right to have the lawfulness of one's detention reviewed by a court is considered a norm of general and customary international law.<sup>21</sup> Thus the right of detained people to habeas corpus should be legally binding in domestic law and be applicable at all times, including during emergencies and armed conflict, even in countries that are not yet State Parties to relevant international treaties, such as Myanmar.

Despite legal reinstatement of habeas corpus in Myanmar, obstacles remain to the procedure's implementation in practice. The systematic dismantling of Myanmar's legal system and its isolation from the international legal community has rendered judges, lawyers and members of the government unfamiliar with international laws and standards and Myanmar's own jurisprudence.<sup>22</sup>

The Myanmar judiciary remains drastically under-resourced and lacks the independence necessary to challenge the decisions and actions of the executive and the military, especially arrest and detention.<sup>23</sup> The judiciary must be able to independently examine the legality of arrest and detention. It must also have the authority to release those it finds are detained illegally.

The examination of the habeas corpus laws and jurisprudence in Myanmar since 2008 reveals shortcomings in the legislation as well as its current implementation. For example, Article 296(b) of the 2008 Constitution, and Chapter 2 Section 3 of the Writ Law, suspend applications to issue writs in the areas under declared states of emergency. The suspension of habeas corpus, even under a 'state of emergency,' is inconsistent with international human rights standards.

Section 296 of the Constitution, as well as the Writ Law and the Writ Procedure, which make the issuance of writs the prerogative of the Supreme Court alone, compromise

18 International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Geneva, Switzerland, 2008. p. 51.

19 International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, Geneva, Switzerland, 2011. pp 144 – 145; the African Commission has stated that "while the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform." *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (143/95 and 150/96), African Commission, 13th Annual Report (1999) §33.

20 As habeas corpus is a remedy for violations of rights that are not subject to derogation even during emergencies, such as the prohibitions of torture, arbitrary detention and enforced disappearance, it should apply at all times. Human Rights Committee, General Comment 29. para.16; Article 27(2) of the American Convention of Human Rights; Article X of the Inter-American Convention on Forced Disappearance of Persons; Article 4(2) of the Arab Charter of Human Rights; Section M(5)(e) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

21 The Working Group on Arbitrary Detention summarises the international law as follows: 'Recognizing that everyone has the right to be free from arbitrary or unlawful deprivation of liberty, everyone is guaranteed the right to take proceedings before a court without delay, in order that that court may decide on the arbitrariness or lawfulness of the detention, and obtain appropriate and accessible, appropriate remedies.' Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court. UN Doc: A/HRC/30/xx. para.19

22 ICJ, *Right to Counsel*. pp. 12-20.

23 ICJ, *Right to Counsel*. pp. 12-20.

the effective use of habeas corpus. Apart from the Constitution, Section 491(1)(a) and (b) of the CrPC of 1898 provide remedy akin to habeas corpus at the High Courts. The law remains valid and pre-1962 jurisprudence suggests it could be a useful tool to challenge unlawful arrests and detention. Nevertheless, and somewhat inexplicably, lawyers in Myanmar do not utilize this procedure; the ICJs urges Myanmar judges, lawyers, and law enforcement agencies to revitalize use of Section 491.

Without access to the High Courts, the procedure to file a habeas corpus petition is difficult due to the exclusive jurisdiction of the Supreme Court in Nay Pyi Taw. The location of the Supreme Court, away from the country's major population centres, burdens petitioners with excessive travel time and costs that render the procedure impractical and ineffective. As a result the benefits of habeas corpus can become illusory.<sup>24</sup>

The International Commission of Jurists is aware of only a few habeas corpus petitions filed with the Supreme Court since 2008. Of these, copies of only four decisions could be obtained. None of them were officially reported, making information difficult to access and unreliable. According to the information available to the ICJ, since 2008, the Supreme Court has not granted the writ of habeas corpus: the Supreme Court has not ordered the respondent-authorities to 'produce the body', nor has it ruled that an arrest or detention was unlawful on any occasion. The few judgements discovered by the ICJ appear inconsistent with both national and international standards. These judgments and the applicable standards are detailed in this report.

The ICJ hopes that this report and the implementation of the recommendations will assist the Supreme Court to implement its Judicial Strategic Plan 2015-2017, which lists promoting independence and accountability as a key strategic action area. The ICJ considers the creation of a Writs Department by the Supreme Court a key first step towards establishing judicial independence. This report should serve to encourage lawyers and judges and guide the application of the writ. Habeas corpus is a key component of the rule of law. Its implementation in practice will be an important measure of judicial reform in Myanmar.

Part I of this report examines international standards relating to habeas corpus. The standards are drawn from international and regional treaties and interpretations of the treaties referenced by regional human rights courts. International human rights treaties, such as the International Covenant for Civil and Political Rights (ICCPR) and the Convention of the Rights of the Child (CRC), the latter of which Myanmar is party to, and other standards enshrine the obligation of States to establish and ensure effective access to a procedure for this purpose.<sup>25</sup> This report also analyses the following

24 International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Geneva, Switzerland, 2007 p. 55.

25 25 International Covenant on Civil and Political Rights, 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 Mar. 23, 1976. Article 9(4) (Hereinafter: ICCPR); International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), entered into force Dec. 23, 2010. Article 17(2)(f). (Hereinafter: The Convention on Enforced Disappearance); Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. Article 37(d). (hereinafter: CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003. Article 16(8). (Hereinafter: Migrant Workers Convention); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). Article 7(6). (Hereinafter: American Convention on Human Rights); Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. Article 5(4). (Hereinafter: the ECHR); Organisation of African Unity, Guidelines and Measures for the Prohibition and the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, Robben Island Guidelines, 2002. Principle 32. (Hereinafter: The Robben Island Guidelines); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX) 247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005). Section M(4) and (5); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). Article XXV (Hereinafter: American Declaration); Guidelines on Human Rights and the Fight Against Terrorism, adopted by the Committee of Ministers at its 804th meeting (11 July 2002) (Hereinafter: CoE Guidelines on human rights and counter-terrorism); Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) Article 8.

international standards: General Comments of the UN Human Rights Committee; non-treaty standards, most of which have been adopted by the UN or regional inter-governmental bodies; UN resolutions; and best practices and legal commentaries regarding criminal procedure and a detainee's right to challenge the legality of his arrest and detention.

Part II examines the regulatory framework for habeas corpus, which is guaranteed by the Myanmar Constitution 2008 and codified in the Application of Writs Law 2014. It also examines Section 491 of the CrPC that provides similar access to remedy. This section provides a digest of available Supreme Court decisions on habeas corpus petitions since the writ was reinstated. It highlights the challenges applicants face under the current criminal justice system—a system that in practice does not conform to either national or international standards. To further assist the development of law and practice regarding habeas corpus in Myanmar, and to highlight past precedents in law, Part II concludes with a discussion of the pre-1962 constitutional, legal, and procedural jurisprudence on writs.

The report concludes in Part III with a set of recommendations aiming to ensure the effective application of the writ of habeas corpus as well as enhance respect for the independence of the judiciary and protection of human rights and the rule of law in Myanmar. The key recommendations include:

1. **Legislature:** Revise key provisions of the Constitution, laws and policies pertaining to the writ of habeas corpus, as well as arrest and detention, to ensure their consistency with international standards.
2. **Supreme Court:** Act independently and impartially to uphold the constitutional right to habeas corpus; ensure that the detainee appears before the court and the legality of their arrest and detention is determined; provide reasoned public judgements for all habeas corpus petitions; provide extensive training for Judges on the application of the writ of habeas corpus.
3. **Executive and Attorney General:** Issue a directive to ensure that arrest and detention is carried out in line with international standards and to implore law officers to comply with the writ of habeas corpus procedure; law officers must be present in court, produce the detainee and explain how the detention was carried out in accordance with the law; provide extensive training on the role of the prosecutor in habeas corpus petitions.
4. **Bar Associations and Lawyers:** Provide extensive capacity building, support and encouragement for lawyers to challenge arrest and detention as well as to file petitions for the writ of habeas corpus or to use similar procedures under CrPC Section 491.

### **Minimum Guidelines for Habeas Corpus**

States must ensure that the remedy of habeas corpus meets the following base-line requirements (among other applicable standards) in order to comply with international human rights standards:

- a) All persons arrested or detained for any reason, or persons on their behalf, must be entitled to take proceedings before a court to challenge the legality of an individual's detention, regardless of their nationality or other status;
- b) Petitions should be filed without the requirement of legal formalities or prior authorization. Modes of permissible submission should include the most expeditious, reasonable and accessible method and be free of cost;
- c) The application must be heard and decided before an independent and impartial court; the judge or judges considering the petition should preferably be of a rank superior to any judge who ordered the arrest;
- d) The petition must be considered, examined and decided without delay, in the course of a fair proceeding, in which the person deprived of their liberty has a right to be present to be represented by a qualified lawyer and to provide present and challenge evidence;
- e) The authorities must bear the burden of proving the legality of the grounds and procedures for the initial and continuing detention, which must be consistent with national law and international standards;
- f) The decision to grant habeas corpus must be implemented immediately. This means releasing the person deprived of liberty should the court rule that the arrest or detention was illegal;
- g) A person subjected to unlawful or arbitrary arrest or detention must be provided with adequate reparation, including compensation;
- h) The right to challenge the legality of detention is a right, which must always apply and be respected, including during states of emergency.

## Part 1. The Writ of Habeas Corpus and International Law

The writ of habeas corpus (or a similar procedure) is a simple and expeditious judicial remedy designed to protect personal liberty and prevent arbitrary detention.<sup>26</sup> By means of a judicial decree, an independent, impartial and competent court orders the appropriate authorities to bring the detained person before a judge to determine the lawfulness of detention and to release the detainee if the detention was or has become unlawful. It is applicable to all persons under any form of detention, including detention pursuant to the enforcement of the criminal law, security detention (sometimes known as administrative detentions or internment), house arrests,<sup>27</sup> solitary confinement<sup>28</sup> and secret detentions.<sup>29</sup>

In addition, the expeditious review of the legality of a detention can significantly reduce incidents of torture and other ill treatment,<sup>30</sup> incommunicado detention,<sup>31</sup> long or indefinite detention without trial, enforced disappearances,<sup>32</sup> and other grave violations of human rights.<sup>33</sup> The UN Special Rapporteur on Torture has underscored that the right to habeas corpus is one of the “basic legal safeguards” to “ensure humane treatment while in detention.”<sup>34</sup>

The right to liberty, the prohibition of arbitrary detention, the right to a fair trial, and the right to bring proceedings before a court to challenge the lawfulness of detention have been enshrined in numerous international and regional treaties as well as non-treaty

26 *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2004/3, 15 December 2003, para.62. See also UN General Assembly, Resolution 34/178, *The right of amparo, Habeas corpus or other legal remedies to the same effect*, UN Doc. A/RES/34/178, 17 December 1979, article 1(a).

27 Human Rights Committee, UN Doc CCPR/C/89/D/1172/2003, 21 June 2007, para.8.5.

28 Inter-American Court of Human Rights, *Suarez-Rosero v. Ecuador*, Judgment of 12 November 1997, para.59.

29 Human Rights Council Resolution 15/18, UN Doc. A/HRC/RES/15/18, 6 October 2010, para.4(d) – (e); Human Rights Council, *Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin; *The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Manfred Nowak; *The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin*, UN Doc. A/HRC/13/42, 19 February 2010, para.19. The Human Rights Council explains that habeas corpus applies to the following forms of detention: detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests; detention for vagrancy or drug addiction, detention for educational purposes of children in conflict with the law and other forms of administrative detention; house arrest and solitary confinement. Human Rights Committee, General Comment No. 35, Article (Liberty and Security of Person). UN Doc: CCPR/C/GC/35 para.40.

30 *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. E/ CN.4/2004/56, 23 December 2003, para.39; *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/57/173, 2 July 2002, para.16; Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), para.38; and Human Rights Council, Resolution 13/19 on torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, UN Doc. A/HRC/Res/13/19, 26 March 2010, para.5

31 European Court of Human Rights, Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application No 14553/89; 14554/89, paras. 62-63, and Judgment of 12 March 2003, *Ocalan v. Turkey*, Application No 46221/99, para.86.

32 *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1983/14, 21 January 1983, para.141; *Report on the Mission to Colombia*, UN Doc. E/CN.4/1989/18/Add.1, 6 February 1989, para.136; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1990/13, para.346; *Report on the Mission to the Philippines*, UN Doc. E/CN.4/1991/20/Add.1, 10 January 1991, para.167; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1991/20, 17 January 1991, para.409; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1992/18, 30 December 1991, paras. 202; *Report of the UN Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1993/25, 7 January 1993, para.514. E/CN.4/2002/71, 8 January 2002.

33 Inter-American Court of Human Rights, Judgment of 7 September 2004, *Tibi v. Ecuador*, para.128. Other grave violations of human rights includes situations where there is a failure to protect the right to life, the right to liberty, the right to humane treatment, the right to recognition as a person before the law, the right to freedom from slavery, and the right to freedom of conscience and religion.

34 *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/57/173, 2 July 2002, para.18.

standards adopted by the United Nations and by regional inter-governmental bodies. The following international standards apply to the implementation of the writ of habeas corpus:

### 1.1 Right to liberty and freedom from arbitrary detention

All persons have the right to be free from arbitrary or unlawful deprivation of liberty.<sup>35</sup> To safeguard these rights, international standards clarify that a person's liberty may only be lawfully restricted on grounds and in accordance with procedures stipulated and established by law.<sup>36</sup> Domestic laws governing arrest and detention must be consistent with international law.<sup>37</sup> Any deprivation of liberty should be in compliance with the following general principles:

- a) Legality;
- b) Legitimacy;
- c) Necessity and reasonableness;
- d) Proportionality; and
- e) The protection of human rights, particularly, the right to liberty and security of the person, the right not to be arbitrarily detained and the right to an effective remedy.<sup>38</sup>

With regard to the prohibition of arbitrary detention, the term 'arbitrary' should be interpreted broadly and understood to include inappropriateness, injustice, unpredictability and lack of due process of law.<sup>39</sup>

International standards detail a number of rights for people deprived of their liberty. Among them, as a safeguard against arbitrariness, any person arrested has the right to be informed at the time of the arrest, of the reasons for the arrest, and if charged with a criminal offence, to be promptly informed of the charges.<sup>40</sup>

35 WGAD Principles and Guidelines. para.19; UDHR. Article 9; The International Court of Justice has stated that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights", *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgments, I.C.J. Reports 1980, p. 42, para.91.

36 Principle 2 of the Body of Principles for the protection of All Forms of Detention or Imprisonment; ICCPR, Article 9(1); African Charter on Human and Peoples' Rights, article 6; American Convention on Human Rights, article 7; ECHR, section 5(1); see Article 37(b) of CRC.

37 E.g., Human Rights Committee, General Comment 35, UN Doc. CCPR/C/GC/35 (2014) para.44 ; A v. Australia, Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993 (1997) para.9.5; European Court of Human Rights: *Bozano v. France* (Application No. 9990/82), Judgment of 18 December 1986, para.54; *Medvedyev and Others v. France* ( Application No 3394/03), Judgment of the Grand Chamber Judgment of 29 March 2010, paras. 79-80; Inter-American Court of Human Rights Judgment of 21 January 1994, paras. 46-47; *Alfonso Martin Del Campo Dodd v. Mexico* (12.228, Report 117/09), Inter-American Commission (2009) para.22, Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, para.12.

38 See inter alia, Inter-American Court of Human Rights: Judgment of 21 January 1994, *Gangaram- Panday v. Suriname*, Series C No. 16, paras. 46-47; Judgment of 8 July 2004, *Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 83; Judgment of 27 November 2003, *Maritza Urrutia v. Guatemala*, Series C No. 103, para.65; Judgment of 18 September 2003, *Bulacio v. Argentina*, Series C No. 100, para.125; and Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, Series C No. 99, para.78. See: European Court of Human Rights: *Brannigan and McBride v. United Kingdom*, Application Nos. 14553/89; 14554/89, Judgment of 26 May 1993, para.48; *Brogan and others v. United Kingdom*, Application Nos. 11209/84, 11234/84, 11266/84, 11386/85, Judgment of 29 November 1988, para.32; *Günay and others v. Turkey*, Application No. 31850/96, Judgment of 27 September 2001, para.22 *Murat Sakik and others v. Turkey*, Application Nos. 23878/94; 23879/94; 23880/94; 23881/94; 23882/94; 23883/94, Judgment of 26 November 1997, para.44; *Chahal v. United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, para.118.

39 Human Rights Committee, General Comment 35, UN Doc. CCPR/C/GC/35(2014) para.12; Communication No.458/1991, *A.W. Mukong v. Cameroon*, UN. Doc. CCPR/C/51/D/458/1991, 21 July 1994.

40 Article 9(2) of the ICCPR; Principle 10 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.

### Examples of Violations of the Right to Liberty

Some examples of situations that would violate international law, guaranteeing the right to liberty and prohibiting arbitrary or otherwise unlawful detention include when:

- A person is arrested without a warrant, when the law requires a warrant;<sup>41</sup>
- A person is arrested on suspicion of having committed a criminal offence and is not brought promptly before a judge;
- A person is detained by or with the consent or acquiescence of the State and the fact of the person's detention and/or the person's fate or whereabouts is denied or concealed, placing the person outside the protection of the law;
- A person is arrested and detained, solely for exercising the right to freedom of opinion and expression;
- A person is imprisoned following a manifestly unfair trial;
- A person is not released from prison following the expiration of a lawfully imposed term of imprisonment or after a court has ordered that individual's release.<sup>42</sup>

In addition, all persons deprived of their liberty must be informed of their rights, including but not limited to their rights to counsel, to challenge the legality of their detention and their rights during any questioning.<sup>44</sup> Furthermore, to safeguard their rights, people deprived of their liberty have the right to the assistance of a lawyer, access to that lawyer and access to confidential communications with their lawyer.<sup>45</sup>

Detained people have the right to communicate with the outside world, subject only to reasonable conditions and restrictions that are proportionate to a legitimate aim.<sup>46</sup> States must ensure that no one is held secretly in detention<sup>47</sup> and that detainees are held only in a place of detention that is officially recognized.<sup>48</sup>

41 Inter-American Court of Human Rights: *Tibi v. Ecuador*, Judgment of 7 September 2004, para.103.

42 *Human Rights Committee, General Comment 35*, UN Doc. CCPR/C/GC/35 (2014) §§ 17 and 11; Communication No. 132/1982, *M. Jaona v. Madagascar (Views adopted on 1 April 1985)*, in UN Doc. GAOR, A/40/40, p. 186, para.14.

43 Article 9(2) of the ICCPR; Principle 10 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.

44 Principles 13 and 14 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment; Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, paras. 42(c) and 43(i).

45 E.g., Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, principle 17. Human Rights Committee, General Comment No. 35, Article (Liberty and Security of Person). UN Doc: CCPR/C/GC/35. Para.35.

46 Article 17(2)(d) of the Convention on Enforced Disappearance, Rule 26 of the Bangkok Rules; Principle 19 of the Body of Principles, Guidelines 20 and 31 of the Robben Island Guidelines; See Rule 38 of the CoE Rules on remand in custody, Rules 99 and 24 of the European Prison Rules.

47 *El-Masri v. the former Yugoslav Republic of Macedonia* (39630/09), European Court Grand Chamber (2012) §§200-204, 230-241; UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010) §§17-35; CAT Concluding Observations: USA, UN Doc. CAT/C/USA/CO/2 (2006) §17; Syria, UN Doc. CAT/C/SYR/CO/1 (2010) §15; Israel, UN Doc. CAT/C/ISR/CO/4 (2009) §26; UN General Assembly resolution 65/205, §21.

48 Article 17(2)(c) of the Convention on Enforced Disappearance; Article XI of the Inter American Convention on Disappearance; Article 10(1) of the Declaration on Disappearance; Section M(6)(a) of the Principles on Fair Trial in Africa; Principle III(1) of the Principles on Persons Deprived of Liberty in the Americas; HRC General Comment 20, §11; Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68 (2002) §26(e); See *Bitiyeva and X v. Russian Federation* (57953/00, 37392/03), European Court (2007) §118.

All persons who have been arrested have the right to notify someone in the outside world that they have been taken into custody and where they are being held.<sup>49</sup> Detainees, including those held in police custody or on remand pending trial, are to be given all reasonable facilities to communicate with and receive visits from family and friends.<sup>50</sup>

Detention without access to the outside world facilitates torture and other ill treatment, and enforced disappearance; depending on the circumstances, detention incommunicado can itself constitute a violation of the prohibition of torture or other cruel, inhuman or degrading treatment.<sup>51</sup>

Torture and other cruel, inhuman or degrading treatment or punishments are absolutely prohibited, at all times.<sup>52</sup> Anyone who has ill-treated whilst in detention has the right to an effective remedy, including the right to file a complaint to the authorities responsible for the administration of the place of detention, other relevant higher authorities, as well as to those who have powers to review the complaint and provide reparation, including compensation.<sup>53</sup> Allegations of such treatment must be promptly, independently, impartially and thoroughly investigated.<sup>54</sup>

As a further safeguard of the right to liberty, the prohibition against arbitrary detention and other human rights abuses, international standards require that all detention be ordered or subject to the effective control of a judicial authority.<sup>55</sup> International standards require that persons arrested or detained be brought promptly before an independent and impartial judicial authority.<sup>56</sup>

In accordance with the right to liberty and the presumption of innocence, there is an expectation that people charged with a criminal offence will not be detained while awaiting trial.<sup>57</sup> Thus, following a lawful arrest, when brought before the court, a court may only order the remand of a person pending trial on a criminal offence which carries a term of imprisonment, if it is necessary, reasonable and proportionate in the circumstances of the particular case.<sup>58</sup>

Courts should always adopt a case-by-case approach when considering the necessity, reasonableness and proportionality of ordering or maintaining the detention of an individual. The burden of establishing that substantial risk, one that cannot be allayed by a measure short of detention, lies with the prosecuting authority (or in civil law systems, with the investigating judge).<sup>59</sup>

49 Committee Against Torture, General Comment 2, §13; Guideline 3 para.43(e) of the Principles and Guidelines on the Access to Legal Aid in Criminal Justice Systems; Principle 16(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, CoE Committee of Ministers Recommendation (2012) at 12, Appendix §15.2.

50 Article 17(2)(d) of the Convention on Enforced Disappearance; Article 17(5) of the Migrant Workers Convention; Article 16(2) of the Arab Charter; Rules 26-28 of the Bangkok Rules; Guideline 31 of the Robben Island Guidelines; Rule 92 of the Standard Minimum Rules; Section M(2)(e) of the Principles on Fair Trial in Africa; Principle V of the Principles on Persons Deprived of Liberty in the Americas; Rules 24 and 99 of the European Prison Rules, Regulation 100(1) of the ICC Regulations; CPT 2nd General Report, CPT/Inf (92) 3, §51; Nuri Özen and Others v. Turkey (15672/08 et al), European Court (2011) §59.

51 Inter-American Court: Cantoral-Benavides v. Peru (2000) §83; Chaparro Álvarez and Lapo Íñiguez v. Ecuador (2007) §§166-172.

52 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, principle 6.

53 Ibid. Principle 33(1).

54 Article 8 of the UDHR; Articles 2 and 7 of the ICCPR; Human Rights Committee General Comment 31 paras. 15-16; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987. Articles 12-14.

55 Principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; UN General Assembly resolution 65/205, §20; UN Human Rights Council resolution 15/18, §4(c); UN Commission on Human Rights resolution 2005/27, §4(c).

56 Article 9(3) of the ICCPR and (applicable to people arrested in connection with a criminal charge); Article 10(1) of the Declaration on the Protection of All Persons from Enforced Disappearance; Committee on the Rights of the Child, General Comment 10, UN Doc. CRC/C/GC/10 (2007) para.83; See Principles 4 and 11(1) of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

57 Article 9(3) of the ICCPR; Article 37(b) of the CRC; Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

58 Article 9(3) of the ICCPR; Article 37(b) of the CRC; Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Human Rights Committee General Comment 35, UN Doc CCPR/C/GC/35 (2014) para.12.

59 E.g, Rule 8(2) of the Council of Europe Rules for the Use of Remand in Custody, the Conditions in which it Take Place and the Provision of Safeguards against Abuse, Committee of Ministers of the Council of Europe Recommendation (2006) 13.

### Pre-trial Detention and Bail

The courts' analysis of detention and bail should take into account the following factors:

- The nature, seriousness and circumstances of the offence allegedly committed;
- The nature and severity of the possible penalties (if the possible penalty on conviction of the offence charged does not include a term of imprisonment, the individual must be released);
- The risk of the accused absconding;
- The risk of the accused tampering with evidence;
- The risk of the accused re-offending, including by interfering with witnesses;<sup>60</sup>
- The availability and appropriateness of other measures, short of detention, including for example conditional release on bail, that could address the concerns in the particular case.<sup>61</sup>

The United Nations' Working Group on Arbitrary Detention (WGAD), the UN expert-body that is mandated to assist States in preventing arbitrary detention and to investigate cases of deprivation of liberty that is inconsistent with international standards, has underlined the importance of ensuring that all people deprived of their liberty, even in connection with terrorism-related activity, must enjoy the effective right to habeas corpus.<sup>62</sup>

## 1.2 Right to challenge the legality of detention

All persons have a right to a decision by the court without delay on the lawfulness of their detention, and on the release if the detention is not lawful under international law, as outlined above.<sup>63</sup> This right is typically exercised through habeas corpus proceedings or other equivalent judicial remedies with the same effect, such as the writ of *amparo*.<sup>64</sup>

The right to challenge the lawfulness of the detention differs from the right to be brought before a judge because it is initiated by the detainee rather than by the authorities. That the individual has been brought before a court does not fulfil this right.

60 Human Rights Committee: Views of 23 July 1990, *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, para.5.8; Views of 5 November 1999, *Aage Spakmo v. Norway*, Communication No. 631/1995, para.6.3; Views of 21 July 1994, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para.9.8; and Views of 3 April 1997, *A [name deleted] v. Australia*, Communication No. 560/1993, para.9.2.

61 *Patsuria v. Georgia*, (30779/04) European Court of Human Rights, (2007) para.71; Rule 7(c) of the Council of Europe Rules for the Use of Remand in Custody, the Conditions in which it Take Place and the Provision of Safeguards against Abuse, Committee of Ministers of the Council of Europe Recommendation.

62 WGAD, UN Doc. A/HRC/10/21 (2009) §§53, 54(e)-(f).

63 ICCPR, article 9(4); Convention on Enforced Disappearance, article 17(2)(f); Migrant Workers Convention, article 16(8); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 32(1); American Convention on Human Rights, article 7(6); American Declaration of the Rights and Duties of Man, principles XXV; Arab Charter on Human Rights, article 14(6); ECHR, article 5(4); The Robben Island Guidelines, guideline 32; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, section M(4) and (5).

64 UN General Assembly, Resolution 24.178, The right of amparo, Habeas corpus or other legal remedies to the same effect, UN Doc. A/RES/34/178, 17 December 1979, para.3; The UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities called on all States "to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful", UN Commission on Human Rights Resolution 1992/35 and UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1991/15.

All detainees retain the right to challenge the legality of their detention in a habeas corpus proceeding. In the course of these procedures, the detainees' whereabouts, well being,<sup>65</sup> and the legality of their detention is addressed.

Human rights standards take into account the diversity of national legal procedures. They set out the minimum standard that national systems should provide to ensure justice, respect for the rule of law and human rights. Article 9(4) of the ICCPR elaborates on habeas corpus as follows:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>66</sup>

The right to challenge the lawfulness of detention before a court is a self-standing human right, the denial of which constitutes a human rights violation.<sup>67</sup> It is also a means of determining the whereabouts and state of health of detainees and identifying the authority ordering or carrying out the deprivation of liberty.

The right to review the lawfulness of detention is considered a norm of general and customary international law. Thus the right of detained people to habeas corpus should have legal and binding force in domestic law and be applicable at all times, including during emergencies and armed conflict, even in countries that are not yet State Parties to the ICCPR, such as Myanmar.<sup>68</sup> The Working Group on Arbitrary Detention has stated that the right to bring such proceedings is a peremptory (*jus cogens*) norm.<sup>69</sup>

The Working Group on Arbitrary Detention has clarified that national legal systems must guarantee the right to challenge the lawfulness of detention. The law, at the highest level, must guarantee prompt, appropriate and accessible remedies. States must develop procedures that ensure the right is accessible and effective for all persons and provide the necessary human and financial resources to ensure its implementation.<sup>70</sup> The procedures must be simple and expeditious,<sup>71</sup> and should be free of charge.<sup>72</sup> The law should also establish penalties for officials who delay or obstruct such proceedings, including those who refuse to disclose relevant information during habeas corpus proceedings.<sup>73</sup>

### 1.3 Right to continuing review of detention

All persons who are deprived of their liberty, including those detained who have not been charged and those remanded on criminal charges, are also entitled to have the lawfulness of their continued detention periodically reviewed by a court that has the power to release the detainee if it is found that the detention is no longer lawful, necessary, reasonable or proportionate.<sup>74</sup>

65 Declaration on the Protection of All Persons from Enforced Disappearances, article 9; Inter-American Convention on Forced Disappearance of Persons, article X; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, Section M(5)(b).

66 ICCPR. Article. 9(4)

67 WGAD Principles and Guidelines. para.1.

68 Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4, 10 January 2008, para.67; see also Human Rights Committee General Comment 29 para.16 and Human Rights Committee General Comment 35 para.67.

69 WGAD, UN Doc. A/HRC/27/47 (2014), para.6.

70 These and other standards regarding the right to challenge the legality of detention are set out in the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings before a Court, adopted by WGAD in April 2015, following a review of national and international standards and based on input and a global consultations involving governments, national human rights institutions, inter-governmental organizations, UN and regional human rights bodies and mechanisms, NGOs, and academics. They are hereafter referred to as the WGAD Basic Principles and Guidelines. WGAD Basic Principles and Guidelines Principle 2.

71 Human Rights Committee, Concluding Observations: Panama, UN Doc. CCPR/C/PAN/CO/3 (2008) §13.

72 WGAD Basic Principles and Guidelines, Guideline 9, para.94. See Principle 32(2) of the Body of Principles, which requires that the procedure be free of charge to individuals without adequate means.

73 International Convention on Enforced Disappearance, article 22(a); UN Mechanisms Joint Report on Secret Detention. UN Doc. A/HRC/13/42 (2010) §292(b).

74 WGAD Basic Principles and Guidelines: Principle 6; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 39; Council of Europe Rules on Remand in Custody, rule 17; Council of Europe Guidelines on human rights and counter-terrorism, guideline VIII; Rome Statute, article 60(3).

Detention that was initially lawful may become unlawful if it is no longer necessary, reasonable, or proportionate in the circumstances. The WGAD highlighted that the lack of periodic review could render arbitrary a detention that was initially lawful.<sup>75</sup> The right to have one's detention periodically reviewed by a court should also be enjoyed by all detained persons, including those who are held under suspicion of having committed a criminal offence and have yet to be charged.<sup>76</sup>

Under general and customary international law, the right to challenge the lawfulness of detention must be respected at all times and is not subject to derogation even during emergencies or armed conflict. These principles have been reiterated by the UN Human Rights Committee and other human rights bodies and courts, and are enshrined expressly in some human rights treaties and standards.<sup>77</sup> The European Court of Human Rights requires adequate safeguards against abuse to be available, such as, access to a lawyer, doctor, and family and the right to habeas corpus.<sup>78</sup>

#### 1.4 Right to reparation for unlawful arrest or detention

Under international law, persons found to have been unlawfully arrested or detained have the "enforceable right to compensation".<sup>79</sup> This must be regulated by comprehensive legislation.<sup>80</sup> The right applies, regardless of whether the individual is subsequently convicted or acquitted. The notion of 'compensation' is understood to cover a broad range of remedies, including rehabilitation, satisfaction, restitution and guarantees of non-repetition.<sup>81</sup>

In view of the right to liberty and the right to a trial within a reasonable time, the authorities must ensure that any pre-trial detention does not continue longer than a reasonable period and should such unnecessary delays occur, the judicial authority should be able to release the detainee, if necessary and appropriate with sureties.<sup>82</sup> The longer the duration of pre-trial detention, the greater is the need to scrutinize its necessity and proportionality.

75 Opinions adopted by the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4/Add.1, 15 January 2008, pg 29-37, para.36.

76 Principle 39 of the Body of Principles, Rule 17 of the CoE Rules on remand in custody, Guideline VIII of the CoE Guidelines on human rights and counter-terrorism, Article 60(3) of the ICC Statute.

77 Human Rights Committee: Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93 (1998), para.21; Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, para.41; Human Rights Committee, General Comment 29 (2011), para.16; UN Commission on Human Rights, Resolution on Habeas corpus, UN Doc. E/CN.4/RES/1992/35, article 2; Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, para.43; Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4, 10 January 2008, para.82(a); Sub-Committee on the Prevention of Torture: Honduras, UN Doc. CAT/OP/HND/1, 10 February 2010, para.282(b); para.47; Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44 (2012) para.47; Article X of the Inter-American Convention on Forced Disappearance of Persons, Article 4(2) of the Arab Charter of Human Rights: Section M(5)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

78 European Court: Brannigan and McBride v. United Kingdom (14553/89, 14554/89), (1993) §§61-66; Aksoy v. Turkey (21987/93), (1996) §§83-84; Inter-American Court, Castillo-Petruzzi et al v. Peru (1999) §§104-112.

79 ICCPR, article 9(5); International Convention on Enforced Disappearance, article 24(4); Arab Charter on Human Rights, article 14(7); ECHR, article 5(5); Principles on Fair Trial in Africa, Section M(1)(h).

80 WGAD Basic Principles and Guidelines: Guideline 16.

81 A comprehensive explanation of the types of reparation may be found here: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

82 Rome Statute, article 60(4).

## 1.5 Specific Obligations related to particular categories of detainees

### 1.5.1 Children

Children enjoy all of the guarantees provided to all persons, including in the area of deprivation of liberty and fair trial, but as children are entitled to additional protections. The right to challenge the legality of detention of anyone under the age of 18 is a right guaranteed by Article 37(d) of the Convention on the Rights of the Child (CRC), a treaty to which Myanmar is a State Party and thus is bound to comply with. The CRC provides for a general obligation to take the child's best interests as a primary consideration in all actions concerning them, including in the area of arrest and detention.<sup>83</sup> Unlike with adults, there is a positive obligation on courts to act in the child's best interests.<sup>84</sup> Furthermore, the right of the child to be heard pursuant to Article 12 of the CRC needs to be respected in habeas corpus proceedings brought by or on behalf of children.

A child's right to challenge the legality of detention must be given particular priority, including in view of the duty of the authorities under Article 37(b) of the CRC to ensure that the deprivation of a child's liberty is lawful and not arbitrary and is only used as measure of last resort, and for the shortest appropriate time.<sup>85</sup> The procedure must be accessible and appropriate to the legal and social needs of children. Moreover, authorities must *ex officio* request courts to review the lawfulness of detention in addition to the child's right to bring such proceedings.<sup>86</sup>

### 1.5.1 Women

Myanmar, having ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 22 July 1997, has specific obligations regarding women.<sup>87</sup> Fulfilling the right to challenge the lawfulness of detention of women and girls requires specific measures to be taken.<sup>88</sup> This includes introducing an active policy of incorporating a gender equality perspective into all policies, laws, procedures, programmes and practices relating to the deprivation of liberty to ensure equal and fair access to justice.<sup>89</sup>

### 1.5.2 Persons with Disabilities

Persons with disabilities require specific measures with regard to the right to challenge the lawfulness of their detention. Myanmar has signed and ratified the Convention on the Rights of Persons with Disabilities and has the duty to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities.<sup>90</sup>

The authorities must comply with the obligation to prohibit involuntarily committal or internment on grounds of the existence of an impairment or perception of a disability. States are obliged to develop a strategy to remove disabled people from unnecessary institutionalization based on the human rights model of disability. The deprivation of a disabled person's liberty must comply with national and international law including

<sup>83</sup> WGAD Basic Principles and Guidelines: Principle 18.

<sup>84</sup> CRC. Article 3(1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

<sup>85</sup> The obligation of the State to prioritize alternatives to judicial proceedings in dealing with children in conflict with the law, whenever appropriate, is outlined in the CRC article 40(3).

<sup>86</sup> WGAD Basic Principles and Guidelines, Principle 18. For more details see: Committee on the Rights of the Child, The Right of the Child to be Heard, General Comment No. 12 (2009), CRC/C/GC/12 20, July 2009; Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10 (2007) CRC/C/GC/10 25 April 2007.

<sup>87</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981. (Hereinafter: CEDAW).

<sup>88</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) UN Doc: A/RES/65/229 (16 March 2011) Rule 7.

<sup>89</sup> WGAD Basic Principles and Guidelines, Principle 19.

<sup>90</sup> International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008.

the prohibition of discrimination. Appropriate accommodation and support must be provided when needed to exercise the right to challenge detention.<sup>91</sup>

#### 1.5.4 Non-nationals

Habeas Corpus must also be ensured for non-nationals, including migrants regardless of their immigration status, asylum seekers, refugees and stateless persons.<sup>92</sup> All such persons deprived of their liberty must be guaranteed access to an independent and impartial court of law that has power to order their release from illegal or arbitrary detention and vary the conditions of release.<sup>93</sup> This is particularly important in the current context of Myanmar, as tens of thousands of Rohingya Muslims in Myanmar are denied citizenship.

In addition to their right to bring proceedings challenging the legality of detention before a court, they are also entitled to having the necessity, proportionality, lawfulness and non-arbitrariness of their detention regularly and automatically reviewed by a judicial authority. The Court should ensure it remains necessary, proportional, lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.<sup>94</sup> Detaining the children of migrants due to their parent's migration status will always constitute a violation of the child's rights.<sup>95</sup>

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91 WGAD Basic Principles and Guidelines: Principle 20.

92 WGAD Basic Principles and Guidelines: para.60.

93 UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012). para.43: International law prohibits detention or restrictions on the movement of a person on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status. This applies even when derogations in states of emergency are in place. States may also be liable to charges of racial discrimination if they impose detention on persons of a "particular nationality". At a minimum, an individual has the right to challenge his or her detention on such grounds; and the State will need to show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals, or between non-nationals, in this regard.

94 WGAD Basic Principles and Guidelines: para.61.

95 WGAD Basic Principles and Guidelines: Principle 21.

## Part 2: Myanmar's Legal Framework

An effective habeas corpus procedure can prevent or decrease the use of arbitrary detention as a tool of political repression. The writ of habeas corpus, when understood and applied effectively, can also encourage the police to follow the procedures for arrest and detention under Myanmar law. The operation of an effective habeas corpus procedure would also contribute to a more positive perception of justice and the rule of law.

### 2.1 2008 Constitution, Union Judiciary Law, the Writ Law and Writ Procedure

Chapter 1 of the 2008 Constitution, Article 18(c), confers the power to issue writs on the Union Supreme Court. The jurisdiction of the Supreme Court to issue writs is outlined in the 2008 Constitution, Chapter VI, Article 296, which duplicates Article 25 of the 1947 Constitution. Article 296 reads as follows:

The Supreme Court of the Union:

(a) has the power to issue the following writs:

- (i) Writ of Habeas corpus;
- (ii) Writ of Mandamus;
- (iii) Writ of Prohibition;
- (iv) Writ of Quo Warranto;
- (v) Writ of Certiorari.

(b) The applications to issue writs shall be suspended in the areas where the state of emergency is declared.<sup>96</sup>

The jurisdiction of the Union Supreme Court to issue writs, including the writ of habeas corpus, is reiterated in chapter VIII of the 2008 Constitution on the Fundamental Rights and Duties of Citizens. Article 378 sets out that 'in connection with the filing for the application of rights granted' by the Constitution, the Supreme Court has the power to issue writs.<sup>97</sup>

Notwithstanding many shortcomings,<sup>98</sup> the 2008 Constitution's recognition of writs under Chapter VIII on the Fundamental Rights and Duties of the Citizen is a positive step for the rule of law in the country. Article 378 confirms that habeas corpus is a fundamental right protected by the constitution.

While Articles 353 and 367 of the 2008 Constitution protect against arbitrary detention and provide a right to be brought before a court, habeas corpus allows individuals to challenge the legality of detention. The inclusion of habeas corpus brings the Constitution closer to international standards that enshrine the right of all persons deprived of their liberty 'to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'<sup>99</sup>

<sup>96</sup> The Supreme Court's Jurisdiction is confirmed in the The Union Judiciary Law (No. 20 / 2010).

<sup>97</sup> Constitution of Myanmar 2008, Art. 378. (a) In connection with the filing of application for rights granted under this Chapter, the Supreme Court of the Union shall have the power to issue the following writs as suitable: (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari.

(b) The right to issue writs by the Supreme Court of the Union shall not affect the power of other courts to issue order that has the nature of writs according to the existing laws.

<sup>98</sup> Global Justice Centre. 'The 2008 Constitution Breaches Myanmar/Burma's Binding Obligations under International Law Including the United Nation's Charter' (November 2012).

<sup>99</sup> ICCPR. para.9(4); Article 17(2)(f) of the Convention on Enforced Disappearance; Article 37(d) of the CRC; Article 16(8) of the Migrant Workers Convention; Article 7(6) of the American Convention on Human Rights; Article 14(6) of the Arab Charter; Article 5(4) of the European Convention; Principle 32 of the Body of Principles; Guideline 32 of the Robben Island Guidelines; Section M(4) and (5) of the Principles on Fair Trial in Africa; Article XXV of the American Declaration; Guideline VII(3) of the CoE Guidelines on human rights and counter-terrorism; See also: Article 8 of the Universal Declaration of Human Rights.

Before the Writ Law and procedure were developed, the Supreme Court had jurisdiction to issue writs under the Union Judiciary Law.<sup>100</sup> The procedural rules for the application of writs were developed between 2011 and 2013.

In June 2014, the Law on the Application for Writs 24/2014 (Writ Law) was enacted to codify the procedure: it sets out limited definitions, duties and responsibilities concerning all procedural writs. While it is narrow in its focus, the Writ Law is significant in part because it provides an indication of current understandings of the doctrine of separation of powers and the role of the courts.

The Writ Law clarifies the Supreme Court's procedure for considering an application for a writ. The Writ Law establishes an application 'hearing body' within the Supreme Court, which consists of three judges including the Chief Justice (or a designee if the Chief Justice is not available).<sup>101</sup>

According to the Writ Law and Writ Procedure, habeas corpus petitions must be filed with the Director General of the Supreme Court.<sup>102</sup> They may be initiated either by the detainee, or by any other persons acting on the detainee's behalf. The latter requires an additional explanatory statement.<sup>103</sup> Together with the application, the following documents must be submitted to the Supreme Court:

- A personal justification letter;<sup>104</sup>
- An affidavit stating the reasons why the petitioner believes detention to be unlawful.<sup>105</sup>

Originally, the Supreme Court would only accept completed applications with the relevant supporting documents attached.<sup>106</sup> This procedural rule was amended in 2013 to ensure that incomplete applications are returned with instructions on how to complete them.

If the application for the writ of habeas corpus passes preliminary review by either the Supreme Court Director General or Deputy Director General, a general petition will be initiated.<sup>107</sup> This general petition is then forwarded to the on-duty Justice of the Supreme Court.<sup>108</sup> The Justice hearing the case has the discretion to grant habeas corpus based on the evidence presented without a hearing.<sup>109</sup> In cases where the writ is not granted immediately, the Justice should summon the detaining authority to appear in court to explain why habeas corpus should not be granted.<sup>110</sup>

On the day of the hearing, after the Union Supreme Court has heard the submissions from both the parties, the judge may either set the detainee free or summon the respondent to appear along with the detainee at a specific date and time.<sup>111</sup> Section 12 allows the applicant to present or submit arguments. Neither the Writ law nor the Procedural Rules demand the presence of the detainee at this point when the arguments are heard.

After the preliminary court hearing, a summons is issued to the person having custody of the detainee, a family member or a representative.<sup>112</sup> If the summoned person is a responsible prison official or a civil servant, he or she has to confirm the order to his

<sup>100</sup> The Union Judiciary Law (Law No. 20/2010).

<sup>101</sup> Writs Act 2014, Ch. 4, Section 7.

<sup>102</sup> Writs Act 2014, Section 4; Writs Rules 2013, Section 3.

<sup>103</sup> Writs Rules 2013, Section 4.

<sup>104</sup> Writs Act 2014, Section 6; Writs Rules 2013, Section 4.

<sup>105</sup> Writs Rules 2013, Section 4. Although not stated in the procedure, the ICJ was informed in an interview with a Lawyer on 2 December 2012, that additional statements from witnesses are sometimes required. ICJ interview, lawyer, Yangon, 2 December 2012.

<sup>106</sup> Ibid.

<sup>107</sup> Writs Act 2014, Section. 8; Writs Rules 2013, Section 6.

<sup>108</sup> Writs Rules 2013, Section 7.

<sup>109</sup> Ibid. Section 8.

<sup>110</sup> Ibid. Section 9.

<sup>111</sup> Writs Rules 2013, Section 12, 14.

<sup>112</sup> Writs Rules 2013, Section 13.

subordinate or his representative at the place of detention of the detainee.<sup>113</sup> If more than one person is summoned, the summons is sent to the supervisor and copies of it sent to the others.<sup>114</sup>

The summoned respondent is required to submit a Reply to the Query to the Supreme Court that includes the reasons for detaining the person in question.<sup>115</sup> The summoned person can amend or submit additional replies to the Supreme Court with the Court's permission.<sup>116</sup>

The summoned person's reply letter is read first, after which the court can order the detainee to be released, issue a remand, make further amendments or cancel the reply to the query.<sup>117</sup> If unresolved, the application is then submitted to the Chief Justice for the final hearing in the Supreme Court.<sup>118</sup> Three Justices of the Supreme Court conduct the final hearing.<sup>119</sup> The Chief Justice may preside in either the primary or final hearing.<sup>120</sup>

The Procedural Rules at Section 19 indicate that the detainee appears at the final hearing before the Supreme Court. The applicant's arguments are heard first, followed by the arguments from the Attorney General or his representative.<sup>121</sup> Should there be additional arguments for the applicant, the Supreme Court shall hear these.<sup>122</sup>

Although the Court may issue a judgment on the same day of the hearing, this is not normally the case. The Procedural Rules at Section 20 allow the Court to designate a day on which to issue judgement. Typically, judgments are handed down approximately one week from the end of the final hearing.<sup>123</sup>

## 2.2 The Criminal Procedure Code (CrPC) Section 491

Myanmar law also provides a procedure before the High Courts similar to habeas corpus, but the ICJ has not documented any use of this potentially useful procedure in recent decades (nor has ICJ been able to establish why this procedure is not being used by Myanmar lawyers now).

Apart from the writ of habeas corpus guaranteed under the Constitution, section 491(1) (a) and (b) of the CrPC provides a remedy akin to habeas corpus. It confers the High Courts with appellate criminal jurisdiction power to set free individuals who are illegally detained. Chapter XXXVII on Directions of the Nature of Habeas Corpus, Section 491(1) states that the High Court of the Region or the High Court of the State,<sup>124</sup> whenever it thinks fit, can give the following habeas corpus-like directions:

- (a) That a person within the limits of its appellate criminal jurisdiction be brought before the Court to be dealt with according to law;
- (b) That a person illegally or improperly detained in public or private custody within such limits be set at liberty.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Writs Rules 2013, Section 15.

<sup>116</sup> Ibid.

<sup>117</sup> Writs Rules 2013, Section 16.

<sup>118</sup> Writs Act 2014, Section 11; Writs Rules 2013, Section 17.

<sup>119</sup> Writs Act 2014, Section 7(b); Writs Rules 2013, Section 18.

<sup>120</sup> Writs Act 2014, Section 7(c).

<sup>121</sup> Writs Rules 2013, Section 19.

<sup>122</sup> Ibid.

<sup>123</sup> ICJ, Lawyer interview Yangon, 2 December 2012.

<sup>124</sup> High Courts of the Region were added by CrPC Amendment Law no.16/2016, January 20th 2016. In Section 491 (2) Supreme Court of the Union may, from time to time, frame rules to regulate the procedure in cases under this section. For example see: High Court Notification No. 10 (General), dated the 17th September 1947, as amended by Notification No.3 (General), dated the 26th May 1949 (High Court Rules and Orders, Third Edition, p. 515).

When the 1947 Constitution was abolished during the 1962 military coup d'état, this provision remained the only statutory avenue to challenge unlawful detentions.<sup>125</sup> Nonetheless, according to information available to the ICJ, section 491 of the CrPC has never been invoked after 1962.

However, the provision remains in force. The 2008 Constitution, moreover, clarifies that the jurisdiction of the Supreme Court to issue writs “shall not affect the power of other courts to issue order [sic] that has the nature of writs according to existing laws.”<sup>126</sup> Lawyers therefore may proceed to file applications seeking writ-like orders from the High Court at the State level.

Section 491 remains on the code to the present day and provides an important alternative route for detainees to have the legality of their arrest and detention determined by the court and to be released if the court considers the arrest or detention illegal. The High Courts, moreover, are located in State capitals rather than Nay Pyi Daw, thereby simplifying the process of application. Applications for habeas corpus to the High Courts would greatly reduce the time and cost of the process as the High Courts are more accessible.

Lawyers explained to the ICJ that they have not sought to use this remedy before the High Courts because they were confused about its applicability. Others believed that the writ of habeas corpus, now guaranteed under the Constitution, takes precedence over section 491 of the CrPC.<sup>127</sup> Still others pointed out that there was no need to use this provision as their clients had already appeared in a court.<sup>128</sup>

## 2.3 Concerns about the Habeas Corpus in Myanmar

Aside from ongoing concerns related to detention and fair trials in Myanmar,<sup>129</sup> there are a number of shortcomings related to the application of the writ of habeas corpus and the provision of effective protection from arbitrary arrest and detention in practice.

### 2.3.1 The Independence of the Judiciary

The judiciary of Myanmar is not independent. Decades of authoritarian rule have systematically weakened Myanmar's judiciary and compromised the independence of its legal system. The executive branch, and in particular the country's military and security apparatus, maintain undue influence on the judiciary. Lawyers interviewed by the ICJ agree that in politically sensitive and criminal cases the state and security authorities continue to exert improper influence.<sup>130</sup> Many lawyers in Myanmar assume that a habeas corpus application cannot be successful, as the Supreme Court would have to overrule the police or the military.

The proper application of the writ of habeas corpus requires a judiciary capable of independently determining whether the actions of government are legal or not. Without an independent judiciary habeas corpus will be ineffective. Having a judiciary that is independent in structure and function of the other branches of government is a necessary condition for the fair administration of justice and inherent to respect for the

125 Nick Cheesman, 'The Incongruous Return of Habeas corpus to Myanmar' in Nick Cheesman, Monique Skidmore and Trevor Wilson, *Ruling Myanmar From Cyclone Nargis to National Elections*, (Institute of Southeast Asian Studies (ISEAS) Singapore) p. 96.

126 Constitution of Myanmar 2008, Section 378(b).

127 ICJ interview, lawyers Yangon, 22 April 2013.

128 ICJ Interview, lawyers, Yangon, 2014.

129 Amnesty International, *New Expression Meets Old Repression: Ending the Cycle of Arrest and Imprisonment in Myanmar*. (24 March 2016, Index number: ASA 16/3430/2016) Available at: <https://www.amnesty.org/download/Documents/ASA1634302016ENGLISH.PDF>.

130 ICJ, *Right to Counsel*. p. 2.

rule of law.<sup>131</sup> Accordingly, the constitution, laws and policies of a country must ensure that the judiciary is truly independent from the other branches of the State.

Article 19 of the 2008 Constitution of Myanmar prescribes “as judicial principles”: “to administer justice independently according to law; to dispense justice in open court unless otherwise prohibited by law; and to guarantee in all cases the right of defence and the right of appeal under law”.<sup>132</sup> The principle of independence is reinforced through the requirement that judges of the Constitutional Court, the Supreme Court and High Courts be free from party politics.<sup>133</sup>

However, these Constitutional provisions have not yet been reflected in actual practice. Even with formal independence, the position of the judiciary is no match for the power and influence of the Military over the executive.<sup>134</sup> In 2013 the then Special Rapporteur on the situation of human rights in Myanmar stated he “sees no evidence that the judiciary is developing any independence from the executive branch of government”.<sup>135</sup>

Political and military influence over judges remains a major obstacle to the rule of law. Depending on the nature of the case, judges often render decisions based on orders coming from government officials, in particular local and regional authorities. The most problematic cases are those that challenge the government, officials or their vested interests.<sup>136</sup> Throughout her visit, the Special Rapporteur on the situation of human rights in Myanmar was informed of continued failure to hold State authorities accountable for serious violations of international human rights law.<sup>137</sup>

Although the judiciary in Myanmar has taken first steps towards asserting its independence it remains unwilling and unable to directly challenge the decisions and actions of the executive. Some Judges may feel allegiance to the military and fail to act independently. The Courts seem reluctant to take on vested interests in sensitive cases. Judges and lawyers are not accustomed to holding the government accountable.

Despite these limitations to independent judicial review, since 2013, both the Attorney General’s Office and Office of the Supreme Court of the Union (OSCU) have turned their attention to the writs. For example, in February 2013 a seminar for law officers from the Attorney General’s Office on ‘The Prerogative Writs under the 2008 Constitution of Myanmar’ was organised with the ICJ in Naypyidaw.<sup>138</sup> This event broke the 50-year absence of public discourse on writs by government agencies since the 1962 military coup.<sup>139</sup> The OSCU, for its part, opened a Writs Department in 2014 that is now in

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

132 These principles are also reflected in the Union Judiciary Law (The State Peace and Development Council Law, No. 20/2010) Section 3.

133 Constitution of Myanmar 2008, Art. 300(a) and Art. 301(f) and Union Judiciary Law, S. 30(f) for the Chief Justice of the Union and the Judges of the Supreme Court; Art. 309(a) and Art. 310(f) and Union Judiciary Law S. 48(f) for the Chief Justices and Judges of the High Courts; 2008 Constitution, Art. 330(c) and Art. 333(f) for the Justices of the Constitutional Court.

134 Melissa Crouch, ‘The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar’ in Lindsay & Crouch (eds.) *Law, Society and Transition in Myanmar* (Hart, 2014) p.146.

135 Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/22/58 (17 April 2013), para.63.

136 ICJ, Right to Counsel. pp. 18, 40.

137 Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar, Report to the Human Rights Council, UN Doc. A/HRC/28/72 (23 March 2015).

138 Details of the Workshop are available here: <http://www.icj.org/icj-holds-seminar-on-prerogative-writs-under-the-2008-constitution-of-myanmar/>.

139 Melissa Crouch, ‘The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar’ in Lindsay & Crouch (eds.) *Law, Society and Transition in Myanmar* (Hart, 2014) p.147.

nascent stages of development. The renewed interest in writs is likely a response to a practical need to address a growing number of cases. It may also open the door to the possibility of strengthened government accountability and judicial independence in the future.<sup>140</sup>

### 2.3.2 State of Emergency

The reintroduction of writs in 2008 was regarded as an essential element of strengthening the rule of law and respect for human rights. As noted above in Part I, under international human rights law, the right to challenge the legality of detention before a court, which is a remedy that safeguard against a variety of non-derogable rights including arbitrary detention, torture or other ill treatment and enforced disappearance, is applicable at all times and not subject to derogation.<sup>141</sup>

However, Article 296(b) of the 2008 Constitution (which repeats the provisions of the 1947 Constitution) and Writ Law Chapter 2, Section 3 suspend applications to issue writs in a declared state of emergency, in violation of international human rights standards.

The Writ law in Chapter 2, Section 3 states that, “the application to issue writs shall be suspended in the areas where the state of emergency is declared.”<sup>142</sup> The section qualifies that in times of war, invasion or insurrection the constitutional writs should not be suspended unless “required to protect public safety”. These broad terms are also used in the Union Judiciary Law, Section 16(c).<sup>143</sup> This language is particularly problematic because in practice in Myanmar the imposition of a state of emergency is used as a tool of political repression and is left open to potentially arbitrary application.

The problem is acute in Myanmar where “emergencies” are common. For instance, a state of emergency was declared in June 2012 in Rakhine State and another one was invoked in Meikhtila District in March 2013 after unrest between Buddhist and Muslim communities broke out.<sup>144</sup> The “state of emergency” declarations permit the armed forces to carry out arrests and detain people without fundamental due process protections.<sup>145</sup> Numerous reports documented the mass arbitrary arrests of Muslims in Rakhine state in the immediate aftermath of the 2012 “state of emergency” declaration.<sup>146</sup> This is precisely the sort of situation that calls for the use of habeas corpus to remedy abuses, but at the time the remedy was suspended.

### 2.3.3 The Exclusive Jurisdiction of the Supreme Court

Under Section 296 of the Constitution, the Writ law and the Writ Procedure, the issuance of writs remains the prerogative of the Supreme Court alone.<sup>147</sup> This exclusive jurisdiction is inconsistent with international standards that require habeas corpus procedures be accessible and effective.

140 Ibid.

141 Human Rights Committee General Comment 29, §16 and General Comment 35§67; Inter-American Court: Advisory Opinion OC-8/87 (1987) §42, Advisory Opinion OC-9/87 (1987) §41(1); Commission on Human Rights resolution 1992/35, §2; UN Mechanisms Joint Report on secret detention, UN Doc. A/HRC/13/42 (2010), §§46-47; Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4 (2008) §§67, 82(a); Sub-Committee on the Prevention of Torture : Honduras, UN Doc. CAT/OP/HND/1 (2010), §282(a)-(b).

142 Ibid. Chapter 2 Section 3 (b).

143 Union Judiciary Law, Section 16(c) At the time of the occurrence of the following situation, the right to claim the rights contained in section 377 of the Constitution shall not be suspended unless it is required for public security: (i) in time of war; (ii) in time of foreign aggression; (iii) in time of insurrection.

144 A state of emergency is declared pursuant to Article 410 of the Constitution, which allows the President, after coordinating with the National Defence and Security Council, to declare a state of emergency in areas where the administrative functions can no longer be carried out in accordance with the Constitution.

145 ICJ Interview, Lawyer Nyein Chan, Sitwe, 15 October 2014.

146 Human Rights Watch, “Burma: Mass Arrests, Raids on Rohingya Muslims”, 5 July 2012, <http://www.hrw.org/news/2012/07/05/burma-mass-arrests-raids-rohingya-muslims>; “Arrest of 100 Rohingya Muslim in the village of “Nga Khura” Arakan State”, Rohingya News Agency, 11 February 2013, <http://www.rna-press.com/en/news/21388.html>.

147 Writs Act 2014, Section 3 (a).

The exclusive jurisdiction of the Supreme Court makes the habeas corpus procedure unnecessarily complicated and costly. Legal papers must be filed with and hearings take place at the Supreme Court in Nay Pyi Taw. Because of Nay Pyi Taw's distance from the country's major population centres, a typical trip would also include an overnight stay at a hotel as well as the cost of transportation.<sup>148</sup> A typical application necessitates multiple costly journeys to the seat of the Court.<sup>149</sup> As legal aid has not yet developed to cover such expenses, habeas corpus is effectively beyond the budget of most people in Myanmar.<sup>150</sup>

These limitations mean that lawyers prefer to avoid filing habeas corpus petitions and pursue other options, such as lodging a complaint to the Pyidaungsu Hluttaw or Assembly of the Union.<sup>151</sup> They believe that the Hluttaw is the only institution capable of providing relief or remedy in cases of unlawful detention.<sup>152</sup> This has contributed to the dearth of habeas corpus jurisprudence.

### 2.3.4 The Application of Habeas Corpus since 2008 - Jurisprudence

In addition to the problematic habeas corpus framework outlined above, the ICJ's research has uncovered problematic jurisprudence arising from its implementation. The ICJ has discovered only four judgements of petitions for the writ of habeas corpus that were filed, admitted and decided by the Supreme Court. None of these were officially reported. In 2013, by examining Supreme Court diary entries, the ICJ found that at least 32 additional cases related to a single incident were filed but dismissed by the Supreme Court. As far as the ICJ can determine, there have been no habeas corpus cases filed since 2013.

According to the information available to the ICJ, since 2008, the Supreme Court has not replied positively to any petitions for habeas corpus: the Supreme Court has not ordered the respondent-authorities to literally 'produce the body' (meaning to bring the detained individual before the Court), nor has it ruled that an arrest or detention was unlawful on any occasion.

Information on the use of any of the constitutional writs since their reintroduction in 2008 is difficult to obtain. Between 31 March 2011 and 30 June 2013, more than 400 prerogative writ petitions are thought to have been filed with the Supreme Court.<sup>153</sup> It is also unknown if these writ applications received fair hearing. Supreme Court cases are not necessarily open to the public.<sup>154</sup>

No official complete records are available for 2013 but a Supreme Court document obtained by the ICJ indicates that at least 322 writ petitions (concerning all the available writs) were submitted for that year. The document divides the petitions by writ but did include a category for habeas corpus. There were no known petitions for habeas corpus filed with the Supreme Court in 2014 or 2015.<sup>155</sup>

148 ICJ interview, lawyer Yangon, 2 December 2012.

149 Ibid.

150 Due to the high costs involved in travelling to, and staying in, Naypyidaw for hearings the detainee's families return home between trial dates. Kachinland News (23 February 2012) 'Burmese Government's Supreme Court Delays Hearing for Three Kachin Villagers', <http://kachinlandnews.com/?p=21348>. Accessed 7 December 2015.

151 ICJ interview, lawyers and law students Yangon, 2 December 2012.

152 Ibid.

153 "Chief Justice of the Union stresses important role of courts in ensuring rule of law", New Light of Myanmar, 9 August 2013, pp.8, <http://www.burmalibrary.org/docs15/NLM-2013-08-09-red.pdf>. Out of this, 286 petitions have been rejected, while the court heard 84 applications.

154 Melissa Crouch, 'The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar' in Lindsay & Crouch (eds.) *Law, Society and Transition in Myanmar* (Hart, 2014) p.147.

155 ICJ Interview, Writs Department, Office of the Supreme Court, 16 June 2015.

Of the hundreds of writ petitions filed from 2008, ten have been officially reported in the annual Myanmar Law Reports for 2008-2014, none of which were for habeas corpus.<sup>156</sup> The limited court reporting and the politically sensitive nature of habeas corpus mean that the number of applications to the Supreme Court remains unknown.

### The Common Law in Myanmar

The Myanmar legal system ostensibly follows the common law and relies on precedent and on the legal principle of *stare decisis* which require that the public, lawyers and judges have access to jurisprudence, typically provided by accurate court reporting and publication of reasoned judgments. But in Myanmar there is no uniform or regular system of court reporting, which undermines the common law legal system.

Some jurisprudence is set out in the annual Myanmar Law Reports published by the Union Attorney General's Office. This publication reports only the rulings in selected Supreme Court cases; it does not include judgments of the lower courts. The choice of which judgments will be included in the Law Reports is made annually by the Law Reporting Board, which consists of high-level staff from the Attorney General's Office and the Office of the Supreme Court of the Union. Unreported judgments are considered to be less important than published rulings.<sup>157</sup>

In a representative, transparent and accountable political system, cases would be reported due to their value as precedent. But the independence of the Myanmar Law Reports and the Law Reporting Board is often questioned.<sup>158</sup>

The judiciary's lack of independence and the omission of any politically sensitive cases from the Myanmar Law Reports suggest it is likely that the few reported cases are published because they are not controversial or contentious. The legal reasoning behind most judgments therefore remains unknown.

It is hoped that the reintroduction of the writs and their increased use will confirm both their legitimacy and remove some uncertainty about the relevance of the common law.

The four unreported habeas corpus petitions that have been filed, admitted and decided are in relation to arrests in the Kachin State during the armed conflict in 2011-2012. These petitions allege that the petitioners were unlawfully arrested and detained on suspicion of belonging to an illegal association, the Kachin Independence Association (KIA). The other petitions, dismissed in 2013, pertain to men allegedly being held by the Wa Army and subjected to forced labour in Shan State.

<sup>156</sup> See: Myanmar Law Reports (MLR) 2011 (Containing six writ cases), MLR 2013 (Contains one writ case) and MLR 2014 (Contains three writ cases).

<sup>157</sup> ICJ interview, U Tin Myint, Bangkok, 20 August 2012; ICJ Interview, Lawyer U Myat Hla, Yangon, 15 October 2014.

<sup>158</sup> Melissa Crouch, 'The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar' in Lindsay & Crouch (eds.) *Law, Society and Transition in Myanmar* (Hart, 2014) p.150.

*(i) Daw Mar Hkawn v Commander Aung Zaw Oo*

In this case the detainee was never produced in the Supreme Court and the legality of his arrest and detention was never determined. The petition was not allowed because the detainee was charged and appeared in a District Court more than a month after his initial arrest. It appears that the Supreme Court has confused the obligation to ensure a trial with the detainee's right to periodical review of arrest and detention.<sup>159</sup> Moreover, obtaining evidence sufficient to justify an arrest after directing the order of detention is not in accordance to law.

Daw Mar Hkwan alleges that the 37th Regiment of the Tatmadaw arrested her husband, U Brang Saing on 5 January 2012.<sup>160</sup> She claims that troops arrived at her home when her husband was asleep and detained him at the upper Tarlawgyi Monastery.

The petitioner's lawyer filed a petition for a writ of habeas corpus on 25 January 2012 and the Supreme Court issued summons to the Respondent, U Aung Zaw Oo, the Commander of the 37 regiment in question, to appear before it on 9 February 2012.<sup>161</sup> The summons did not require the respondent to bring U Braing Saing to the court.

On the day stated in the summons, the counsel for the Respondent successfully requested that the hearing be postponed to 23 February 2012.<sup>162</sup> Due to the high costs involved in travelling to, and staying in, Naypyidaw for the hearing the members of U Brang Saing's family returned home to wait for the new hearing date.<sup>163</sup>

The Court heard the preliminary arguments on the 23rd from the Respondent and the application was eventually dismissed on 1 March 2012.<sup>164</sup>

The Respondent did not deny arresting U Brang Saing. He explained that on 7 February 2012, (almost a month after his arrest) a case was filed against the detainee under Section 17(1) of the Unlawful Association Act.<sup>165</sup> The Supreme Court accepted that the Myitkyina Township Court had acted in line with Section 167 of the CrPC,<sup>166</sup> which gives it the power to authorize detention of a person during a police investigation beyond an initial 24-hour period for which the police is empowered to exercise detention powers. The Supreme Court ruled that because the Myitkyina Township Court had already issued an order for the petitioner to be remanded into police custody on 8 February 2012, the writ of habeas corpus should not be granted.<sup>167</sup>

<sup>159</sup> This violates the international law as well as Myanmar's domestic law, as discussed below.

<sup>160</sup> *Dar Mar Hkawn v. Commander Aung Zaw Oo* (Responsible official of Military Column), Supreme Court of the Union, General Application for Writ No.1, Judgment of 1 March 2012.

<sup>161</sup> ICJ Interview, lawyer Yangon, 30 July 2012.

<sup>162</sup> *Ibid.*

<sup>163</sup> Kachinland News (23 February 2012) 'Burmese Government's Supreme Court Delays Hearing for Three Kachin Villagers', <http://kachinlandnews.com/?p=21348>. Accessed 7 December 2015.

<sup>164</sup> ICJ Interview, lawyer Yangon, 30 July 2012.

<sup>165</sup> *Dar Mar Hkawn v. Commander Aung Zaw Oo* (Responsible official of Military Column), Supreme Court of the Union, General Application for Writ No.1, Judgment of 1 March 2012.

<sup>166</sup> Section 167 of the Criminal Procedure Code states that: (1) Whenever any person is arrested and detained in custody, and if appears that the investigation cannot be completed within the period of twenty four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) The Magistrate to whom the accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit. But the detention of such person shall not exceed in the whole 30 days where a person is accused of an offence punishable with rigorous imprisonment for a term of not less than seven years, and where a person is accused of an offence punishable with rigorous imprisonment for a term of less than seven years, the detention of such person shall not exceed 15 days in the whole. If such Magistrate has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that no Magistrate of the third class, shall authorize detention in the custody of the police. (3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing. (4) If such order is given by a Magistrate other than the District Magistrate or Subdivisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

<sup>167</sup> *Dar Mar Hkawn v. Commander Aung Zaw Oo* (Responsible official of Military Column), Supreme Court of the Union, General Application for Writ No.1, Judgment of 1 March 2012.

The Supreme Court stated in its judgment that habeas corpus can only be issued if someone is arrested without a concrete reason. It therefore rejected the application. The Court did not comment on the lawfulness of the original arrest and detention or on the legality of U Brang Saing's subsequent one-month detention in police custody, i.e. the period between the time of his initial arrest on 5 January and the 8 February 2012 when the Myitkyina Township Court had ordered his remand.<sup>168</sup>

While U Brang Seng did not appear at the Supreme Court, he appeared at the Myitkyina township court in relation to the Section 17(1) charges against him. He was sentenced to six months' imprisonment but was released by Presidential amnesty in 2013.<sup>169</sup>

### **(ii) *Daw Marit Hkawng v Commanding Officer Aung Zaw Oo***

Daw Marit Hkawng's habeas corpus petition of 25 January 2012 was heard simultaneously with Daw Mar Hkwan (set out above) and dismissed on the same grounds. The Supreme Court reasoned that the detainee had already been charged in another court.<sup>170</sup>

As in the previous case, the detainee was never produced in the Supreme Court and the legality of his arrest and detention was never determined. The petition was not allowed because the detainee was charged and appeared in a District Court more than a month after his initial arrest. It appears that the Supreme Court has confused the obligation to ensure a trial with the detainee's right to periodical review of arrest and detention. Again, obtaining evidence sufficient to justify an arrest after directing the order of detention is not in accordance to law.

The application for habeas corpus alleged that on 31 December 2011, a military column from 37th Regiment arrested the petitioner's son, Zaw Saing; he was then brought to and held in custody at the Upper Tarlawgyi Monastery.<sup>171</sup> While the Supreme Court accepted that this was the case, it did not pass judgement on the legality of the arrest.<sup>172</sup> The Respondent also stated that the Police had filed a case against Zaw Saing under Section 17(1) of the Unlawful Association Act on 7 February 2012, more than a month after his arrest. The Myitkyina Township Court then had issued an order remanding Zaw Saing into continued detention on 8 February 2012 in line with Section 167 of the CrPC.<sup>173</sup>

On 1 March 2012, the Supreme Court held that the issuance of a writ of habeas corpus was unnecessary. The Court accepted the argument that Zaw Saing was legally remanded and therefore not unlawfully detained.<sup>174</sup>

Zaw Saing did not appear before the Supreme Court and it is unclear if he appeared before a local court in relation to charges of unlawful association. He was sentenced to three years' imprisonment and was released by a Presidential amnesty in 2013.<sup>175</sup>

168 *Dar Mar Hkawng v. Commander Aung Zaw Oo* (Responsible official of Military Column), Supreme Court of the Union, General Application for Writ No.1, Judgment of 1 March 2012.

169 ICJ interview, lawyer, Yangon, 6/8/14; Thomas Mung Dan, Justice For All, Myitkyina, 14 October 14.

170 *Daw Marit Hkawng v. Commanding Officer Aung Zaw Oo* (Responsible official of Military Column of the 37 Regiment, Myitkyina township), Supreme Court of the Union, General Application for Writ No.2, Judgment of 1 March 2012.

171 *Daw Marit Hkawng v. Commanding Officer Aung Zaw Oo* (Responsible official of Military Column of the 37 Regiment, Myitkyina township), Supreme Court of the Union, General Application for Writ No.2, Application for the Habeas Corpus Order According to Habeas Corpus Procedure Section 3, Union Judiciary Act Section 16(a)(1).

172 *Daw Marit Hkawng v. Commanding Officer Aung Zaw Oo* (Responsible official of Military Column of the 37 Regiment, Myitkyina township), Supreme Court of the Union, General Application for Writ No.2, Judgment of 1 March 2012.

173 *Ibid.*

174 *Ibid.*

175 ICJ interview, lawyer, Yangon, 6/8/14; Thomas Mung Dan, Justice For All, Myitkyina, 14 October 14.

*(iii) U Dau Luang v Lt Col Zaw Myo Htut*<sup>176</sup>

Having had no response from the Chief Minister of Kachin State requesting his wife Daw Sumlut Roi Ja's release, U Dau Luang filed a petition for habeas corpus on 25 January 2012 under section 378(a)(1) of the 2008 Constitution and section 16 (a)(1) of the Judiciary Law No 20/2010.

U Dau Luang alleged that he, his wife and his father were abducted by soldiers at their farm in the Kachin hills near Hkaibang village, Momauk Township on 28 October 2011. Three military personnel from the light infantry Battalion 321 of the Tatmadaw allegedly took the petitioner's wife to Mot Bon military base in Kachin State.<sup>177</sup>

The petitioner claimed no warrant had been issued for the arrests. He argued that Daw Sumlut Rai Ja's detention violated various articles of the 2008 Constitution,<sup>178</sup> including Article 21 (b) and Article 376 arguing that no citizen can be placed under arrest without a warrant or remanded into custody for more than 24 hours. The petitioner argued that under Article 353 of the 2008 Constitution, the government has a duty to protect the 'life and freedom' of citizens and had failed to do so in the case of his wife.

According to Article 347, the government must ensure every citizen enjoys equality before the law. The Petitioner argued that his wife was being treated unfairly because she is Kachin, a recognized ethnic group, and that she is not a member of the Kachin Independence Army (KIA) and therefore should not have her rights limited.

The application included reference to Myanmar's early jurisprudence. It cited the decision in *Tin Zar Maw Naing & Yangon Policed Colonel*, in support of the applicant's claim of standing on behalf of his wife before the Supreme Court.<sup>179</sup> In support of the right to freedom from unlawful arrest, the applicant cited *G. M Barnargi and Supervising Officer of Insein Jail*,<sup>180</sup> emphasizing that there had been no legal basis for his arrest.<sup>181</sup>

At the preliminary hearing of the habeas corpus petition on 23 February 2012, the Respondent, Lt. Col. Zaw Myo Htut, denied that the alleged arrest had taken place. He alleged that the applicant is a member of the KIA and submitted an interrogation file, dated 19 January 2012, indicating that the KIA had a military presence at the residence of the Applicant.<sup>182</sup>

The Respondent also contended that since there was no report of arrest made to the Women's Affairs Organisation, police station, or the General Administration Department of the township, there was no information to prove the arrest of Daw Sumlut Roi Ja had occurred.<sup>183</sup>

It is uncertain what action the Respondent took to establish the applicant's whereabouts and it is not clear if the Supreme Court took any action to examine the basis for the Respondent's denial of Daw Sumlut Roi Ja's arrest.<sup>184</sup>

The Court, on 1 March 2012, rejected the petition for a writ of habeas corpus on grounds that there was insufficient evidence in the affidavits to show the army had detained the victim.<sup>185</sup> The Supreme Court therefore reasoned the application could not be

176 *U Dau Luang v. Lt Col Zaw Myo Htut* (Responsible official of Loilontaung Met Bum station, 321 Regiment, Loi Jei township), Supreme Court of the Union, General Application for Writ No.3, Judgment of 1 March 2012.

177 *Ibid.*

178 These were articles 21(b), 376; s 347; and s 353 of the Myanmar Constitution 2008.

179 *Tin Zar Maw Naing & Yangon Policed Colonel* [1950] BLR (SC) 17.

180 *G. M Barnargi and Supervising Officer of Insein Jail* [1948] BLR (SC) 199.

181 Melissa Crouch, *Constitutional Writs as "Weapons" in Myanmar?*, Int'l J. Const. L. Blog, July 9, 2013, available at: <http://www.icconnectblog.com/2013/07/constitutional-writs-as-weapons-in-myanmar>.

182 *U Dau Luang v. Lt Col Zaw Myo Htut* (Responsible official of Loilontaung Met Bum station, 321 Regiment, Loi Jei township), Supreme Court of the Union, General Application for Writ No.3, Judgment of 1 March 2012.

183 *Ibid.*

184 Report of the Special Rapporteur on the situation of human rights in Myanmar in accordance with Assembly Resolution 66/230, presented at the 67th session of the UN General Assembly, 25 September 2012.

185 UNGA, 'Situation of Human Rights in Myanmar' (25 September 2012) available

allowed.<sup>186</sup> Despite the arguments of the Applicant, it did not appear from the judgment that the Court availed itself of the opportunity to examine the lawfulness of Daw Sumlut Roi Ja's of arrest and detention.

As of December 2015, Daw Sumlut Roi Ja's whereabouts remained unknown. Her husband fears that she is dead.<sup>187</sup> Civil society representatives consider the situation one of enforced disappearance.<sup>188</sup>

#### **(iv) U Myo Min Thu v The State and Police 2nd Lieutenant Aung Win Tint**

U Myo Min Thu petitioned the Supreme Court for a writ of habeas corpus on 4 June 2012 on behalf of his father, U Myint Swe. The petition was brought against two Respondents: the Union of Myanmar and a Second Lieutenant of the Tatmadaw. The application was unsuccessful as the Supreme Court decided that an unreasonable amount of time had passed and that there were technical problems with the habeas corpus application.

According to the Petitioner's affidavit, U Myint Swe was taken away by a special branch squad, led by the 2nd Lieutenant, in Nant Monn Village in Inn Taw Gyi region, Kachin State on 24 June 2005.<sup>189</sup> During the hearing of the habeas corpus petition, the 2nd Lieutenant claimed that he had only carried out the identification process and not the arrest.<sup>190</sup>

While the Writ Law sets time limits for writs of certiorari and writs of prohibition to be filed, there is no time limit for the submission of habeas corpus petitions.<sup>191</sup> In this respect, the Writ Law complies with international standards for habeas corpus, which state that the remedy of habeas corpus should not be time barred.<sup>192</sup>

Nevertheless, the Court held that the seven-year lapse between the dates of filing the petition and of the alleged incident could not be considered as reasonable.<sup>193</sup> The Court also found that the Petitioner's affidavit had technical problems and lacked evidence; it did not mention any police report or investigations carried out to locate the place of detention.<sup>194</sup>

International standards clarify that the habeas corpus procedures must be simple and expeditious. Dismissal on the grounds of technical problems appears to be inconsistent with both international standards and national law and procedure.

The burden of proof of the legality of detention must lie with the State. Clearly, the information deemed lacking would have been more readily available to the State than to the Petitioner. Requiring the production of such information by the Petitioner – particularly at the application stage – is inconsistent with the nature of habeas corpus challenges under international human rights law. Rather than dismissing it as an incomplete application, under Chapter 6 of the Writ Law, the Court should have returned the application with instructions to the Applicant to resubmit it if there were technical problems.

<sup>186</sup> U Dau Luang v. Lt Col Zaw Myo Htut (Responsible official of Loilontaung Met Bum station, 321 Regiment, Loi Jei township), Supreme Court of the Union, General Application for Writ No.3, Judgment of 1 March 2012.

<sup>187</sup> ICJ interview, lawyer, Yangon, 2 December 2012; ICJ Interview, Thomas Mung Dan, Justice For All, Mytkyina, 14 October 14.

<sup>188</sup> FIDH, Burmese government urged to investigate the enforced disappearance of Sumlut Roi Ja (28 Oct 2014) available at: <https://www.fidh.org/International-Federation-for-Human-Rights/asia/burma/16329-burmese-government-urged-to-investigate-the-enforced-disappearance-of>.

<sup>189</sup> U Myo Min Thu v. The State and Police 2nd Lieutenant Aung Win Tint, Supreme Court of the Union, General Application for Writ No.5, Judgment 7 August 2012.

<sup>190</sup> Ibid.

<sup>191</sup> Writs Act 2014, Section 16.

<sup>192</sup> Principle 32 (1) of the Body of Principles; Principle 8 of the WGAD Basic Principles and Guidelines; See HRC General Comment 35, UN Doc ICCPR/C/GC/35 (2014) §§42-43.

<sup>193</sup> U Myo Min Thu v. The State and Police 2nd Lieutenant Aung Win Tint, Supreme Court of the Union, General Application for Writ No.5, Judgment 7 August 2012.

<sup>194</sup> Ibid.

The family of U Myint Swe remains unaware of his fate or whereabouts, raising concerns that he was subjected to an enforced disappearance.

#### **(v) *Daw Ei Kaung Te & 30 others vs U Pauk Yu Chan***

At least 31 other habeas corpus petitions were also filed on 3 June 2013.<sup>195</sup> The Supreme Court dismissed them all on 11 July 2013. All the cases were filed by the same lawyer for villagers in the Shan State who had allegedly been abducted by the Wa Army in the Wa self-administered area.<sup>196</sup> In response to the application, the Union Supreme Court summoned the Wa Communication Officer. The cases were dismissed, as the Supreme Court found that the summons could not be delivered due to armed conflict.<sup>197</sup> The Supreme Court diary entries for the rest of the applications do not contain further details. The villagers did not appear before any court.<sup>198</sup> The fate of the Shan State villagers, who have not managed to escape since being allegedly abducted, remains unknown.<sup>199</sup>

#### **(vi) *U Wai Yang (a.k.a. U She Tar) v. U Pauk Yu Chan***

The lawyer for the applicant provided an additional application related to the incident outlined in the section above.<sup>200</sup> U Wai Yang's (a.k.a. U She Tar) application was dismissed at the early stages of the procedure as the Supreme Court claimed that an affidavit signed by a friend, rather than a family member, was inadmissible.<sup>201</sup> There is no judgment or diary record of this case. It is unclear whether the Supreme Court directed the applicant to reapply on procedural grounds or whether the case was dismissed.

<sup>195</sup> 31 of the judgments are unavailable. The ICJ was only able to acquire Supreme Court diary records in which they were acknowledged. The diary records are as follows: Daw Ei Kaung Te v. U Pauk U Chan 2013, General Criminal (writ) No. 8, Supreme Court Diary; Daw Ei Kaung v. U Pauk U Chan 2013, General Criminal (writ) No. 9, Supreme Court Diary; Daw Ei Htan Mar v. U Pauk U Chan 2013, General Criminal (writ) No. 10, Supreme Court Diary; Daw Ei Eain v. U Pauk U Chan 2013, General Criminal (writ) No. 11, Supreme Court Diary; Daw Ei Nan Lon v. U Pauk U Chan 2013, General Criminal (writ) No. 12, Supreme Court Diary; Daw Ei Nan v. U Pauk U Chan 2013, General Criminal (writ) No. 13, Supreme Court Diary; U Eaik Kyan v. U Pauk U Chan 2013, General Criminal (writ) No. 14, Supreme Court Diary; U Eaik Phat v. U Pauk U Chan 2013, General Criminal (writ) No. 15, Supreme Court Diary; U Eaik Shan v. U Pauk U Chan 2013, General Criminal (writ) No. 16, Supreme Court Diary; U Mai Khan v. U Pauk U Chan 2013, General Criminal (writ) No. 17, Supreme Court Diary; U Eaik Oan v. U Pauk U Chan 2013, General Criminal (writ) No. 18, Supreme Court Diary; U Eaik Oo v. U Pauk U Chan 2013, General Criminal (writ) No. 19, Supreme Court Diary; U Mai Ngan Lat v. U Pauk U Chan 2013, General Criminal (writ) No. 20, Supreme Court Diary; U Sai Hone v. U Pauk U Chan 2013, General Criminal (writ) No. 21, Supreme Court Diary; U Sai Sam v. U Pauk U Chan 2013, General Criminal (writ) No. 22, Supreme Court Diary; U Mai Ann v. U Pauk U Chan 2013, General Criminal (writ) No. 23, Supreme Court Diary; U Mai Ann v. U Pauk U Chan 2013, General Criminal (writ) No. 24, Supreme Court Diary; Daw Ei Ann v. U Pauk U Chan 2013, General Criminal (writ) No. 25, Supreme Court Diary; Daw Ei Yot v. U Pauk U Chan 2013, General Criminal (writ) No. 26, Supreme Court Diary; Daw Ei Onn v. U Pauk U Chan 2013, General Criminal (writ) No. 27, Supreme Court Diary; Daw Nar Khan v. U Pauk U Chan 2013, General Criminal (writ) No. 28, Supreme Court Diary; Daw Nan Shan Khan v. U Pauk U Chan 2013, General Criminal (writ) No. 29, Supreme Court Diary; Daw Nan Kaung Kyauk v. U Pauk U Chan 2013, General Criminal (writ) No. 30, Supreme Court Diary; Daw Ei Than v. U Pauk U Chan 2013, General Criminal (writ) No. 31, Supreme Court Diary; Daw Ei Onn v. U Pauk U Chan 2013, General Criminal (writ) No. 32, Supreme Court Diary; Daw Ei Kaung v. U Pauk U Chan 2013, General Criminal (writ) No. 33, Supreme Court Diary; Daw Ei Htan Mar v. U Pauk U Chan 2013, General Criminal (writ) No. 34, Supreme Court Diary; Daw Ei Kyan Thar v. U Pauk U Chan 2013, General Criminal (writ) No. 35, Supreme Court Diary; Daw Ei Khan Nan v. U Pauk U Chan 2013, General Criminal (writ) No. 36, Supreme Court Diary; Daw Ei Nan v. U Pauk U Chan 2013, General Criminal (writ) No. 37, Supreme Court Diary.

<sup>196</sup> The United Wa State Army, abbreviated as UWSA and also known as the UWS Army, is the military wing of the United Wa State Party (UWSP). It is an ethnic minority army of an estimated 20,000 -25,000 Wa soldiers of Myanmar's Special Region No.2.

<sup>197</sup> ICJ Interview, Lawyer Yangon, 15 July 2014.

<sup>198</sup> ICJ Interview, Lawyer Yangon, 15 July 2014. The Supreme Court decided to dismiss the cases on the grounds that the summons was undeliverable in line with Writ Procedure Section 13 and had received no reply to their query mandated in Section 15. 2013, General Criminal (writ) No. 8-37, Supreme Court Diary Date: 11/7/2013.

<sup>199</sup> ICJ Interviews with family members, Tachilek, Shan State, January 2015.

<sup>200</sup> U Wai Yang (a.k.a. U She Tar) v. U Pauk Yu Chan. Interview with U Kyi Win(Latpotta) , advocate Date: 15 July 2014.

<sup>201</sup> Interview with U Kyi Win(Latpotta) , advocate Date: 15 July 2014

## 2.4 Early Habeas Corpus Jurisprudence in Myanmar

In addition to the international standards set out in Part I above, the process of reform in Myanmar can and should draw upon the precedents established in the case law of the country's Supreme Court - to the extent that it is consistent with international human rights standards.

In 1948, there were two ways to apply for habeas corpus. One was via the writ jurisdiction of the Supreme Court, which guaranteed all persons the right to approach the court directly for relief. The other way was via the appellate criminal jurisdiction of the High Court, under section 491 of the CrPC, which permitted applications "in the nature of habeas corpus".

After independence, the writ of habeas corpus became 'The most popularly evoked remedy' in response to government action invoked under emergency powers.<sup>202</sup> The courts interpreted their role liberally: in the 1948 G.N. Banerji ruling, the Supreme Court's authority to issue writs was described as "whole and unimpaired in extent but shorn of antiquated technicalities in procedure".<sup>203</sup> By 1958 the courts were given fewer opportunities to exercise their authority. With the Military takeover in 1962, although writs remained on the book, there was no longer an independent judiciary to receive petitions.<sup>204</sup>

During the period between 1948 and 1962 the Supreme Court issued the writ of habeas corpus. Detainees were released when arrest warrants were improperly prepared or carried out, for being arrested without justification, and for being held indefinitely.<sup>205</sup> In deciding many cases of detention under the Public Order (Preservation) Act 1947 were illegal, the courts gained a reputation for delivering independent judgments and upholding rights against arbitrary government action or Acts of Parliament.<sup>206</sup> This reinforced the view that arbitrary government action or Acts of Parliament could not overrule constitutional rights.<sup>207</sup> As a result, there are precedents available to the Supreme Court to consider today when hearing habeas corpus petitions.

### 2.4.1 Under section 25(2) of the 1947 Constitution

Section 25(2) of the 1947 Constitution established the jurisdiction of the Supreme Court to issue orders, including habeas corpus, to prevent arbitrary arrests and vindicate fundamental liberties.

In *G.N. Banerji v The Superintendent, Insein Jail Annexe* (1948) BLR (SC) 199, Justice E. Maung quoted Lord Wright in *Greene v Secretary of State for Home Affairs* (1942) AC 284, describing habeas corpus as a writ of right, and not one of course.<sup>208</sup> Justice E. Maung explained that the first step in any habeas corpus proceeding is to determine whether a prima facie case that the applicant's freedom was unlawfully impeded is established.<sup>209</sup> The next step is for the judge to consider whether the response produced

202 Maung Maung. *Burma's Constitution*. 2nd ed., The Hague: Martinus Nijhoff, 1961. P. 99.

203 *G.N. Banerji v. Superintendent, Insein Jail Annexe, Insein*. BLR (1948) SC 203-04; In 1950, the Tinsa Maw Naing ruling explained that, "The personal liberty of a citizen, guaranteed to him by the Constitution, is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and present". *Tinsa Maw Naing v. Commissioner of Police, Rangoon & Another*. BLR (1950) SC 37.

204 Nick Cheeseman, 'The Incongruous return of Habeas Corpus to Myanmar' Cheeseman, Skidmore & Wilson. *Ruling Myanmar: From Cyclone Nargis to National Elections* (ISEAS 2010) p. 96.

205 Dr. Malar Aung, *Reported Cases of Writs Application with Judgment Summary 1948-1971*.

206 Silverstein, Joseph (1977) *Burma: Military Rule and the Politics of Stagnation* (Ithaca, NY, Cornell University Press, 1977) p.57. For example, despite that the Public Order (Preservation) Act stated that an order to detain a person under the Act could not be reviewed by a court, the Supreme Court held that this provision was unconstitutional because it was contrary to the powers of the Supreme Court under section 25 of the Constitution. See *Bo San Lin v. The Commissioner of Police and one* [1949] BLR 372.

207 Melissa Crouch, 'The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar' in Lindsay & Crouch (eds.) *Law, Society and Transition in Myanmar* (Hart, 2014) p.143.

208 *G.N. Banerji v. The Superintendent, Insein Jail Annexe* (1948) BLR (SC) 199, pp 202.

209 *Ibid*.

by the respondent is good and sufficient.<sup>210</sup>

The judgment noted that the value of habeas corpus is that it allows the immediate determination of the right of a detained individual to release.<sup>211</sup> In doing so, the court should prevent evasion and delay.<sup>212</sup>

In addition, Justice E. Maung also made reference to Lord Halsbury, thrice the Lord Chancellor of Great Britain, in *Cox Hakes* (15 App. Cas. 506, 514), where he stated that no formality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined.<sup>213</sup>

Myanmar's jurisprudence shows that the Courts in the country have upheld international standards in the past. Previous cases show that during the course of the proceedings the detained individual as well as the third party has the right to be:

- Physically present at an appropriate Court,<sup>214</sup>
- Represented by counsel, and
- Have the effective right to challenge the grounds for detention in a fair procedure.<sup>215</sup>

The Supreme Court also had the power to grant release of the individual where the response of Respondent to the writ was manifestly insufficient or where there was doubt as to the veracity of the facts alleged in the Respondent's response.<sup>216</sup>

In *Maung Hla Gyaw v The Commissioner of Police, Rangoon* the Supreme Court held that it should examine and, without delay, rule as to whether the grounds and procedure to detain the individual were and remain lawful under national and international law.<sup>217</sup> Should the detention be found unlawful, the detainee must be released without delay.

### **Habeas Corpus Procedure**

In addition to the principles set out above, the following precedents should guide the procedure applied to cases brought under the 2008 Constitution:

- Liberty of the person is indefeasible under the Constitution and is not to be interfered with save in accordance with law and in strict compliance with the prescribed procedure;<sup>218</sup>
- When drafting a warrant, or documents of grave importance involving the interference with fundamental rights, precision in the use of language must be exercised;<sup>219</sup>
- Judges should examine the truth of the facts set forth in the authorities' response to a writ of habeas corpus;<sup>220</sup>

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<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid. p. 199.

<sup>213</sup> Ibid. p. 202.

<sup>214</sup> *Lim Pwe Htin v. The Chairman, Public Property Protection Committee and another* (1952) BLR (SC) 55. See Dr. Malar Aung, Reported Cases of Writs Application with Judgment Summary pp 18.

<sup>215</sup> *U Sann Lwin, 'Writs'* (September 2012) 10 Law Journal p.33.

<sup>216</sup> *Daw Khin Tee v. U Chan Tha and One* (1949) BLR (SC) 193; See Dr. Malar Aung, Reported Cases of Writs Application with Judgment Summary p. 10.

<sup>217</sup> *Maung Hla Gyaw v. The Commissioner of Police, Rangoon and one* (1948) BLR (SC) 764; See Dr. Malar Aung, Reported Cases of Writs Application with Judgment Summary no.8, p. 7.

<sup>218</sup> *Lee Kyin Su @ U Su v. The Commissioner of Excise and three others* (1957) BLR (SC) 5; See Dr. Malar Aung, Reported Cases of Writs Application with Judgment Summary no. 33, p. 25.

<sup>219</sup> *G.N. Banerji v. The Superintendent, Insein Jail Annexe* (1948) BLR (SC) 199, p. 212.

<sup>220</sup> *Kin Ma Ma v. The Chairman, Public Property Protection Board and another* (1948) BLR (SC) 574; See Dr. Malar Aung, Reported Cases of Writs Application with Judgment Summary no.6, p. 6.

- The Court must examine the materials before it and determine by an objective test the lawfulness of an individual's detention;<sup>221</sup>
- The detaining authority is required to show sufficient material supporting the basis of their action.<sup>222</sup> In their return, the Respondent should set out the nature of the unlawful activities or the nature of acts prejudicial to public safety and maintenance of public order, of which the detaining officer had reason to believe that the detainee was guilty.<sup>223</sup>

### *The Lawfulness of Detention*

The pre-1962 rulings setting out the circumstances in which detention was deemed unlawful, should serve as useful precedent for present day authorities, lawyers and judges:

- Unless the procedure followed for arrest was in accordance with law, the detention would be illegal;<sup>224</sup>
- The power of arrest should not be delegated;<sup>225</sup>
- An order to arrest or detain an individual justified only by the fact that it was made by a superior authority is manifestly illegal;<sup>226</sup>
- When a person was not a resident in Rangoon or his activities do not constitute a menace to public safety or public order in Rangoon, the Commissioner of Police of Rangoon does not have the jurisdiction to order detention;<sup>227</sup>
- An order of arrest must be in writing. Detention in pursuance of a verbal order is invalid;<sup>228</sup>
- A single order to arrest several persons at the same time is improper because the authority passing such order is unable to consider the case of each detainee individually;
- A single order in respect of 71 persons arrested at different places on different dates is deprecated and should be avoided;<sup>229</sup>
- Obtaining evidence sufficient to justify an arrest after directing the order of detention is not in accordance to law;<sup>230</sup>

221 *Tinsa Maw Naing v. The Commissioner of Police, Rangoon and another* (1950) BLR (SC) 17. See U Hla Aung, 'The Law of Preventive Detention in Burma' pp 60; *Maung Hla Gyaw v. The Commissioner of Police, Rangoon and one* (1948) BLR (SC) 764. See Dr. Malar Aung, *Reported Cases of Writs Application with Judgment Summary*. p. 6.

222 *U Win Pe v. Secretary, Home Ministry* (1957) BLR (SC) 32; See: U Hla Aung, 'The Law of Preventive Detention in Burma'. p. 59.

223 *Ah Nywe v. Commissioner of Police, Rangoon and another* (1948) BLR (SC) 737; See: Dr. Malar Aung, *Reported Cases of Writs Application with Judgment Summary no 7*, p 6.

224 *Bo San Lin v. The Commissioner of Police and one* (1948) BLR (SC) 372. See Dr. Malar Aung, *Reported Cases of Writs Application with Judgement Summary no. 3*, p. 3. This means that although a police officer might have had good and sufficient grounds for what he did, if the law requires that he proceed in a certain manner, then strict compliance has to be adhered to.

225 *G.N. Banerji v. The Superintendent, Insein Jail Annexe* (1948) BLR (SC) 199, p. 208.

226 *Lee Kyin Su @ U Su v. The Commissioner of Excise and three others* (1957) BLR (SC) 5; See: Dr. Malar Aung, *Reported Cases of Writs Application with Judgement Summary no.33*, p. 25.

227 *Ma Aye Kyi v. The Commissioner of Police and one* (1948) BLR 772; *Maung San Tint v. The Deputy Commissioner of Pegu and one* (1949) BLR (SC) 196; See: Dr. Malar Aung, *Reported Cases of Writs Application with Judgement Summary no. 9*, p 8 and no. 15, p.11.

228 *Ah Nywe v. Commissioner of Police, Rangoon and another* (1948) BLR 737; *Bo San Lin v. The Commissioner of Police and one* (1948) BLR (SC) 372; *Ma Aye Kyi v. The Commissioner of Police and one* (1948) BLR 772; and *Daw Aye Nyunt v. The Commissioner of Police, Rangoon and one* (1949) BLR (SC) 5.

229 *Bo San Lin v. The Commissioner of Police and one* (1948) BLR (SC) 372. See Dr. Malar Aung, *Reported Cases of Writs Application with Judgement Summary no. 3*, p. 4.

230 *U Zan v. The Deputy Commissioner, Insein and another* (1951) BLR (SC) 17; See: Dr. Malar Aung, *Reported Cases of Writs Application with Judgement Summary no. 4*, pp. 16 – 17. There must be reasonable satisfaction of necessity, such as to investigate into the activities of the detainee, to direct detention. The reasonable grounds for detention must have already been known to the authority before exercising such discretion can be considered valid.

- The transfer of an applicant during the hearing is an attempt to evade the jurisdiction of the Supreme Court and can interfere with the Constitutional rights of the detainee.<sup>231</sup>

#### 2.4.2 Jurisprudence Under section 491 of CrPC

Myanmar's 1947 Constitution allowed for the High Court, which is highest court in each of Myanmar's seven States and Regions, to hear writs applications under its jurisdiction if provided for by law.<sup>232</sup> In 1949, however, the Supreme Court declared that the High Courts did not have the power to issue prerogative writs, and so its jurisdiction was limited to the power to issue the writ of habeas corpus in cases of illegal detention, as provided for under section 491 of the Code of Criminal Procedure 1898.<sup>233</sup>

The jurisprudence addresses concerns about the relationship of the Supreme Court and the High Courts and their ability to hear habeas corpus cases. In *Ma Mar Mar v P.S.O., Ahlone and others*<sup>234</sup> the applicant sought special leave from the Supreme Court to appeal an order passed by a High Court under section 491 of the CrPC.<sup>235</sup> The judge also applied the English common law practice from the case of *Eshugbayi Eleko v. Officer administering the Government of Nigeria and another* (1928) A.C. 459, where the failure of the applicant to obtain a direction in the nature of habeas corpus from the High Court would not bar the applicant from applying to the Supreme Court for relief.

This decision is relevant for those wishing to seek directives of the nature of habeas corpus from high courts in Myanmar today. Article 378 of the 2008 Constitution mirrors the meaning Article 25 of the 1947 Constitution.<sup>236</sup> As chapter XXXVII, Section 491 affords the High Courts the power make directions of the nature of a habeas corpus, lawyers can file an application with either the Supreme Court or the High Court. Moreover, they can do so consecutively. An order of a High Court refusing relief under Section 491 of the CrPC would not bar the filing of a petition for a writ of habeas corpus before the Supreme Court and vice versa.

In *Sitaram v. The Superintendent, Rangoon Central Jail and Another*,<sup>237</sup> the applicant approached both the High Court and then the Supreme Court to determine the legality of a number of arrests stemming from charges laid under the Burma Extradition Act and the Burma Foreigners Act. Both the Supreme Court and the High Court never questioned the ability to use one route or another to obtain directives on the nature of habeas corpus.

231 *Bo Aye Ko v. The Commissioner of Police, Rangoon and two others* (1950) BLR (SC) 181; See: Dr. Malar Aung, Reported Cases of Writs Application with Judgement Summary no. 19, p. 15. The facts of the case involved a detainee who was originally arrested at Hmawbi and detained in the Rangoon Central Jail under the orders of the Deputy Commissioner of Police of Rangoon. When the detainee filed for Habeas corpus, the Deputy Commissioner of Police of Rangoon cancelled his order. This order was replaced by an order under the Deputy Commissioner of Police of Insein, where he directed the detention of the applicant in the Rangoon Jail Central until further orders and then passed a second order to transfer the applicant to Insein Jail.

232 The High Court was established under ss 134 and 135 of the Constitution and s 2 of the Union Judiciary Act 1948.

233 See: *Kean Eng & Co v. The Custodian of Moveable Properties, Burma & One* [1949] BLR (SC) 71. According to s 491 of the Code of Criminal Procedure, the High Court could make a direction in the nature of habeas corpus.

234 [1948] BLR (SC) 214.

235 The application was brought pursuant to Section 6 of the Union Judiciary Act, which conferred on the Supreme Court powers to grant special leave to appeal any judgment, decree or final order of any court in any civil, criminal or other case if all legal remedies had been exhausted. The Supreme Court held that there was a separate effective remedy under Section 25 of the 1947 Constitution whereby it could issue 'directives in the nature of habeas corpus' and that no subject would go without its redress if a legitimate grievance exists.

236 Article 25 (2) of the 1947 states that the Supreme Court has the power to issue writs, 'Without prejudice to the powers that may be vested in this behalf in other Courts.' Article 378 (b) of the 2008 Constitution states that the Supreme Court's right to issue writs 'shall not affect the power of other courts to issue order that has the nature of writs according to the existing laws.'

237 *Sitaram v. The Superintendent, Rangoon Central Jail and Another* 1957 B.L.R (H.C) 190 Appellate Criminal.

## PART 3: Recommendations

The ongoing reform process, momentous elections and swearing in of a new government in Myanmar provide an important opportunity to ensure that law and practice related to arrest and detention is reviewed and amended in light of international human rights standards.

Where the separation of powers is respected, and the rule of law maintained, habeas corpus can be used as an effective remedy as it would ensure that the judiciary serves as a check on the power of the executive branch to detain individuals. This would reduce the risk of the abuse of power.

The ICJ offers the following recommendations with a view to assisting the authorities to address the obstacles faced and enhance the effectiveness of the writ of habeas corpus in Myanmar, bringing the law and its implementation in line with relevant international human rights standards.<sup>238</sup>

### 3.1 Enhance the Independence of the Judiciary

The principle of the separation of powers is the cornerstone of an independent and impartial justice system. A judiciary that is independent of the executive and legislative branches of government is a necessary condition for the fair administration of justice as well as intrinsic to the rule of law.

- The government should adopt legislation and take other measures to ensure that there is a clear distinction between the executive, legislative and judicial branches of government and to ensure that there is no interference by the other branches of government or any other person in matters for which the judiciary is solely responsible. In doing so they should be guided by international standards, including the UN Basic Principles on the Independence of Judges, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors.
- Judges and lawyers must be free to carry out their professional duties, including in the defence of human rights, without fear or favour and without interference including from the executive branch of government.
- The right of civilians to challenge the legality of their detention, including through petition for a writ of habeas corpus, must in all circumstances be guaranteed under the ordinary jurisdiction.<sup>239</sup>
- The Supreme Court of Myanmar must establish a Judicial Code of Conduct that provides a system of judicial accountability and bolsters judicial independence in line with the Supreme Court's Strategic Plan 2015-2017, where it lists establishing a Judicial Code of Conduct as one of its priorities.

### 3.2 Revision of the Constitution, Writ Law and Procedures

The ICJ also calls on the Government of Myanmar to:

- Delete Section 296(b) of the 2008 Constitution, and to ensure that the writ of habeas corpus is available at all times including in areas where a state of emergency has been declared, or there is internal armed conflict.
- Amend Section 296 and 377 of the Constitution to extend the jurisdiction to hear petitions for the writ of habeas corpus to the State and district courts, so as to enhance the accessibility and affordability for those seeking to file petitions for writs of habeas corpus.

<sup>238</sup> The relevant international standards are set out in Part 1 of this Handbook.

<sup>239</sup> International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, Geneva, Switzerland, 2008 p. 54.

- Amend the Procedural Rules and Regulations for the Application of Writs to ensure that petitions for habeas corpus are simple, expeditious and free of charge, at least for people who lack adequate means.
- Incorporate in the Procedural Rules and Regulations for the Application of Writs a provision to allow for a petition to be accepted by the Supreme Court by the most expeditious, accessible, reasonable and free means, without the need for prior authorization.
- Impose sanctions on government officials who delay or obstruct procedures to challenge the legality of detention.

### 3.3 Ensure national laws on arrest and detention and habeas corpus are consistent with international human rights standards and are applied in practice

In this context, the ICJ calls on the Government of Myanmar and the Union Attorney General's Office to:

- Ensure that Myanmar law related to grounds and procedures for arrest and detention is consistent with international standards.
- Take necessary measures, such as issuing instructions and ensuring effective supervision and fair accountability mechanisms, to ensure that any arrest and detention is carried out solely on grounds prescribed by law and that these laws are amended to ensure consistency with international human rights standards.
- Introduce a provision in the CrPC that enshrines the right of any person to challenge an alleged violation of their right to liberty or other rights as detainee (guaranteed under international standards) before an independent and impartial court, and to receive adequate reparation, in the event of such a violation. The provision should extend the right of petition to interested persons taking action on behalf of the detainee, such as but not limited to family members.
- Issue a directive instructing its law officers to comply with the writ of habeas corpus procedure; law officers must ensure that the detainee is present in court and explain how the detention was carried out in accordance with the law.
- Ensure comprehensive and regular periodic training for those authorised by law to carry out arrests on the lawful grounds and procedures for arrests and detention, based on the procedures set out under the CrPC and international standards.
- Ensure that training on the law and procedure related to arrest and detention, and on habeas corpus and other remedies for violations of the law and the rights to liberty and security of the person, are included in the curriculum of relevant university courses including those within the study of law and law enforcement.
- Establish legal aid centres nationwide staffed with independent and suitably trained and experienced legal professionals to provide information and legal assistance necessary for a habeas corpus petition.
- Ensure that legal aid is extended to applications for the writ of habeas corpus and for any review of the legality of detention and arrest.

### 3.4 Encourage the judiciary and bar associations, including through training, to use habeas corpus procedures including Section 491 of the CrPC and the use of Myanmar's jurisprudence

The ICJ calls on Bar Associations to:

- Include courses on the laws and procedures and international standards related to arrest and detention and right to challenge the legality of detention (including under CrPC 491 and Constitutionally guaranteed habeas corpus) in Continuing Legal Education for lawyers.
- Use relevant pre-1962 jurisprudence and international human rights standards as sources of authority in support of petitions for habeas corpus, including in submission to the Supreme Court.
- In urgent cases, where the alleged unlawful or arbitrary detention took place within less than 9 months, consider the appropriateness of filing applications to the High Court under article 491 of the CrPC.

The ICJ calls on the Supreme Court of Myanmar to:

- Make public all habeas corpus petitions and provide reasoned judgements. The Supreme Court should encourage the public dissemination of relevant jurisprudence including through lawyers' organizations, government institutions and civil society. All court judgments and rulings should be available to lawyers and the public. The creation of a publicly accessible online documentation system, which should potentially include legislation, court rules, regulations and case law, would further enhance this effort.
- Increase reliance on pre-1962 jurisprudence and international human rights standards pertaining to the right to liberty and prohibition of arbitrary and otherwise unlawful detention in their judgments on habeas corpus petitions.
- The Supreme Court should instruct High Courts to issue rules, pursuant to Section 491(2), to regulate the procedure in cases under Section 491 of the CrPC.
- Consistent with precedent, receive and consider habeas corpus petitions, even if the matter of the detention was addressed in petition under Section 491 of the CrPC, and dismissed by the High Court.
- Accept and consider successive bona fide habeas corpus petitions, in line with international standards.



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