

FACTSHEET | JULY 2020

Myanmar's Proposed Prevention Of Violence Against Women Law

A Failure to Meet International Human Rights Standards

I. Introduction

The introduction of the Prevention of Violence against Women Law (PoVAW)¹ in Myanmar² is an important opportunity for Myanmar to at long last ensure a comprehensive framework for addressing sexual and gender-based violence, bring its domestic laws in line with international obligations, and ensure adequate redress for violence to all women. This requires, however, that Myanmar passes and implements the law in accordance with the highest standards possible; some standards are not discretionary but rather firm commitments Myanmar is required to uphold, including under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Geneva Conventions, and customary international law. Myanmar's obligation to protect all women from violence is governed by the legal principle of "due diligence," meaning that the Myanmar government is responsible for taking measures to prevent, investigate, prosecute, punish, and provide reparations for all acts of gender-based violence committed by both private and public officials.

The Myanmar government has long shown a lack of commitment to breaking the cycle of impunity for widespread sexual and gender-based violence, a problem that is exacerbated by broader structural barriers with respect to Myanmar's military justice system, and a lack of robust domestic options for accountability.³ Recently, Myanmar has rejected any responsibility for sexual and gender-based violence in its Independent Commission of Enquiry (ICOE) report, engagement with the case filed by The Gambia at the International Court of Justice (ICJ), nor CEDAW review.⁴ The introduction of this law also comes at a critical time of renewed conversations regarding justice and accountability, with specific respect to the crimes committed against the Rohingya, via processes at the ICJ, the International Criminal Court (ICC), and domestic courts in third party states under the theory of universal jurisdiction.⁵

It is imperative that any efforts to draft and pass a new law take meaningful steps towards addressing sexual and gender-based violence. Myanmar has also received consistent recommendations from the CEDAW Committee, United Nations (UN) Secretary-General, and Special Rapporteur on the situation of human rights in Myanmar to ensure the new law complies with international standards; however, this version of the law patently does not meet those standards.

In order to help ensure a comprehensive PoVAW law that meets international standards and best practices, the Global Justice Center has created expert legal analysis to inform advocates and policymakers with the following components:

- ¹ This analysis is based on an unofficial translation of The Prevention of Violence Against Women Law as of Jan-uary 2020.
- ² GJC notes the distinction between Burma and Myanmar and uses the name Myanmar in this document since most of the references herein are to the governing infrastructure and its failings, rather than the country as a whole.
- ³ See Global Justice Center, Structural Barriers To Accountability For Human Rights Abuses In Burma (Oct. 2018), <https://www.globaljusticecenter.net/files/Structural-Barriers---Burma.pdf>; Global Justice Center, Myan-mar's Independent Commission of Enquiry: Structural Issues and Flawed Findings (Feb. 2020), https://www.globaljusticecenter.net/files/20200203_ICOEFact_sheet.pdf.
- ⁴ See Global Justice Center, Myanmar's Independent Commission of Enquiry: Structural Issues and Flawed Findings (Feb. 2020), https://www.globaljusticecenter.net/files/20200203_ICOEFact_sheet.pdf; Global Justice Center, Q&A: The Gambia v. Myanmar Rohingya Genocide at The International Court of Justice (May 2020), https://www.globaljusticecenter.net/files/20200519_ICJ_QandA_Update_FINAL.pdf; CEDAW Committee, Con-cluding observations on the report of Myanmar submitted under the exceptional reporting procedure, CEDAW/C/MMR/CO/EP/1, 18 Mar. 2019, ¶¶5, 25, 35.
- ⁵ See Global Justice Center, Q&A: The Gambia v. Myanmar Rohingya Genocide at The International Court of Justice (May 2020), https://www.globaljusticecenter.net/files/20200519_ICJ_QandA_Update_FINAL.pdf.

- ▶ Significant concerns regarding the PoVAW law with a list of principal areas of concern in need of further clarification and support, such as increasing participation of all women and civil society organizations, establishing time-bound and financial commitments for implementation of the law, and providing consistency in use of terminology and definitions.
- ▶ In-depth analysis of deficiencies and areas for improvement in the PoVAW law with respect to women’s rights and human rights in three major issue areas: definitions, rape, and marital rape; sexual and reproductive health and rights; and conflict-related sexual violence and military accountability.

II. Significant Concerns Regarding PoVAW Law & Process

The Global Justice Center has reviewed and analyzed the PoVAW law and identified certain overarching concerns in the law requiring further clarification and support. While not comprehensive, these are some of the most important concerns that need to be addressed if the PoVAW law is to meaningfully and comprehensively address sexual and gender-based violence in Myanmar.

Definitions, terminology & penalties

Overall, the PoVAW law fails to adequately identify, define, prohibit and punish crimes in order to prevent violence against all women. The **law is inconsistent** in defining some terms but not all, referencing the Penal Code or Criminal Code for some crimes but not all, and neglecting to pair defined crimes with a corresponding prohibition or punishment. The law should incorporate modern, clear definitions of crimes in line with international standards and best practices. If the law is intended to refer to other laws, such as the Penal Code or Criminal Code, that must be done clearly. Finally, the PoVAW law should clarify how it is intended to be used in relation to other existing laws.

The PoVAW law contains problematic and antiquated **definitions of crimes**. For example, the Penal Code definition of rape should be amended to meet international standards, and marital and intimate partner rape should be prohibited and subsumed under the crime of rape. The amended definition of rape should be gender-neutral and comprehensive, encompassing an expansive range of acts, similar to the definition in the Rome Statute. The amended definition of rape should clarify that the relationship between the parties—the victim and the perpetrator—does not matter. Additionally, the definition of sexual violence should not import antiquated definitions from the Penal Code, including “unnatural offenses.” The criminalization of unnatural offenses will violate international protections for LGBTIQ persons. Further, the definition of consent is unclear; regarding the requirements of consent, it does not specify who bears the burden to prove lack of consent, and excludes a broader range of coercive environments and circumstances where lack of consent is presumed, including those caused by armed action, conflict, or states of emergency, which is recommended under international standards. The Law should make clear that the burden to prove consent rests on the accused and not the victim of violence. The Law should also clarify that consent is not transferable and may be withdrawn at any time. Further, the relationship between the accused and the victim of violence, including marriage or intimate partner or prior relations, does not create a presumption of consent.

The law should be evaluated and made **gender-neutral and inclusive**. As was reflected by international fact-finders,⁶ gender informs the motivations of perpetrators, and the selection of and impact on victims of sexual violence. Accordingly, the law must be rendered in a way that captures the various forms gendered violence can take, particularly violence against all women.

Terminology and definitions should be employed clearly and consistently throughout the law. Terms should only be defined once and not be redefined elsewhere in the law. All definitions should be reviewed for clarity and comprehensiveness. Further, the law should include a definition of “gender” in line with international standards.

Provisions that conflict with this law must be amended and/or removed. The PoVAW law must supersede any conflicting laws, including customary law, which cannot be used to excuse noncompliance with the law. Some of the specific areas of this law that conflict with the corresponding Penal Code provisions include: definition and

⁶ See Human Rights Council, Sexual and gender-based violence in Myanmar and the gendered impact of its eth-nic conflicts, A/HRC/42/CRP.4, 22 Aug. 2019.

penalties for marital rape, exceptions for abortion services, and age of consent.⁷ An additional example is the law's reference to divorce without a clear explanation of how this law is intended to be used in relation with the Myanmar Divorce Act.

Penalties should track the severity of the crime, focus on rehabilitation rather than retribution, and decisions regarding sentencing should be left to the discretion of the judge. Mandatory minimums and other mandatory sentencing requirements have proven over time to contravene principles of restorative justice and result in punishments that are not proportional to the crimes. As a result, such sentencing decisions should not be mandatory but rather left to the discretion of judges with clear guidelines for their deployment. These guidelines must also be developed in line with international standards.⁸ Appropriate defenses and aggravating or mitigating factors for sentencing should also be included.

The law must **grant civilian courts jurisdiction over military perpetrators** in all contexts and specify that military crimes of sexual and gender-based violence will be prosecuted in civilian courts, whether or not the crime took place during conflict. Furthermore, the law should be clear that any actors who commit crimes in the context of conflict, including police and border guards in addition to the military, will be prosecuted under the law and do not have immunity.

Processes & services

Equal participation of all women should be advocated at all levels including within the implementation mechanisms created under this law. There should also be gender-sensitive training for responsible staff at all levels, including within the judiciary and police, with clear, consistent instructions regarding the topics to be covered.

In order for victims to obtain temporary protection measures, there should be one **streamlined process** with multiple access points for both obtaining and enforcing the measures, including regional township committees, courts, police officers, and village tract heads. These multiple points are especially critical for women living in rural parts of Myanmar, where courts may not be easily reached. Further, all parts of the process should be free of cost for victims of violence.

Finally, the law should specify who is tasked with enforcing the measures, that measures should be issued immediately, and should clearly articulate police responsibilities in enforcing temporary protection measures.

Similarly, with respect to the provision on **protective orders**, the language should be amended to be more comprehensive. There is no clear procedural language on how to obtain a protection order. In addition, there is no language on police responsibilities to enforce and carry out the orders, no language on the process for how to amend an order, or how to renew an order. Further, any **investigations** involving the victim of violence should consider the requests of the victim.

The PoVAW law should be amended to better protect women's **reproductive rights** and access to health services, including abortion. With respect to enforced sterilization, abortion, or pregnancy, the law must make clear that the prohibited act is forced abortion or forced sterilization and clarify that the law is focused on acts that occur without the full and free consent of the victim. Additionally, it must be made clear that the subject of the law, the one to be held responsible under it, is the perpetrator—the person who forced another to undergo sterilization or abortion—and not the victim or the service provider. Further, the requirement of Medical Examination Board approval should be removed from the procedures to obtain sexual and reproductive health services. Such approval processes are considered under international human rights law to constitute barriers to accessing safe abortion services. Finally, the inclusion of the provision in this PoVAW law under Article 63 regarding the right of a woman in such a situation to apply for childcare costs raises concerns of the potential for reproductive coercion and violence. More specifically, such a provision could result in unintended outcomes such as the possibility for pressure or coercion from sexual partners regarding pregnancy choices, and as such should be calibrated against protections from enforced abortion and sterilization.

⁷ Note that the references to the Penal Code provisions regarding marital rape and age of consent are intended to reflect the amended versions of the Penal Code.

⁸ For example, see Rule 145 Determination of sentence of International Criminal Court, Rules of Procedure and Evidence, 57 (2013), <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

Civil society organizations should be included in implementation processes, with members of women's organizations sitting on the state, regional, and township-level committees for women.

Implementation of the law is currently contingent on the creation, funding and deployment of a variety of new organizations and mechanisms. To that end, the Myanmar National Committee on Women's functions should be reviewed to ensure that its role in implementing the law is clear and comprehensive. So too, the roles and responsibilities of the Ministry with respect to the implementation of this law should be comprehensive, time-bound and clear. The law must incorporate **time-bound commitments**, ideally within 90 days, for setting up the committees, funds, and other structures established by this law. There should also be clear **financing responsibilities and commitments** designated for the central government to ensure the services and measures specified in the law are provided.

The law should ensure that **burdens of proof** are clearly placed on the perpetrator and not on the victim.

Steps must be taken to ensure that **access to legal services**, including representation by counsel, is widely available to victims at little or no cost.

The PoVAW law should allow for **victim impact statements** in order to facilitate decision-making by justice actors. The victim's right to privacy and confidentiality should not be compromised.

The provisions regarding **sexual/workplace harassment** need to be clearer and spell out the duties of the employer and civil penalties for perpetrators.

III. In-Depth Analysis Of Deficiencies In PoVAW Law

Definitions, Rape & Marital Rape

Amending The Definition Of Rape

Issues

The draft PoVAW law incorporates by reference the problematic definition of rape found in Myanmar's Penal Code, which was adopted in 1861.⁹ According to the Penal Code, rape can only be committed by a man, is limited to vaginal penetration between a man and a woman, and exempts marital rape (see below for more detail). Furthermore, under the Penal Code the burden rests on the rape victim to prove that she did not consent to the rape. This definition of rape is out of line with current international standards and should be amended, both in the PoVAW law and the Penal Code.

Standards

According to international standards, set out in the Rome Statute of the ICC, the Istanbul Convention, and by the Verma Committee, the definition of rape should be gender-neutral (as both men and women can perpetrate rape against either gender) and utilize such terms as 'perpetrator' or 'person.'¹⁰ Additionally, the Rome Statute's definition of rape is broad and includes any form of "penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."¹¹ Finally, international standards require that the definition of rape be based on lack

9 Article 3(e) reads: Rape means the same definition included in Myanmar Penal Code Section 375, apart from exception mentioned in this Penal Code. Article 375 of the Penal Code reads: A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: First-- Against her will. Secondly-- Without her consent. Thirdly-- With her consent, when her consent has been obtained by putting her in fear of death or of hurt. Fourthly-- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly-- With or without her consent, when she is under fourteen years. Explanation-- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception-- Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

10 In 2002 the Rome Statute established the International Criminal Court, which is responsible for investigating and prosecuting crimes against humanity, war crimes, and genocide in the international community. The Istanbul Convention was formed by the Council of Europe in 2011 to counter violence against women and domestic violence. Following a gang rape case in India in 2012, the Verma Committee was created with the intent to amend the criminal law in order to better protect women against sexual violence.

11 ICC, Elements of Crimes, 2011, art. 7(1)(g)-1 ¶1, <http://www.refworld.org/docid/4ff5dd7d2.html>.

of consent. While the PoVAW law defines consent, the definition is unclear regarding the requirements of consent, does not specify who bears the burden to prove lack of consent, and excludes a broader range of coercive environments and circumstances where lack of consent is presumed, including those caused by conflict or states of emergency, which is recommended under international standards.

Considering Myanmar's status as a State party to CEDAW, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has issued specific recommendations for the country "to ensure that the definitions of rape ... are in full compliance with the [CEDAW] Convention."¹² The UN Secretary-General has also called for Myanmar "to harmonize the domestic definition of rape, which derives from the Penal Code of 1860, with current international standards."¹³ Notably, the Special Rapporteur on the situation of human rights in Myanmar has raised the need to amend "several outdated penal code provisions" and highlighted the need to include "a comprehensive definition of rape" in the PoVAW law.¹⁴

Recommendations

- ▶ Amend the PoVAW law and the Penal Code to incorporate a definition of rape in line with current international standards. The new definition of rape should be gender-neutral and comprehensive, encompassing an expansive range of acts, similar to the definition in the Rome Statute.
- ▶ Broaden and clarify the definition of consent, especially to incorporate and account for any coercive circumstances that may have been present.¹⁵
- ▶ Clarify that the PoVAW law supersedes any contradictory provisions in the Penal Code or other law. Any contradictory provisions should be amended to match the terms of the PoVAW law or repealed.

Eliminating Marital Rape

Issues

In Myanmar, there is a problematic conceptualization of rape between a man and his wife as an exception to the crime of rape and as something distinct from rape. This cultural understanding is codified in Myanmar's Penal Code, which includes an exception for marital rape in its definition of rape. Specifically, the Code states: "Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape."¹⁶ Although the most recent version of the PoVAW law incorporates the Penal Code definition of rape without the marital rape exception, the exception itself remains in the Penal Code, thereby setting up a potential conflict of laws issue. Moreover, the PoVAW law merely defines marital rape¹⁷ and sets out a separate, less severe punishment for marital rape than rape.¹⁸ Finally, the law does not appear to cover situations of intimate partner rape.

Standards

International standards make clear that rape and sexual violence are crimes regardless of the relationship of the perpetrator to the victim. As of 2015, 52 countries have incorporated laws making marital rape a crime.¹⁹ Both the Special Rapporteur on violence against women, its causes and consequences and the Special

¹² The CEDAW Committee is responsible for monitoring the implementation of the Convention on the Elimination of Discrimination against Women by member States. CEDAW Committee, Concluding observations on the combined fourth and fifth periodic reports of Myanmar, CEDAW/C/MMR/CO/405, 25 July 2016, ¶27(a).

¹³ The Secretary-General is the chief administrative officer of the United Nations, of which Myanmar is a member. UN Security Council, Report of the Secretary-General on conflict-related sexual violence, S/2017/249, 15 April 2017, ¶53.

¹⁴ UN General Assembly, Situation of human rights in Myanmar, Note by the Secretary General, Report of the Special Rapporteur on the situation of human rights in Myanmar, A/72/382, 8 Sept. 2017, ¶14; Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/31/71, 18 Mar. 2016, ¶47.

¹⁵ Article 3(g)(iii) provides "consent given for the assailant who is a member of the armed forces" as an example of a condition in which consent would not be present. This is clearly an example of a coercive circumstance, yet international standards, such as the Rome Statute, dictate a broader standard ("taking advantage of a coercive environment") as an element of the crime of rape. ICC, Elements of Crimes, 2011, art. 7(1)(g)-1 ¶2, <http://www.refworld.org/docid/4ff5dd7d2.html>.

¹⁶ In 2016 this age provision was modified to 15 years old. Myanmar Penal Code, art. 375 (1861).

¹⁷ Article 3(f) reads: Marital Rape means rape to a wife committed by husband.

¹⁸ Article 50 reads: Whoever is convicted of committing an offence under section 41 (prohibiting sexual violence against own wife committing marital rape) shall be liable to be sentenced with imprisonment for a term from a minimum of one (1) year to a maximum of three (3) years. Article 376 of Myanmar's Penal Code reads: Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

¹⁹ UN Economic and Social Affairs, The World's Women 2015: Trends and Statistics, 2015, p. 160.

Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment have called for the criminalization of marital rape.²⁰ “The European Court of Human Rights has denounced the notion of marital immunity as incompatible with human rights principles.”²¹ As a State party to CEDAW, Myanmar is included in the call for member States to “harmonis[e] domestic law with the Convention.”²² This involves repealing all laws that discriminate against women – including the exclusion of marital rape from the crime of rape. The CEDAW Committee has also repeatedly and specifically recommended that Myanmar “ensure that marital rape constitutes a criminal offense.”²³

Recommendations

- ▶ All instances of marital or domestic partner rape should be subsumed into the crime of rape and not be presented as a separate crime.²⁴ Further, the punishment for marital or domestic partner rape should be the same as and incorporated into the punishment for rape.
- ▶ Amend the Penal Code to eliminate the marital rape exception.
- ▶ Make clear that the relationship between the accused and the victim of violence, including marriage or intimate partner or prior sexual relations, do not create a presumption of consent or a defense. A provision should be added to the definition of consent in Article 3(g) to read: “vi. The relationship between the accused and the victim of violence, including marriage or intimate partner, familial relationships or prior sexual relations, does not create a presumption of consent.”

Consistency Of Definitions And Conflicting Laws

Issues

There are several instances in the PoVAW law where inconsistent use of definitions contributes to confusion. For example, the PoVAW law defines a child as a human being under the age of 18 years of age.²⁵ However, the Penal Code states that the age of consent is 16 years old; similarly, Myanmar’s Child Law defines a child as a person who has not attained the age of 16 years.²⁶ Additionally, as discussed above, the PoVAW law confusingly incorporates the problematic Penal Code definition of rape without the marital rape exception, yet the law itself defines marital rape and sets out a separate, less severe punishment for marital rape than rape. Further, as detailed below, the PoVAW law’s provision on abortion access (permitted where continuing the pregnancy would endanger the woman’s life or affect psychological and physical health, or the pregnancy resulted from rape) conflicts with the Penal Code (permitted where abortion is performed to save a woman’s life).

Standards

While there is no global consensus with respect to the legal age of the consent, international bodies, including the CEDAW Committee, have commented on the age requirement with respect to legal marriages. According to the CEDAW Committee, child marriage is defined as “any marriage where at least one of the parties is under 18 years of age.”²⁷ Additionally, the CEDAW Committee has recommended that member States “ensure...[t] hat a minimum legal age of marriage for girls and boys, with or without parental consent, is established at 18 years.”²⁸ The Committee on the Rights of the Child has also recommended that Myanmar, a State party, “review

20 Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to India, A/HRC/26/38/Add.1, 1 Apr. 2014, ¶78(c); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 Jan. 2016, ¶¶55, 69.

21 International Commission of Jurists, Women’s Access to Justice for Gender-Based Violence: A Practitioner’s Guide, Feb. 2016, p. 215. The European Court of Human Rights is responsible for overseeing the enforcement of the European Convention on Human Rights drafted by the Council of Europe.

22 CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017, ¶26(a).

23 CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/MMR/CO/3, 7 Nov. 2008, ¶47. See also CEDAW Committee, Concluding observations on the combined fourth and fifth periodic reports of Myanmar, CEDAW/C/MMR/CO/4-5, 25 July 2016, ¶27.

24 Specifically, Article 50, which sets out a lesser punishment for marital rape than rape, should be removed.

25 Article 3(b) reads: Child means a human being under the age of eighteen (18).

26 Penal Code, art. 375; The Child Law, art. 2(a).

27 CEDAW Committee, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 14 Nov. 2014, ¶20.

28 “When a marriage at an earlier age is allowed in exceptional circumstances, the absolute minimum age must not be below 16 years, the grounds for obtaining permission must be legitimate and strictly defined by law and the marriage must be permitted only by a court of law upon the full, free and informed consent of the child or both children, who must appear in person before the court.” CEDAW Committee, Joint general recommendation No. 31 of the Committee on the Elimination

its legislation to define the child as any person below 18 years of age and establish the minimum legal age for marriage for boys and girls at 18 years.”²⁹

Inconsistencies between legal doctrines can lead to a problematic conflict of laws where it is unclear to judges, lawyers, and advocates which law applies to their circumstances. Resolution of any conflicts as well as clarity regarding application of the laws is imperative. The Special Rapporteur on the situation of human rights in Myanmar has even noted that “[i]t will also be vital to ensure that the new [PoVAW] law supersedes any law or other provisions in variance with it.”³⁰

Recommendations

- ▶ The PoVAW law should be consistent with Myanmar’s Child Law and the Penal Code regarding the age of a child – a person who has not yet attained the age of 18 years.
- ▶ Any conflicting provisions in other laws that contradict the PoVAW law should be amended in line with the PoVAW law or repealed. Specifically, provision 2(a) in the Child Law should be amended to reflect that a child is a person who has not yet attained the age of 18 years. The Penal Code should also be amended to reflect consistently throughout that a child is someone under the age of 18.
- ▶ Rape and acts of sexual violence should be defined clearly and consistently. All instances of marital rape should be subsumed into the crime of rape and not be presented as a separate crime. The PoVAW law should make clear that the penalties described therein govern over any inconsistent laws in place before the passage of the PoVAW law.
- ▶ Penal Code provision 312,³¹ which criminalizes abortion in Myanmar and only provides for abortion in cases where it would save the life of the woman, should be amended in line with the PoVAW law.

Sexual & Reproductive Health & Rights

PoVAW Law Must Ensure Effective Access To Abortion

Issues

The PoVAW law aims to increase access to abortion in limited circumstances, yet it problematically permits women in Myanmar to receive abortion services only in limited situations. Namely, a woman can only receive an abortion (1) with the decision of a medical board and (2) in cases where continuing the pregnancy would endanger the woman’s life or affect psychological and physical health, or the pregnancy resulted from rape.³² Additionally, the PoVAW law does not explicitly include abortion as part of the reproductive health services that health care providers can deliver to victims of violence and indicates that such services will be provided in line with an undefined set of stipulations.³³

Standards

Requiring women to obtain additional steps of approval, such as through a medical board, in order to receive an abortion imposes undue delays and hinders their access to medical care.³⁴ Such barriers have been opposed

of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 14 Nov. 2014, ¶55(f).

29 Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Myanmar, CRC/C/MMR/CO/3-4, 14 Mar. 2012, ¶34.

30 UN General Assembly, Situation of human rights in Myanmar, Note by the Secretary General, A/72/382, 8 Sept. 2017, ¶54.

31 Myanmar’s Penal Code Article 312 reads: “Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Explanation-- A woman who causes herself to miscarry is within the meaning of this section.”

32 Article 16 reads: With the approval of the Medical Examination Board, victim of violence shall have the right to abortion services according to any of the following conditions on her own will: a. likely to be dangerous of women's life if being pregnant, or affect psychological and physical health; b. the pregnancy due to rape.

33 See Article 33 and sub-section (b), which reads: The healthcare provider shall provide the following necessary measures to victims in accordance with stipulations though complaint is not lodged at respective police station: b. emergency contraception, and providing the reproductive health services.

34 There is no information regarding the composition and process of the Medical Board in the PoVAW law; however, in some countries, the approval of two doctors is required before a woman is allowed to proceed with an abortion. In these cases, the Royal College of Obstetricians & Gynaecologists (RCOG) has noted, “[T]he current need for two doctors’ signatures to certify that a woman is approved to undergo an abortion is anachronistic. There are no other situations where either

by international entities, including the Committee on Economic, Social and Culture Rights which requires that member States, including Myanmar, “repeal, and refrain from enacting, laws and policies that create barriers in access to sexual and reproductive health services. This includes third-party authorization requirements.”³⁵ The CEDAW Committee has also recommended that member States protect rural women and girls’ right to health care, including by repealing “laws that criminalize or require waiting periods or third-party consent for abortion.”³⁶ The Human Rights Committee has stated that countries should ensure women have “effective access to safe legal abortion” without “prolonged review of complaints about refusals to perform abortions.”³⁷

Additionally, international authorities have highlighted the dangers women face when their access to health services is hindered by administrative barriers. For example, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has highlighted the risks to women seeking to obtain abortion services as a result of “administrative and bureaucratic hurdles.”³⁸

With respect to the provision of abortion services, the Committee on Economic, Social and Culture Rights obliges member States, including Myanmar, to remove barriers to women’s health care and “adopt legal and policy measures ... to guarantee women and girls access to safe abortion services and quality post-abortion care.”³⁹ Further, it has found that the right to health includes sexual and reproductive care, encompassing “legal abortion services, which are available, accessible, acceptable and of good quality.”⁴⁰ Finally, the CEDAW Committee has recommended that States parties protect rural women and girls’ right to health care by providing “access...to safe abortion and high-quality post-abortion care, regardless of whether abortion is legal.”⁴¹

International experts have called for the decriminalization of abortion, and recommend that abortion services be provided at the very least in “cases of incest, rape or fetal impairment or to safeguard the life or health of the woman.”⁴² As a State party to CEDAW, Myanmar has been specifically called upon by the CEDAW Committee to legalize abortion in the cases listed above, but also “to decriminalize abortion in all other cases.”⁴³ The CEDAW Committee has also recommended that States parties “[a]bolish discriminatory criminalization and review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women... [and] “decriminalize forms of behaviour that can be performed only by women, such as abortion.”⁴⁴

Recommendations

- ▶ Remove the requirement of Medical Examination Board approval from the procedures for obtaining sexual and reproductive health services. Decriminalize abortion entirely. At a minimum, expand the exceptions where abortion is permitted to cases of rape, incest, fetal impairment, and where continuance of the pregnancy would involve risk to the mother’s life or injury to mental and physical health.
- ▶ Penal Code provision 312, which criminalizes abortion in Myanmar and only provides for abortion in cases where

competent men or women require permission from two third parties to make a personal healthcare decision.” Royal College of Obstetricians & Gynaecologists, Q&A: Approving abortions (2017), <https://www.rcog.org.uk/en/news/campaigns-and-opinions/human-fertilisation-and-embryology-bill/qa-approving-abortions/>.

35 Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, ¶41. The Committee on Economic, Social and Culture Rights is tasked with monitoring implementation by member states of the International Covenant on Economic, Social and Cultural Rights, which Myanmar ratified on November 6, 2017 with declarations.

36 CEDAW Committee, General recommendation No. 34 (2016) on the rights of rural women, CEDAW/C/GC/34, 7 Mar. 2016, ¶39(c).

37 Human Rights Committee, Concluding observations on the seventh periodic report of Poland, CCPR/C/POL/CO/7, 23 Nov. 2016, ¶24. See also Human Rights Committee, Concluding observations: Zambia, CCPR/C/ZMB/CO/3, 9 Aug. 2007, ¶18. (“[T]he Committee is concerned that the requirement that three physicians must consent to an abortion may constitute a significant obstacle for women wishing to undergo legal and therefore safe abortion. (art. 6”). The Human Rights Committee is responsible for monitoring implementation by member states of the International Covenant on Civil and Political Rights.

38 “The denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment.” Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 Jan. 2016, ¶44 (citing European Court of Human Rights, app. No. 57375/08, P and S v. Poland, judgement of 30 Oct. 2012).

39 Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, ¶28.

40 OHCHR, Information Series on Sexual and Reproductive Health and Rights – Abortion (2015).

41 CEDAW Committee, General recommendation No. 34 (2016) on the rights of rural women, CEDAW/C/GC/34, 7 Mar. 2016, ¶39(a).

42 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 Jan. 2016, ¶43. UN Human Rights Office of the High Commissioner (OHCHR), “Unsafe abortion is still killing tens of thousands women around the world” – UN rights experts warn, 27 Sept. 2016.

43 CEDAW Committee, Concluding Observations on the combined fourth and fifth periodic reports of Myanmar, CEDAW/C/MMR/CO/4-5, 25 July 2016, ¶39(b).

44 CEDAW Committee, General recommendation No. 33 on women’s access to justice, CEDAW/C/GC/33, 3 Aug. 2015, ¶51(l).

it would save the life of the woman, should be amended in line with the PoVAW law.

- ▶ The PoVAW law should explicitly include abortion services as part of the reproductive health services that health care providers can give to victims of violence. It should also specify that the services should be provided “as requested by the victim.” The law should likewise clarify and define the stipulations referenced in Article 33.

Clarifying The Prohibition On Forced Sterilization And Forced Abortion

Issues

The PoVAW law is vague in its prohibitions of forced sterilization and forced abortion.⁴⁵ It is an important distinction to clearly prohibit forced abortion and forced sterilization, to ensure that women who undergo sterilization or abortion for health reasons are not penalized.

Although the PoVAW law specifies punishments for persons convicted of sterilization or abortion in contradiction with the law, it does not specify the forced nature of the crimes or the exclusion of doctors from prosecutions.⁴⁶ To be clear, there should not be a general exemption for doctors who perform forced services, as many may be complicit with or explicitly in charge of such decisions. Rather, there is a concern that the PoVAW law as it stands will be used as a pretext for prosecuting doctors who provide voluntary abortion services in line with Myanmar’s law on abortion.

Standards

It is an act of violence to compel a woman to undergo forced sterilization or forced abortion.⁴⁷ Often women in marginalized groups are those most impacted by these forced practices, particularly women belonging to racial or ethnic minorities, poor women, women with disabilities, and women with HIV.⁴⁸ Additionally, “women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their rights, including through...forced pregnancy and forced sterilization.”⁴⁹ The negative impacts of these forced practices are many, “adversely affect[ing] women's physical and mental health, and infring[ing] the right of women to decide on the number and spacing of their children.”⁵⁰

The Committee on Economic, Social and Cultural Rights has commented on States parties’, including Myanmar’s, obligation to protect, and how “[v]iolations of the obligation to protect occur when a State fails to take effective steps to prevent third parties from undermining the enjoyment of the right to sexual and reproductive health. This includes the failure to prohibit and take measures to prevent all forms of violence and coercion committed by private individuals and entities, including...harmful practices such as...forced sterilization, forced abortion and forced pregnancy.”⁵¹ The CEDAW Committee has also opposed such coercive practices, stating “Decisions to have

45 Article 43(a) reads: A woman shall not be enforced sterilization, abortion or pregnancy under any of the follow-ing conditions: a. by force, coercion or undue influence.

46 Article 49 reads: Whoever is convicted of one of the following offences shall be liable to be sentenced with im-prisonment for a term from a minimum of one (1) year to a maximum of three (3) years: b. sterilization or preg-nancy without consent of a woman. Article 53 reads: Whoever is convicted of one of the following crimes shall be sentenced with imprisonment for a term from a minimum of three (3) years to a maximum of ten (10) years: b. abortion without consent of woman; c. abortion unconformity with the provision of Section 44 (prohibiting sterilization or pregnancy in contradiction to Section 16, which provides victim of violence right to abortion services with approval of Medical Examination Board in the condition that a. being pregnant is likely to be dan-gerous to the woman's life, or affect psychological and physical health; b. the pregnancy is due to rape.).

47 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53, 1 Feb. 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

48 WHO, Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement – OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, 2014, http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf; Open Society Foundations, Against Her Will: Forced and Coerced Sterilization of Women Worldwide, <https://www.opensocietyfoundations.org/sites/default/files/against-her-will-20111003.pdf>; Special Rapporteur on the Right to Health, Mental Disability and the Right to Health, E/CN.4/2005/51, 11 Feb. 2005, ¶9, 12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/108/93/PDF/G0510893.pdf?OpenElement>.

49 Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, ¶30.

50 CEDAW Committee, General Recommendation No. 19 Violence against women, 11th session, 1992, ¶22, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

51 Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, ¶59. Notably, the Rome Statute has incorporated “enforced sterilization” and “forced pregnancy” in its definition of crimes against humanity, when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Enforced sterilization is defined as conduct that “deprive[s] one or more persons of biological reproductive capacity” and “was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genu-ine consent.” The crime of forced pregnancy

children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government.”⁵²

States parties to CEDAW, including Myanmar, must ensure that women’s access to health care services is free of discrimination.⁵³ Myanmar’s Penal Code, which criminalizes the provision of abortion, obstructs women’s right to non-discriminatory access to health care services. As the CEDAW Committee has stated, “laws that criminalize medical procedures only needed by women” constitute a “barrier[] to women’s access to appropriate health care.”⁵⁴ Similarly, laws preventing doctors from providing abortions, in this case by making them subject to prosecution, impede women’s protected rights by limiting their access to abortion services. The CEDAW Committee has recommended States parties “[c]losely monitor sentencing procedures and eliminate any discrimination against women in the penalties provided for particular crimes...”⁵⁵

Recommendations

- ▶ The law should be clear in its prohibition and in the corresponding penalties for forced sterilization and forced abortion. Forced sterilization and forced abortion should be defined as acts of sexual violence in Chapter 1.
- ▶ Clarify that all medical decisions, to the extent possible, should require express authorization by the victim. Additionally, it must be made clear that the subject of the law, the one to be held responsible under it, is the perpetrator – the person who forced another to undergo sterilization or abortion – and not the victim or the service provider.
- ▶ Penal Code provisions 312 and 313,⁵⁶ which imposes penalties on women and doctors, should be repealed or amended in line with the PoVAW law.

Funding For Victims Of Sexual Violence

Issues

The PoVAW law calls for the creation of a fund for the prevention of violence against women, but it does not specifically account for the different types of services that will be provided to victims of violence. The law should ensure the provision of essential services, including healthcare, legal, justice, and social services to victims of violence, along with clear roles, responsibilities, timing, and budget requirements for service providers in order to ensure availability and accessibility of services. In particular, the law should include provisions for funding sexual and reproductive health services, including abortion, for victims of sexual violence.

Standards

Victims of sexual violence are entitled to recourse under international standards.⁵⁷ The CEDAW Committee’s General Recommendation 35 states that reparations should be provided for victims of gender-based violence, including “the provision of legal, social and health services including sexual, reproductive and mental health for a complete recovery.”⁵⁸ This includes establishing legal frameworks and legislation protecting “women and girls,

is described as a “perpetrator confin[ing] one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” Rome Statute of the ICC, A/CONF.183/9, 17 July 1998, art. 7(1). (g), https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/o/Rome_Statute_English.pdf.

52 CEDAW Committee, General recommendation No. 21: Equality in Marriage and Family Relations (1994), ¶22.

53 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, art. 12, <http://www.refworld.org/docid/3ae6b3970.html>.

54 CEDAW Committee, General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, 1999, chap. I, ¶14, <http://www.refworld.org/docid/453882a73.html>.

55 CEDAW Committee, General recommendation No. 33 on women’s access to justice, CEDAW/C/GC/33, 3 Aug. 2015, ¶51(m).

56 Myanmar’s Penal Code Article 313 reads: “Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

57 Report of the Special Rapporteur on violence against women, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/14/22, 19 April 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22_AEV.pdf. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Para”, art. 7(g), <http://www.oas.org/juridico/english/treaties/a-61.html>.

58 CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017, ¶46.

who become pregnant as a result of rape, with the choice of safe and legal abortion.”⁵⁹ In developing reparation programs, international standards call for considering gender differences and the specific harms women and girls may face, “including forced abortions, sterilization or impregnations.”⁶⁰ These measures must not forget to account for the “needs of children born out of rape.”⁶¹ The CEDAW Committee also recommends States parties such as Myanmar “[c]reate women-specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation.”⁶² Further, Myanmar should pay particular attention to the health care needs of rural women and girls “and ensure...the adequate financing of health-care systems in rural areas, in particular with regard to sexual and reproductive health and rights.”⁶³

Recommendations

- ▶ Add a specific provision to the law providing for government funding of health care services, including abortion services, for victims of sexual violence.
- ▶ The law should provide time-bound commitments for the creation and implementation of the fund for the prevention of violence against women, as well as funding guarantees.
- ▶ The law should specify that the Ministry of Social Welfare, Relief and Resettlement of the Union Government is responsible for funding the measures detailed within this law. This includes, but is not limited to, allocating appropriate resources for the services detailed in the law, including resources to support capacity-building of related service providers, and gender expertise and training for all responsible persons for protection of victims.

Conflict-Related Sexual Violence & Military Accountability

Barriers To Accountability For Crimes Committed By Military Actors & In Conflict

Issues

Violence against women occurs in both peacetime and conflict, and the law should address instances of sexual and gender-based violence in both. All perpetrators of violence in conflict, including the military, police, and other state security forces, must be tried in civilian courts. Despite clear calls from the international community to bring the military under civilian jurisdiction, Myanmar has failed to do so.⁶⁴ This is particularly egregious in the context of sexual violence where impunity has been the rule rather than the exception.⁶⁵ Myanmar’s Constitution exempts military personnel from legal process in civilian courts, adding to a culture of impunity.⁶⁶ The Commander-in-Chief of the military is exempt from all legal constraints within Myanmar and has the sole right to administer and adjudicate all affairs of the Defence Services, with his decisions being “final and conclusive.”⁶⁷ Additionally, the President also has the power to grant amnesty “in accord with the recommendations of the National Defense and Security Council,” which is under the control of the military.⁶⁸ As one expert told the Independent International Fact-Finding Mission on Myanmar (IFFM) with regard to military prosecutions of sexual violence, “When cases are tried by a military court, the charges are often not what is expected because the

59 Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, June 2014, p. 20, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

60 Report of the Special Rapporteur on violence against women, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/14/22, 19 April 2010, ¶44, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22_AEV.pdf.

61 Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, June 2014, p. 13, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

62 CEDAW Committee, General recommendation No. 33 on women’s access to justice, CEDAW/C/GC/33, 3 Aug. 2015, ¶19(d).

63 CEDAW Committee, General recommendation No. 34 (2016) on the rights of rural women, CEDAW/C/GC/34, 7 Mar. 2016, ¶39(b).

64 Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/31/71, 18 Mar. 2016, ¶49; UN General Assembly, Situation of human rights in Myanmar Note by the Secretary General, Report of the Special Rapporteur on the situation of human rights in Myanmar, A/70/412, 6 Oct. 2015, ¶50-51.

65 Global Justice Center & Leitner Center, Joint Submission to the UN Human Rights Council Universal Periodic Review 23rd Session – Myanmar (Nov. 2015), at 4-6.

66 Constitution of the Republic of the Union of Myanmar (2008) [hereinafter “Constitution”] at art. 343, 445. See also Women’s League of Burma, Same Impunity, Same Patterns (Jan. 2014), at 30-31.

67 Constitution at ch. I, art. 20(b-c) and ch. VII, art. 343(b).

68 Constitution at art. 204(b). See also Global Justice Center, Structural Barriers To Accountability For Human Rights Abuses In Burma (Oct. 2018), <https://www.globaljusticecenter.net/files/Structural-Barriers---Burma.pdf>.

military code is different. For example, in a case of sexual violence, there is no such charge, so a perpetrator was sentenced instead for intoxication during official duty and got a lighter sentence. Sometimes lawyers are allowed to go to military hearings but mostly we are not, we just get informed of the outcome, we never get a written copy, we are just told orally. We also never know whether or not the rulings are implemented.”⁶⁹

Notably, the PoVAW law does not explicitly include military crimes in the offenses covered by and punishable under the law. Additionally, the terminology used in the PoVAW law for military actors is not wholly inclusive of other common terms used in existing laws, including “defence services” in the Defence Services Act of 1959. As a result, the term “armed force” in the PoVAW law could be a troubling pretext to only enforce this provision against ethnic armed actors.⁷⁰ Thus, the PoVAW law must be amended to more clearly account for crimes perpetrated by military actors.

Standards

Rape and sexual violence are never legitimate tactics of warfare, and perpetrators need to be held accountable in civilian courts for their crimes. Greater accountability – including through laws such as this one – is required to bring justice to victims of sexual violence in conflict. As measures of preventing human rights violations, the UN General Assembly has noted the importance of “ensuring effective civilian control of military and security forces” and “strengthening the independence of the judiciary.”⁷¹ International bodies have called upon Myanmar to eliminate provisions immunizing members of the military from prosecution.⁷² The Special Rapporteur on the situation of human rights in Myanmar has specifically noted concerns over the lack of civilian control over the military, and has called on the country to make certain “the cases of members of the military who perpetrate serious crimes against civilians are systematically transferred to civilian courts.”⁷³ The Special Rapporteur has also called on Myanmar to ensure that the PoVAW law “include provisions against rape and other forms of sexual violence committed by the military,⁷⁴ police and uniformed personnel in conflict...and provide for adequate penal sanctions, including against the military” and to ensure that “cases of conflict-related sexual violence committed by the military are heard in civilian courts.”⁷⁵

With respect to accountability and amnesties, the CEDAW Committee has called for member States, including Myanmar, to “combat impunity” and “[e]nsure that support for reconciliation processes do not result in blanket amnesties for any human rights violations, especially sexual violence against women and girls.”⁷⁶ The UN Security Council’s Resolution 1325 also “[e]mphasizes the responsibility of all States to put an end to impunity...including those [crimes] relating to sexual and other violence against women and girls” and to prohibit amnesties.⁷⁷

It is a principle of customary international humanitarian law (IHL), seen in the Geneva Conventions governing the conduct of armed conflict, that a state is responsible for violations of IHL perpetrated by any of its constituent parts, including the military.⁷⁸ While this is a specific legal framework that only applies during times of conflict, the principles of international human rights law, including those obligations outlined above, continue to apply to

69 Human Rights Council, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, A/HRC/42/CRP.4, 22 Aug. 2019, ¶233.

70 For example, in Article 3(g)(iii) in defining consent, there is reference to “member of the armed forces” - in particular, consent is deemed not to be given for the assailant who is a member of the armed forces.

71 Resolution adopted by the General Assembly on 16 December 2005, 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, A/Res/60/147, 21 Mar. 2006, ¶23(a),(c), <https://undocs.org/A/RES/60/147>.

72 Report of Secretary-General on conflict-related sexual violence, S/2017/249, 15 April 2017, ¶53 (referencing CEDAW Committee from 2016).

73 Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/34/67, 14 March 2017, ¶18, p. 23, <https://undocs.org/A/HRC/34/67>.

74 Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/31/71, 18 Mar. 2016, ¶47.

75 Report of the Special Rapporteur on the situation of human rights in Myanmar, A/72/382, 8 Sept. 2017, ¶54.

76 CEDAW Committee, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 18 Oct. 2013, ¶81(c).

77 UN Security Council, Resolution 1325 (2000), S/RES/1325 (2000), 31 Oct. 2000, ¶11, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>.

78 International Committee of the Red Cross (ICRC), Customary IHL: Rule 149. Responsibility for violations of International Humanitarian Law, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule149. See also Convention (I) on Wounded and Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949, art. 51; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949, art. 52; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, art. 131; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, art. 148. The four Geneva Conventions, as well as the Additional Protocols, enshrine the principles of the laws of war “that regulates the conduct of armed conflict and seeks to limit its effects.” ICRC, The Geneva Conventions of 1949 and their Additional Protocols, 1 Jan. 2014, <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

states during times of conflict and non-conflict.⁷⁹ Thus, members of the military should be held accountable for crimes of sexual violence, even those perpetrated during times of conflict.

Recommendations

- ▶ The PoVAW law must grant civilian courts jurisdiction over military perpetrators in all contexts and specify that military crimes of sexual and gender-based violence will be prosecuted in civilian courts, whether or not the crime took place during conflict. Furthermore, the law should be clear that any actors who commit crimes in the context of conflict, including police and border guards, in addition to the military, will be prosecuted under the PoVAW law.
- ▶ Reconcile civilian jurisdiction over crimes committed in conflict and/or by military actors with Defence Services Act, 1959, Article 71, so that any person who has committed a crime under the ambit of the PoVAW law is tried in a civilian court rather than a court-martial. Additionally, the exemption of military personnel from accountability in Article 72 of the Defence Services Act who commits “offences a) while on active service, or b) at any place outside the Union of Myanmar, or c) at a frontier post specified by the President by notification in this behalf” should be repealed.
- ▶ The law should include a definition of conflict-related sexual violence. Myanmar must separately domesticate all acts of sexual violence that may constitute international crimes, including crimes against humanity, war crimes and genocide.
- ▶ Amend the Constitution to bring the military and security forces under civilian oversight and repeal provisions granting military actors impunity for human rights abuses, including Article 445.

IV. Conclusion

The Government of Myanmar should make every effort to pass the PoVAW law expeditiously and with, at a minimum, the recommendations included herein. Women’s civil society who have long pushed for the passage of this law must be meaningfully consulted and their concerns must be addressed as a priority.

The passage of the law is an important first step; however, for it to be effective, it must be accompanied by additional measures to ensure justice for all women. This includes, for example, the resolution of any conflicts between the provisions of the PoVAW law and any contradictory laws already in place, including the Penal Code, the Criminal Code, and the Constitution, and the adequate financing of and time-bound commitments for the implementation of the law. Additionally, any domestic accountability efforts for perpetrators of sexual and gender-based violence, including military actors, must meet international standards. With the passage of this law, Myanmar can set a regional and international model for a comprehensive violence against women law. In order for it to be legitimate and deliver on its promises, the law must be founded on human rights principles, be victim-centered, and ensure women’s rights including the right to justice, the right to redress and reparations, and the right to be free from violence.

⁷⁹ ICRC, IHL and human rights law – Overview (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm>.