

# **Domestic Criminal Laws that Conflict with International Law**

## **Burma's Abortion and Rape Laws: a Case Study**

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Human Rights Through the Rule of Law

## Introduction

International law provides a model to improve often outdated domestic laws.

Burma is party to many treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Genocide Convention and the Geneva Conventions. International law requires states to comply with their treaty obligations in “good faith” regardless of whether domestic laws conflict with the treaty. These obligations often include requirements that states modify their domestic laws to ensure compliance with international human rights and humanitarian standards and obligations. For example, the Genocide and Geneva Conventions, ratified by Burma, both require as a part of their fundamental mandates that states pass domestic laws to comply with their treaty obligations. Burma currently has no domestic laws implementing any of its human rights treaty obligations, with the possible exception of its laws against human trafficking.

This document examines Burma’s domestic criminal laws addressing abortion and rape and compares them with the international law standards binding on Burma. These case studies are examples of how international law can be used to reform of Burma’s domestic law to comport with international human rights and humanitarian standards.

# The Crime of Rape: Burma's Domestic Law Compared with International Law

Burma's current rape law was codified in its 1860 penal code.<sup>1</sup> It violates international standards and laws in several ways: (1) it is not gender-neutral; (2) it denies women equality under law; and (3) fails to ensure rape victims full rights to accountability and reparations. The inadequacy of Burma's rape law leaves a considerable number of rape victims without legal recourse and reparations.

## Burma's Domestic Rape Law Violates International Standards

Table 1. Burma's domestic rape law versus the Rome Statute of the International Criminal Court definition of rape

| <u>Burma Penal Code</u>   | <u>Rome Statute – Elements of Crimes</u>   |
|---|--|
| <p><b>A man</b> is said to commit “rape” who, except in the case hereinafter excepted, <b>has sexual intercourse with a woman</b> under circumstances falling under any of the five following descriptions :--</p> <p><i>First.</i>—Against her will.</p> <p><i>Second.</i>—<b>Without her consent.</b></p> <p><i>Thirdly.</i>—With her consent, when her consent has been obtained by putting her in fear of death or of hurt.</p> <p><i>Fourthly.</i>—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.</p> <p><i>Fifthly.</i>—<b>Penetration is sufficient enough to constitute the sexual intercourse necessary to the offence or rape.</b></p> <p><i>Explanation.</i>—<b>Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.</b></p> | <ol style="list-style-type: none"> <li>1. <b>The perpetrator invaded the body of a person</b> by conduct resulting in <b>penetration, however slight</b>, 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.</li> <li>2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or <b>by taking advantage of a coercive environment</b>, or the invasion was committed against a person incapable of giving genuine consent.</li> </ol> |

**First, under Burma's penal code**, the crime of rape can only be committed by a **man against a woman**. In contrast, the explanation accompanying the Rome Statute of the International Criminal Court (“International Criminal Court Statute”),<sup>2</sup> which provides a comprehensive definition of rape<sup>3</sup>: it is “gender-neutral” and utilizes the gender-neutral term “perpetrator,”<sup>4</sup> instead of “a man.” Therefore, under international law, rape can be committed by a man against a woman, by a woman against a man, or a woman against a woman (command responsibility in a war context, for example).

**Second, under Burma's penal code**, the crime of rape is limited to **sexual intercourse** between a man and a woman, with penetration "being sufficient to constitute the sexual intercourse." Because no definition of "sexual intercourse" is given, the traditional definition of sexual intercourse - penetration by the penis of the vagina - applies.<sup>5</sup> In contrast, under the definition in the International Criminal Court Statute, rape includes a broad range of sexual acts. This includes, for example, penetration of any part of the body, such as the ears, mouth or anus by a sexual organ, such as a penis or penetration by a foreign object, such as a knife or stick, in the anal or vaginal opening. By utilizing a broad range of acts that can be prosecuted under the rape statute, the definition under international law offers the potential to fully address the crime, including rape with body parts other than a penis or foreign objects.

**Third, under Burma's penal code**, the female victim is forced to prove that she did not consent to the rape. While such laws are common, they are contrary to international standards. Under international standards, the element of "consent" is flexible and takes into account "contexts of power and culture that affect a woman's ability to express or otherwise assert her will, as well as the inherent inequality in male-female dynamics that can render the issue of consent almost meaningless."<sup>6</sup> For example, during armed conflict or other coercive situations, a woman is presumed not to have consented. The International Criminal Court Statute definition (1) eliminates the requirement of consent, and (2) provides explicitly for coercive environments.<sup>7</sup> (For a discussion of the impact of the consent requirement when prosecuting rape as an international crime, see section *infra* "Burma's Domestic Definition of Rape as Applied to Armed Conflict.")

**Fourth, Burma's penal code** explicitly exempts marital rape from the definition of the crime of rape. The failure to criminalize marital rape is contrary to Burma's obligations under international law, including under the Convention on the Elimination of Discrimination against Women (CEDAW). In fact, the CEDAW Committee, which monitors compliance with the treaty, **has specifically recommended that Burma take steps to "ensure that marital rape constitutes a criminal offense."**<sup>8</sup> Burma's failure to make marital rape a crime violates Burma's binding obligations under the Convention.

### **Burma's Domestic Definition of Rape as Applied to Armed Conflict**

Since the early 1990s, UN bodies and numerous human rights groups have documented systematic sexualized violence perpetrated by the Burmese military, particularly against women in Burma's ethnic groups. While the discussion above addressed rape in a domestic context, it is also important to consider the impact of Burma's domestic rape law with respect to conflict-related rape.

Rape in conflict violates international humanitarian law; it can be a war crime, a crime against humanity and/or an act of torture. Accordingly, under international humanitarian law, states have absolute duties to prosecute, extradite, or surrender for the purpose of prosecution, those individuals present in their territory who are accused of violations constituting "grave breaches" of

***"Rape is used in my country as a weapon against those who only want to live in peace, who only want to assert their basic human rights, especially in the areas of the ethnic nationalities. Rape is rife. It is used as a weapon by the armed forces to intimidate the ethnic nationalities and to divide our country."***

- Daw Aung San Suu Kyi, May 2011

the four Geneva Conventions of 1949, **which includes rape**. States must also prosecute, extradite or surrender those accused of violating the Convention on the Prevention and Punishment of the Crime of Genocide, under which rape can be a constitutive act of genocide. Furthermore, Security Council Resolutions 1325, 1820, and 1960 enhance the duty of all UN member states to ensure accountability for conflict-related sexual violence, including rape.<sup>9</sup>

***Information, including that noted by the United Nations, points to widespread perpetration of rape by Government armed forces (Tatmadaw Kyi) in militarized ethnic border areas.***

- Report of the UN Secretary General on conflict related sexual violence, Jan. 2012

As an integral part of the obligation to prosecute under international law, states must enact legislation that allows for the effective prosecution of these crimes.<sup>10</sup> In this context, both the Burma penal code provision on rape and the provision of the Myanmar Defense Service Act that relates to rape are relevant. The Defense Service Act provides, in pertinent part, “[a]ny person subject to this law who commits an offence . . . of rape in relation to [any person not subject to military law] shall not be deemed to be guilty of an offence against this act and shall not be tried by a court-martial unless he commits any of the said offences . . . while in active service.”<sup>11</sup>

While this law creates a mode of liability for perpetrators of rape in conflict by armed forces in Burma, it is also severely limited. Because the Defense Service Act does not include a definition of rape, the definition in the domestic penal code controls. The inadequacy of the domestic penal code definition of rape is exacerbated in the context of armed conflict.

In particular, while the non-consent provision is problematic under domestic law (see discussion *supra*), it poses special problems within the context of the prosecution of rape as a war crime, crime against humanity, or constitutive act of genocide. First, within the context of conflict, nearly all acts of rape will have been “committed under (threat of force), coercion or coercive circumstances, and the issue of consent becomes redundant.”<sup>12</sup> Second, consent is not an element of any other international crimes “inflicting bodily or mental harm . . . such as torture or enslavement” due to the recognition of the coercive environment of conflict. Furthermore, utilizing consent as a requirement during conflict could mean by extension that a person has the ability to consent to genocide or war crimes committed against them.

The Iraqi High Tribunal (“IHT”) is a model for action in Burma. The IHT is a domestic court established to prosecute those Iraqi nationals suspected of committing war crimes, crimes against humanity and genocide between 1968 and 2003. Iraq, like Burma, is not a party to the ICC. However, the statute of the IHT, which set forth its jurisdiction, was modeled on the ICC Statute, incorporating its definitions of crimes as the basis for the judges on the IHT to use. The IHT statute includes the definition of rape to be utilized by the court, which mirrors the definition from the ICC.<sup>13</sup> Thus, for the first time, Iraqi judges were required to use international law to prosecute crimes, including the international definition of rape. This is significant because, like Burma, the Iraqi penal code is radically different and less comprehensive than the international definition of rape. The IHT was able to use this definition to prosecute and convict military officers for both rape as a war crime and as an element of genocide.<sup>14</sup>

The Global Justice Center, at the request of the judges on the IHT, conducted trainings on how to prosecute rape and other sexual crimes under international law. An excerpt of the training memo on the testimony and evidence necessary can be found in Annex 2 to this document.

Burma is one of the many countries that must change their domestic rape laws to comply with international human rights standards. The United States recently recognized that its rape law was outdated and changed its law in January 2012 to closely mirror the ICC elements of rape.<sup>15</sup> The United States did this even though, like Burma, it is not a party to the ICC.

Steps by Burma to update its domestic rape law, as well as implement those standards that pertain to the prosecution of rape as a war crime under the Geneva Conventions, could be used to protect a broader spectrum of rape victims and expand the rights of women in Burma. Furthermore, Burma must recognize its current inability to prosecute for war rape domestically, both due to the Constitutional amnesty provision and the inadequacy of the domestic rape statute. If the new Burmese government is sincerely committed to transitioning to democracy, as it asserts, it should ratify the Rome Statute of the International Criminal Court and grant the court retroactive jurisdiction over crimes in Burma dating back to July 1, 2002, the date of the entry into force of the statute.<sup>16</sup> Such a step would demonstrate the commitment of Burma's nascent civilian government to implement and ensure human rights within its borders.

## **Abortion under Burma's Penal Code is Improperly Interpreted by Burma and is Contrary to International Law**

Abortion is illegal in Burma under its 1860 Penal Code, unless performed to save the life of a woman. It carries criminal and civil penalties for both the woman and the person performing the abortion.<sup>17</sup> Although the 1860 law contains an exception to allow for abortions to save the life of the woman, Burma does not correctly interpret the “to save the life” exception. This results in less women in Burma having access to safe, legal abortion services.

When Burma became independent from Great Britain in 1947, all British laws, including the penal codes, remained in place until and unless modified by Burma's parliament. Under the Adaptation of Laws Order, these laws must be interpreted as they stood when incorporated into Burmese law in 1947.<sup>18</sup>

***There is virtually no access to safe and legal abortion in Burma. There are mixed reports of abortion practices and prevalence in Burma; however organizations and individuals report that unsafe abortion is common.***

***Methods of unsafe abortion include abdominal massage, consumption of malaria medications, insertion of a packet of plants into the vagina, use of “traditional” medicines, and insertion of a stick, fishing hook, or other instrument into the vagina.***

- **Ibis Reproductive Health, Separated by Borders, United In Need**

In this regard, the English case *Rex. v. Bourne* is essential to interpreting the meaning of the “save the life of a woman” clause in Burma's penal code on abortion. *Bourne*, which was decided in 1938,<sup>19</sup> determined the extent of the life exception to the abortion law under English law and **allowed for abortion to save the physical or mental health of the woman as a part of the “to save the life of the woman” exception.** The case has been held to apply to other the interpretations of the penal codes of other former British colonies and Commonwealth countries, including Australia, Zambia and Fiji. The 1860 Burma Penal Code was put in place while under British rule and the abortion provision is nearly identical to the English law in question in *Bourne*.<sup>20</sup>

Therefore, at the time the 1860 Burma Penal Code was incorporated into the law of independent Burma in 1947, the abortion law encompassed not only the strict language of the statute, but also any applicable jurisprudence interpreting the statute, including *Bourne*.<sup>21</sup> The law, as properly interpreted under the *Bourne* standard, allows for abortions to save the life of the woman, which includes preserving the physical and mental health of the woman.

Furthermore, Burma is a party to several international treaties that come to bear on the issue of abortion, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Geneva Conventions.

### **Convention on the Elimination of All Forms of Discrimination against Women**

The CEDAW Committee has found that the denial of abortion services is discriminatory under CEDAW. Specifically, CEDAW General Recommendation 24 on women and health provides that: (1) “[i]t is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women”; and (2) that “[t]he obligation to respect rights requires



States parties to refrain from obstructing action taken by women in pursuit of their health goals... include[ing] laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”<sup>22</sup>

Table 2. Burma’s domestic abortion law versus CEDAW

| <u>Burma Penal Code</u>   | <u>CEDAW</u>  |
|---|---|
| 312 - “Whoever voluntarily causes <b>a woman with child</b> to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, <b>be punished with imprisonment</b> of either description for a term which may extend to three years, or with fine, or with both; and, if the <b>woman be quick with child, shall be punished with imprisonment</b> of either description for a term which may extend to seven years, and shall also be liable to fine.” | “Barriers to women's access to appropriate health care <b>include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.</b> ” |

States that have ratified CEDAW **must provide access to reproductive health services for women**, including services like family planning, emergency contraception, and abortion. States that do not provide such access are discriminating against women in violation of the Convention.

Burma’s government has admitted that abortion is a major cause of maternal mortality in the country. In Burma’s initial report to the CEDAW Committee, it stated, “abortion is a major cause of maternal death.”<sup>23</sup> In 2011 the maternal mortality rate in Burma was 240/100,000 live births.<sup>24</sup> In contrast, countries such as Japan and Finland, where the abortion law is liberal, have comparatively low maternal mortality rates. In both of those countries the maternal mortality rate is 5/100,000.<sup>25</sup>

**Burma’s restrictive abortion law has also raised concern from the CEDAW Committee.** In 2000, the Committee expressed concern that “there is no information on a woman’s right to terminate a pregnancy resulting from sexual violence.”<sup>26</sup> The Committee requested that the Myanmar Government, in its next report include “more information on sexual violence and pregnancies resulting from rape and the services that are available to the victims.”<sup>27</sup>

In its subsequent 2007 report, the Government provided the following information to the Committee: “[i]n accordance with the Law and Myanmar culture, if Myanmar woman become pregnant from rape, the perpetrator will be prosecuted under Article 376 of the Penal Code of Myanmar. However, Myanmar women usually refrain from carrying out abortion but give birth to a child.”<sup>28</sup> The report from the Government was both unresponsive to the question posed by the CEDAW Committee and actually admitted that the Myanmar government enforces the criminal prohibition on abortion, even for women who become pregnant as a result of rape.

**The Burmese Government’s position is contrary to its obligations under CEDAW.** In cases involving abortion laws that are unduly restrictive, including laws with no rape exception<sup>29</sup> or in countries where abortion is a leading cause of maternal mortality,<sup>30</sup> the CEDAW Committee has specifically recommended that these countries change their abortion laws because they violate



CEDAW. The Committee's position is best characterized by the Colombian Constitutional Court, which in interpreting CEDAW with respect to its domestic abortion law, found that:

CEDAW has emphasized that laws criminalizing medical interventions that specifically affect women constitute a barrier to women's access to needed medical care, compromising women's right to gender equality in the area of health, and **amounting to a violation of states' international obligations to respect those internationally recognized rights.**<sup>31</sup>

### **The Geneva Conventions**

As discussed above, rape as a component of the conflict in Burma is pervasive, and currently continues against its ethnic populations by the military. In the case of women raped as a part of the conflict in Burma, including by the military, the local penal code does not apply. Instead, the right to abortion must be considered under international humanitarian law, which supersedes domestic laws during times of conflict.<sup>32</sup>

Girls and women who are raped as a part of the conflict in Burma are "wounded and sick" under the Geneva Conventions and **are entitled to medical care as defined by international humanitarian law, not domestic law or domestic abortion laws.**

The Geneva Conventions and customary international law provide that girls and women impregnated by rape in armed conflict are entitled to complete, non-discriminatory medical care, including abortions.<sup>33</sup> This means that even though Burma's domestic penal code on abortion does not include an exception for rape, girls and women raped and impregnated as a part of the conflict in Burma have the right to an abortion.

To further protect these rights, international humanitarian law protects doctors treating war victims and following the rules of medical ethics from prosecution under any domestic penal code,<sup>34</sup> including laws prohibiting abortion. This means that doctors providing abortion services in Burma to women who are protected under humanitarian law as the "wounded and sick" cannot be prosecuted under the domestic abortion law.

Burmese girls and women raped as a part of the conflict are also protected by international laws on torture. The laws on torture apply to rape victims in conflict in two ways. First, rape in war has been deemed to violate the humanitarian law prohibitions on torture by international criminal tribunals, including those for Rwanda and the former Yugoslavia. Accordingly, girls and women raped in armed conflict, as victims of torture, are entitled to full rehabilitative medical care that is guided solely by medical ethics,<sup>35</sup> including access to

***Women who are raped and impregnated in situations of armed conflict have increased rates of maternal mortality and risk of resorting to unsafe methods of abortion. States have an obligation to provide non-discriminatory medical care to the wounded and sick under Common Article 3 of the Geneva Conventions, Additional Protocols I and II, and customary international law.***

***Consequently, the denial of the full range of medically appropriate care to victims of rape in situations of armed conflict constitutes a violation of their rights under applicable international law.***

- Norad, Sexual Violence in Conflict and the Role of the Health Sector (Nov. 2011)

safe abortion services. Second, international bodies have held that state laws denying abortions for victims of rape or whose lives are at stake violate the prohibitions on torture or cruel, inhuman or degrading treatment under the Convention against Torture and the International Covenant on Civil and Political Rights.<sup>36</sup> While not binding, these interpretations help define the prohibition on torture in international law.

Although Burma is not a party to either of those treaties, this international law applies to Burma, because the prohibition on torture is now customary international law, meaning it applies to all states, regardless of whether they have signed a treaty.

Burma, as a state party to the Geneva Conventions, is required to take steps to implement its obligations, including the obligation to provide non-discriminatory medical care to rape victims. This means that the Government must ensure that girls and women raped in the context of armed conflict, such as is occurring in the ethnic areas, are entitled to legal abortions under the medical care requirements of the Geneva Conventions and customary international law. The Government must also ensure that such non-discriminatory medical care is actually being provided to war rape victims in Burma.

## Conclusion

Burma's rape and abortion laws are derived from its 1860 penal code and have remained unchanged. These laws are outdated and do not comport with modern international human rights and humanitarian laws and standards. However, due to the rapid advances in international law and the specific obligations under international law, Burma's responsibility to modify its laws to comport with international law and human rights standards has increased. Such changes would help signal the civilian government's commitment to human rights and rapidly expand the protections and rights due to girls and women in Burma.

## Endnotes

<sup>1</sup> BURMA PEN. CODE §375 (1860).

<sup>2</sup> While Burma is not a party to the International Criminal Court, the definition employed by the court is considered to be definitive under international law (see fn. 3 *infra*) and has been used as a model by states to modify their domestic rape laws. For example the United States, who is also not a party to the Rome Statute modified their rape law in 2012 and the language closely mirrors that of the Rome Statute (“The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person”). United States Department of Justice, *Press Release: Attorney General Eric Holder Announces Revisions to the Uniform Crime Report’s Definition of Rape*, Jan. 6, 2012, available at <http://www.justice.gov/opa/pr/2012/January/12-ag-018.html>.

<sup>3</sup> The definition of rape that was included in the Rome Statute was the result of extensive debates and negotiations during the Preparatory Commission for the ICC, which looked to both international jurisprudence on rape, including from the tribunals for Rwanda and Yugoslavia, as well as domestic laws, to come to a mutually agreeable definition for the Rome Statute. ANNE-MARIE L.M. DE BROUWER, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR* 130 at fn. 205 (Intersentia) (2005). Furthermore, “[t]he ICC definition of rape...encompasses all possible forms of rape and should therefore be considered the leading definition of rape in supranational criminal law. DE BROUWER at 133.

<sup>4</sup> Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Elements of Crimes at 8 & 28, First Session, New York, (Sept. 3-10, 2002).

<sup>5</sup> Merriam-Webster Dictionary Online, available at <http://www.merriam-webster.com/dictionary/sexual%20intercourse>.

<sup>6</sup> K. Alexa Koenig, Ryan Lincoln and Lauren Groth, *The Jurisprudence of Sexual Violence* 45 (Sexual Violence & Accountability Project, Working Paper, May 2011), available at [http://www.law.berkeley.edu/HRCweb/pdfs/SVA\\_Jurisprudence.pdf](http://www.law.berkeley.edu/HRCweb/pdfs/SVA_Jurisprudence.pdf).

<sup>7</sup> It should be acknowledged here that the type of coercive environments envisaged by the Rome Statute’s Elements of Crimes are those which pertain to war or situations of widespread and systematic abuses of human rights, but a general extrapolation of that principle would allow for it to be expanded in domestic contexts to those situations where inequality and power dynamics significantly impact a woman’s ability to not consent to sexual activity.

<sup>8</sup> CEDAW Committee, Concluding Observations: Myanmar, ¶47, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

<sup>9</sup> S.C. Res. 1325, OP 11, U.N. Doc. S/RES/1325 (Oct. 31, 2000); S.C. Res. 1820, OP 4, U.N. Doc. S/RES/1820 (Jun. 19, 2008); S.C. Res. 1960, PR 6, U.N. Doc. S/RES/1960 (Dec. 16, 2010).

<sup>10</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 and UN General Assembly, Convention on the Prevention and Punishment of Genocide art. 5, U.N. Doc. A/RES/260 (Dec. 9, 1948).

<sup>11</sup> MYANMAR DEFENSE SERVICES ACT §72 (1959).

<sup>12</sup> DE BROUWER, *supra* note 3, at 120.

<sup>13</sup> Global Justice Center, *The Anfal Decision: Breaking New Ground for Women’s Rights in Iraq*, available at [http://www.globaljusticecenter.net/media/Anfal\\_White\\_Paper-FINAL.pdf](http://www.globaljusticecenter.net/media/Anfal_White_Paper-FINAL.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> United States Department of Justice, *supra* note 2.

<sup>16</sup> Even though this would not cover all of the crimes committed during the conflict in Burma, which started in 1962, it would be a step in the right direction.

<sup>17</sup> BURMA PEN. CODE, *supra* note 1, §312.

<sup>18</sup> John Southalan, *Burma and the common law? An Uncommon Question*, available at <http://www.thailawforum.com/articles/john-southalan.html> (“During the first 15 years of the country's independence, the courts in Burma referred to common law concepts and decisions of the Privy Council and other courts. Burma's courts granted various remedies like certiorari, mandamus, and habeas corpus (against preventative detention). These were common law concepts, certainly, but the actual source of much of this law was from the Burma Code rather than directly from the common law.”). *See also* MAUNG MAUNG KYI, *A NEW APPROACH TO LAW AND LIFE IN BURMA* 64 (Mar. 1968) (“The Union of Burma (Adaptation of Laws Order, 1948 aims at giving effect in continuity to the laws as they stood before the date of Independence subject to such adaptations and modifications as appear to the Government to be necessary or expedient with due regard to the provisions of the Constitution.”).

<sup>19</sup> *R v. Bourne*, (1938) 3 Eng. Rep. 615 (K.B.).

<sup>20</sup> Rebecca Cook and Bernard M. Dickens, *Abortion Laws in Commonwealth Countries* at 7, available at <http://apps.who.int/iris/bitstream/10665/40078/1/9241693037.pdf> (“The essence of these prohibitory provisions [of the English 1861 Offences against the Person Act] appears to provide the basis of Commonwealth abortion law.”).

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- <sup>21</sup> This is not implicated by the provision in the 1974 constitution that prohibited looking at foreign law, because at the time it was incorporated, it formed a component of Burma's domestic law.
- <sup>22</sup> CEDAW General Recommendation No. 24 on women and health, ¶ 14, 20th session (1999).
- <sup>23</sup> CEDAW Committee, Initial report of States parties: Myanmar at 18, U.N. Doc. CEDAW/C/MMR/1 (Jun. 25, 1999).
- <sup>24</sup> United Nations Population Fund, *The State of the World's Midwifery 2011: Delivering Health, Saving Lives: Country Profile: Myanmar*, available at: [http://www.unfpa.org/sowmy/resources/docs/country\\_info/profile/en\\_Myanmar\\_SoWMy\\_Profile.pdf](http://www.unfpa.org/sowmy/resources/docs/country_info/profile/en_Myanmar_SoWMy_Profile.pdf).
- <sup>25</sup> World Health Organization, *Global Health Observatory Data Repository, Country Statistics: Japan and Country Statistics: Finland*, available at: <http://apps.who.int/ghodata/?theme=country>.
- <sup>26</sup> CEDAW Committee, Concluding Observations: Myanmar, ¶129, U.N. Doc. A/55/38 (Jun. 30, 2000).
- <sup>27</sup> Id. at ¶130.
- <sup>28</sup> CEDAW Committee, Combined second and third periodic reports of States parties: Myanmar, ¶62, U.N. Doc. CEDAW/C/MMR/3 (Sept. 4, 2007).
- <sup>29</sup> CEDAW Committee, Concluding Observations Sri Lanka, ¶ 282, U.N. Doc. CEDAW/C/KEN/CO/7 (Jan. 2, 2002).
- <sup>30</sup> CEDAW Committee, Concluding Observations Kenya, ¶ 38(c), U.N. Doc. CEDAW/C/2002/I/CRP.3/Add.5 (Apr. 5, 2011).
- <sup>31</sup> Corte Constitucional [C.C] [Constitutional Court], mayo 10, 2006, C-355/06 (Colom.), *translated in Women's Link Worldwide, C-355/2006: Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia* 7 (2007), available at [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf).
- <sup>32</sup> Geneva Conventions of 1949, common Article 2, *supra* note 10.
- <sup>33</sup> Global Justice Center, *The Right to an Abortion for Girls and Women Raped in Armed Conflict: States' positive obligations to provide non-discriminatory medical care under the Geneva Conventions*, available at: <http://globaljusticecenter.net/publications/Reports/GJCbrief-final.pdf>.
- <sup>34</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts, art.16(1), Jun. 8, 1977, 1125 U.N.T.S. 302 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art.10(1), Jun. 8, 1997, 1125 U.N.T.S. 609.
- <sup>35</sup> Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment sets forth that victims of torture are to be given the "means for as full rehabilitation as possible. UN General Assembly, *Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 14, 1456 U.N.T.S. 85 (10 Dec. 1984). See also UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), UN Doc. HR/P/PT/8/Rev.1 (2004) (The Istanbul Protocol, which sets out guidelines for doctors, amongst others, provides that doctors treating torture victims have a "duty to provide compassionate care" which includes "the duty to only act in the patient's interest and says that doctors owe their patients complete loyalty...doctors must insist on being free to act in patients' interests, regardless of other considerations...[This] requires doctors to ensure that they have 'professional independence to represent and defend the health needs of patients against all who would deny or restrict needed care for those who are sick or injured.'" (internal cites omitted)).
- <sup>36</sup> In considering laws that ban abortion without exceptions in Nicaragua and Peru, the Committee Against Torture has found that these laws violate states' obligations under the Convention. UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Nicaragua*, para. 16, U.N. Doc. CAT/C/NIC/CO/1 (10 Jun. 2009) and *Concluding Observations of the Committee against Torture: Peru*, para. 23, U.N. Doc. CAT/C/PER/CO/4 (25 Jul. 2006). See also, Human Rights Committee, *KL. v. Peru*, ¶ 6.6, U.N. Doc. CCPR/C/85/1153/2003 (22 Nov. 2005) and Human Rights Committee, General Comment 28: *Equality of Rights between women and men*, ¶ 1 (29 Mar. 2000) (which asks State parties to include information on if a state gives "access to safe abortion to women who have become pregnant as a result of rape" in order to assess compliance with article 7 of the Covenant (the prohibition of torture)).

# Annex 1

## MYANMAR-THE PENAL CODE: 1860

### **Chapter-16: OF OFFENCE AFFECTING THE HUMAN BODY Of Rape**

- 375. 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.
  
- 376. 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.

## Annex 2

*This annex contains excerpts from the training materials prepared by the Global Justice Center for the training of judges on the Iraqi High Tribunal on prosecuting rape using international law and the international definition of rape.*

Under international law "IHT/ICC" the crimes perpetrated against the Marsh Arab women could/should be charged under three categories:

1. Rape (charged as a crime under crimes against humanity, war crimes and genocide);
2. Sexual violence (a crime under crimes against humanity under ICC/IHT); and
3. Persecution due to gender (a crime under crimes against humanity under ICC/IHT).

The same criminal act can be charged simultaneously under all three categories of crimes above.

In this email we are going to address only the testimony/evidence required to convict a perpetrator of the crime of rape. We will deal with the other two on Friday noting that those can require less sensitive testimony.

Admissible evidence would be needed to prove each of the elements making up rape as a crime under IHL (ICC/IHT). The IHT elements of rape are identical to those of the ICC.

### **1. Rape is defined in the IHT Elements of Crime (which is identical to the ICC) as:**

*"The perpetrator invaded the body of a person by conduct resulting in 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 part of the body."* [Note: This is critical these elements have not been proved thus far so there is no proof of rape of the Marsh Arab women.]

The invasion committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. [Note: Since genocide has been found in Anfal we believe this requirement has already been met]

### **2. Testimony/ Evidence needed from a rape victim**

*"The perpetrator invaded the body of a person by conduct resulting in penetration"*

This means that a woman (or man) must state that a perpetrator who she can identify either directly or by circumstances i.e. as part of Saddam's army-not just a neighbor or somebody. She does not have to know the perpetrator's name or anything and this can be circumstantial i.e. a soldier in uniform. She should know the date and time of day but if there is severe trauma we can work around that. Thus, a "person" in the rape elements must be her- they use the word "person" because a man can also be raped.

Penetration is key to proving rape, but the meaning is very expansive as we will describe.

In order to satisfy the IHT proof of penetration testimony is different depending on whether the soldier used his penis or used another object (e.g. finger, gun etc).

1. If the soldier used his penis then it is rape if any part of her body was penetrated even partially. For e.g. this is not limited to a soldier inserting his penis into her anus or genital opening or mouth. If the soldier is using his penis any body part proves the case including eyes, ears and nose.

2. If the soldier does not use his penis but rather penetrates the woman using his mouth or fingers or another object such as a gun then the penetration or partial penetration must be to the woman's vagina or anus. We note that some commentators believe this definition to possibly include the soldier using his tongue to penetrate the women's mouth (this remains unclear).

**For example:**

"One of Saddam's militia injured her by taking out his penis and putting it half way into her ear

**OR**

“One of Saddam's militia injured her by putting his fingers in her anus.”

**OR**

”One of Saddam's militia took out his penis (you can use other words) and partially inserted it between her legs i.e. vagina.”

Further, in order to prove rape under part 2 of this definition it must include the presence of a "coercive environment" but we believe that this has already been established based on the findings in the Anfal decision. Thus defense witnesses cannot question her about consent or whether she was "forced".



## Annex 3

### MYANMAR-THE PENAL CODE: 1860

#### **Chapter-16: OF OFFENCE AFFECTING THE HUMAN BODY**

#### **Of the causing of Miscarriage, of Injuries to unborn Children of the Exposure of infants, and of the Concealment of Births.**

- 312. 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.
  
- 314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and if the act is done without the consent of the woman, shall be punished either with transportation for life, or with the punishment above mentioned.
  - Explanation-It is not essential to this offence that the offender should know that the act is likely to cause death.
  
- 315. Whoever, before the birth of any child, act with the intention of thereby preventing that child from born alive or causing it to die after its birth, and does by prevent that child from being born alive, or causes it to die birth, shall, if such act be not caused in good faith for the of saving the life of the mother, be punished with either description for a term which may extend to ten years, shall be liable to fine.
  
- 316<sup>1</sup>. Whoever without lawful excuse does any knowing that he is likely to cause death to a pregnant woman, does by such act cause the death of a quick unborn child, be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

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<sup>1</sup> Substituted by Act XXXIII. 1947